MARTINUS NIJHOFF PUBLISHERS

Nordic Journal of International Law 77 (2008) 319–364

NORDIC JOURNAL OF INTERNATIONAL LAW

www.brill.nl/nord

Diplomatic Assurances Against Torture – An Effective Strategy?

A Review of Jurisprudence and Examination of the Arguments

Lena Skoglund
Wallenberg Scholar, London School of Economics and Political Science
Centre for the Study of Human Rights

Abstract
Human rights organisations have warned repeatedly that basic human rights are being challenged in the so-called 'War on Terror'. One particularly controversial area is the use of diplomatic assurances against torture. According to international human rights instruments, the state shall not return anyone to countries in which they face a substantial risk of being subjected to torture. In the 'War on Terror', an increasing number of non-citizens are being deemed 'security threats', rendering them exempt from protection in many Western states. To be able to deport such 'threats' without compromising their duties under international law, states are increasingly willing to accept a diplomatic assurance against torture – that is, a promise from the state of return that it will not subject the returnee to torture. There is wide disagreement as to whether and/or when diplomatic assurances can render sufficient protection to satisfy the obligations of *non-refoulement* to risk of torture. Whereas the human rights society label such assurances as 'empty promises', others view them as effective, allowing states to retain their right to remove non-citizens without violating international law.

This article reviews international and selected national jurisprudence on the topic of diplomatic assurances against torture and examines if and/or when such assurances might render sufficient protection against torture to enable removals in accordance with international law. The courts and committees that have reviewed the use of diplomatic assurances against torture have identified essential problems of using them, thus rejecting reliance on simple promises not to torture. However, they have often implied that sufficient protection might be rendered by developing the assurances. I argue that this approach risks leading the governments into trying to perfect a system that is inherently flawed – whilst, incidentally, deportations to actual risk of torture continue. Even carefully modelled assurances render only unreliable protection against torture. For this, and reasons connected to undesirable side-effects of their use, I argue that the practice should be rejected.

Keywords
Diplomatic assurances, torture, *non-refoulement*, Agiza, Alzery

DOI 10.1163/157181008X374870

1. Introduction

1.1. Diplomatic Assurances and Their Rationale

Human rights advocates have warned repeatedly that basic human rights are being challenged in the so-called 'War on Terror'. One particularly controversial area is the use of diplomatic assurances[1] against torture. In the War on Terror, governments are increasingly identifying non-citizens with alleged connections to terrorist activities within their territories, which they regard as security threats to the country and want to remove. For example, the Canadian government has instigated 'security certificates'[2] for detaining and deporting such 'threats'. Often, these alleged terrorists face repercussions in their countries of origin. Governments, thus, increasingly have reason to remove persons to countries where they face a substantial risk of torture. However, refoulement of someone when there is a substantial risk of torture is illegal according to international human rights law. In order to remove terrorist suspects and still comply with such obligations, governments increasingly rely on diplomatic assurances against torture: *e.g.* formal promises from the state of return that it will not subject the person to torture.[3] The function of the assurances is to reduce an existing risk of a person being tortured in the other state and by this render a removal lawful. Such assurances are often used for terrorist suspects, but not exclusively. They have also been used in cases where asylum is denied for other reasons, in expulsion procedures or as part of extradition proceedings of other criminal suspects. The practice of using diplomatic assurances against torture has drawn the attention of several human rights organisations and institutions and been the subject of various court proceedings.[4]

Diplomatic assurances against torture have also found a function in another arena. The presence of international peacekeeping or peace-enforcing troops abroad is increasing. Not the least Swedish troops, as the government has decided to restructure the Swedish defence from a defence against invasion to a defence primarily devoted to international missions. The troops often must detain persons, including suspected criminals. The detainees are then handed over to national authorities for prosecution. Peacekeeping missions are mostly present in

---

1) Diplomatic assurances are also referred to as 'diplomatic guarantees' or 'memoranda of understanding'. Here, I will only use 'diplomatic assurances'.

2) *See Immigration and Refugee Protection Act* (2001) p. 27, <laws.justice.gc.ca/en/showtdm/cs/I-2.5>, visited on 2 February 2008, paras. 33–34, 76–85 and 112.

3) The discussion regarding diplomatic assurances against torture is equally applicable to assurances against other ill-treatment to the extent that such treatment or removal to such treatment is prohibited in international law, *cf.* definitions in European Convention on Human Rights (ECHR) Article 3 and UN Convention against Torture (CAT) Article 1. In the essay, I will refer solely to torture, for reasons of limited space.

4) *See e.g.* the reports of Human Rights Watch and Amnesty International *infra* notes 5 and 10.

more or less failed states where torture of prisoners is abundant. In these cases, the transfer of detainees to national authorities may be illegal according to international human rights law forbidding transfer when there is a substantial risk of torture. Diplomatic assurances are increasingly used to assuage concerns about torture in such transfers as well. This practice has come under fire from human rights advocates. Amnesty International recently criticised the trend in a report regarding detainee transfers by the troops of the International Security Assistance Force (ISAF) mission in Afghanistan.[5]

There is wide disagreement regarding whether and/or when diplomatic assurances can render sufficient protection so that the obligation of non-refoulement when there is a risk of torture is satisfied. Whereas important human rights actors have taken the stance that diplomatic assurances against torture should be rejected entirely, several governments view them as an effective means to retain their right to remove non-citizens or transfer detainees without violating international law. Human rights bodies and national courts have often rejected simple promises not to torture as inadequate protection against torture, while implying that the assurances can be developed to sufficiently mitigate the risk.

1.2. Object and Purpose

As mentioned, there is wide disagreement regarding whether and/or when diplomatic assurances against torture can be used: are they an efficient means of mitigating risk of torture, should they be rejected completely, or can they be modelled in a certain way to function efficiently? As the analysis will show, courts and committees dealing with the issue have often rejected the use of simple promises but indicated that more developed assurances may be accepted. In response to such decisions, governments have increasingly started to use more elaborate assurances, providing, for example, mechanisms for post-return monitoring.

Many human rights organisations and intergovernmental human rights bodies have examined the topic of diplomatic assurances against torture. These have, however, seldom thoroughly examined the protection value rendered by the more elaborate assurances or the possibility of enhancing the tool of diplomatic assurances in order to render them efficient. There are a few academic contributions on the topic of diplomatic assurances against torture, but these examine the practice of diplomatic assurances as a mere promise and not comprehensively how and if diplomatic assurances might be modelled to render efficient protection against torture. Furthermore, much has happened in the area since it was last examined. During 2007, several new cases were decided and non-governmental

[5] Amnesty International, *Afghanistan, Detainees Transferred to Torture: ISAF Complicity?*, 13 November 2007, <web.amnesty.org/library/pdf/ASA11011 2007ENGLISH/$File/ASA1101107.pdf>, visited on 17 November 2007.

organisation (NGO) reports were released revealing new information about the use of diplomatic assurances. Indeed, the first weeks of 2008 brought developments in the area: on the 23rd of January, the Canadian government announced that it will stop their practice of using diplomatic assurances against torture in order to transfer detainees in Afghanistan. The decision was taken after intense pressure from human rights advocates and a lawsuit by national NGOs.[6]

I have, accordingly, identified a gap in the doctrine within an area in much need of examination, considering the wide use of diplomatic assurances against torture. In this article, I intend to make a contribution towards filling this gap. I will examine and analyse the jurisprudence and main arguments concerning diplomatic assurances against torture in order to contribute to the debate on the future of the practice.

I will argue that many courts and committees have adopted a dangerous approach when indicating that the assurances might be developed to render better protection against torture. Although such assurances might be modelled in certain cases to render sufficient protection for the removal to be legal, no matter how they are modelled there are limits to how reliable the effectiveness of such assurances can be. To simply reject their use would, from several aspects, be more consistent with principles of international human rights law.

1.3. Methodology, Sources, Delimitations

My study is based on a review of legal and political doctrine, reports from human rights bodies and non-governmental organisations as well as contacts with experts in the field. I have also examined case law in international human rights courts and committees as well as interesting cases from national courts. The different views presented in the material are compared and reviewed.

As mentioned, diplomatic assurances are applied both in the context of transfers of persons between the territories of two states and in the context of transfer of custody within the territory of one state. As of yet, I have found no cases concerning detainee transfers of the latter category.[7] The study will, therefore, focus more on the context of transfers from the national territory of one state to another, but discussions regarding the protection granted by diplomatic assurances apply equally to the other transfer context.

---

6) *See* BC Civil Liberties Association, *News Release: Government Ceases Afghan Detainee Transfer*, 23 January 2008, <www.bccla.org/index.html>, visited on 3 February 2008.

7) However, a Canadian case is pending, *Amnesty International Canada and British Columbia Civil Liberties Association* v. *Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Court File Number T-324-07, <cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-324-07>, visited on 3 February 2008.

1.4. Outline

Diplomatic assurances allegedly fill the function of ensuring adherence to the obligations of international law. Therefore, I will begin, in section 2, by examining the international law applicable to transfers of people, as it is relevant to the practice of diplomatic assurances. Next, in section 3, I will discuss the background context of the use of diplomatic assurances: current state practice, their standing in international law as well as their form and legal character. In section 4, I will present the main positions and arguments in the debate regarding diplomatic assurances against torture: should they be endorsed, rejected completely or used only under certain circumstances and/or modelled in a certain way? In the next section, I will present and analyse the jurisprudence in the area: firstly, decisions in international courts and committees and, secondly, a selection of particularly interesting decisions in national forums. Section 6 contains my analysis of the main aspects of the use of diplomatic assurances against torture in order to find if and/or when they may render sufficient protection against torture. Lastly, in section 7, I will present conclusions and discuss the broader suitability of the tool of diplomatic assurances against torture.

2. International Legal Framework

2.1. International Refugee Law

In the aftermath of the Second World War, with the widespread rejection of Jewish refugees close at hand, the Convention Relating to the Status of Refugees (the Refugee Convention)[8] was adopted by the UN General Assembly. According to its Article 33(1), "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". To receive the protection of non-refoulement according to the treaty, a person must fall under the refugee definition in Article 1 of the Convention. There are, however, grounds for a state to exempt someone from the protection of the Refugee Convention. A person is, according to Article 1(F), exempt from refugee status if there are "serious reasons for considering that he has committed serious non-political crimes prior to entry to the country" or has been guilty of "acts contrary to the purposes of the UN".

[8] Convention Relating to the Status of Refugees, adopted on 28 July 1951 by the UN General Assembly (resolution 429 (v)) and entered into force on 22 April 1954, with the 1967 protocol, adopted by General Assembly in resolution 2198 (XXI) of 16 December 1966, and entered into force on 4 October 1967.

Furthermore, someone that has already obtained refugee status cannot claim the protection according to Article 33(1) if there are "reasonable grounds" for regarding the person as "a danger to the security of the country in which he is".[9] These exemptions have been applied in many cases for persons suspected of involvement in terrorist activities.[10] For example, in the much discussed cases of the Egyptian asylum seekers *Agiza* and *Alzery*, the Swedish government decided to exempt the men from protection, deeming them 'security threats' due to intelligence indicating connections with terrorist organisations.[11] The increase in persons exempted from protection under the Convention has led scholars to speak of a 'securitization' of immigration law, where control is emphasised over the original aim of protection.[12] In summary, the Refugee Convention offers protection against refoulement but not to everyone. The principle of non-refoulement when there is risk of torture is conversely universal and considered absolute.

2.2. The Law of Non-Refoulement to Torture

The ban against torture is perhaps one of the most well established norms of international human rights law. It is widely considered a peremptory norm, *ius cogens*.[13] Furthermore, the ban is expressed in several global and regional human rights conventions. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[14] contains an absolute ban against torture: according to Article 2(2), no exceptional circumstances whatsoever may be invoked as a justification for torture. Furthermore, a non-derogable[15] ban on torture is contained in Article 7 of the International Covenant on Civil and Political Rights (ICCPR),[16] and another in Article 3 of the Convention for the

---

9) Article 33(2).

10) *See e.g.* the cases of the Canadian 'secret trial five' and other examples documented in Human Rights Watch reports: *Empty Promises – Diplomatic Assurances No Safeguard Against Torture*, Vol. 16, No. 4 (D), April 2004, <hrw.org/reports/2004/un0404/>, visited on January 2008; *Still at Risk: Diplomatic Assurances No Safeguard Against Torture, Human Rights Watch*, Vol. 17, No. 4, April 2005, <hrw.org/reports/2005/eca0405/eca0405.pdf>; and *Cases Involving Diplomatic Assurances Against Torture, Developments since May 2005*, No. 1, January 2007, <www.hrw.org/backgrounder/eca/eu0107/>, visited on 23 January 2008.

11) *Infra* section 5.2.

12) N. Larsaeus, *The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment*, *Refugee Studies Centre Working Paper* No. 32, Queen Elizabeth House, Department of International Development, University of Oxford, October 2006, p. 4.

13) *E.g. Al-Adsani* v. *the United Kingdom*, ECtHR, application no. 35763/97, 21 November 2001 and K. Wouters, How absolute is the prohibition on torture, *EJML* 8(1), 2006, p. 1.

14) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the UN General Assembly (resolution 39/46) and entered into force on 26 June 1987.

15) *See* Article 4 of the Convention.

16) International Covenant on Civil and Political Rights, adopted on 16 December 1966 by the UN General Assembly (resolution 2200A (XXI)) and entered into force on 23 March 1976.

Protection of Human Rights and Fundamental Freedoms (ECHR).[17, 18] The prohibition against torture is, as other international human rights norms, considered an obligation *erga omnes*, *i.e.* all states have legal interest in protecting it.[19]

In each of the above-mentioned conventions, the ban on torture contains, or is complemented by, a ban on transferring a person to a place where s/he is at substantial risk of torture. The principle is expressed in CAT Article 3: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".[20] In the ICCPR, there is no express ban on removing a person to face a risk of torture. However, the Human Rights Committee has found that such a principle is contained in the ban on torture in Article 7.[21] Furthermore, the European Court of Human Rights (ECtHR) has interpreted Article 3 of the ECHR to encompass the principle of *non-refoulement:*

> It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article.[22]

As the principle of *non-refoulement* has been so widely endorsed, many argue that it has obtained the nature of *ius cogens* – a peremptory, non-derogable norm of international law.[23]

The principle of *non-refoulement* bans removal at a certain degree of *risk* of torture, rather than an actual treatment. The official making a removal decision must try and assess the risk of a future event. This special character much influences any discussion on *refoulement* and diplomatic assurances against torture.

---

17) Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1951 by the Member States of the Council of Europe (ETS no. 5) and entered into force on 3 September 1953.

18) Similar prohibitions are contained in African Charter on Human and Peoples' Rights, adopted on 27 June 1981 by the Member States of the Organization of African Unity (21) *I.L.M.* 58 (1982) and entered into force on 21 October 1986, Article 5 and American Convention on Human Rights (IACHR), adopted on 22 November 1969 by the Member States of the Organization of American States (no. 36, 1144 *U.N.T.S.* 123) and entered into force on 18 July 1978, Article 5.

19) M. D. Shaw, *International Law*, 5th ed. (Cambridge University Press, Cambridge, 2003) p. 116.

20) A similar provision is contained in the IACHR Article 22(8).

21) *See* Human Rights Committee, General Comment No. 31, para. 12, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

22) *Soering* v. *The United Kingdom*, ECtHR, application no. 14038/88, 7 July 1989.

23) *See e.g.* J. Allain, '*The Jus Cogens Nature of Nonrefoulement*', 13 *International Journal of Refugee Law* (2001).

CAT Article 3 contains certain guidance for the risk assessment: all relevant considerations must be taken into account, including, where applicable, the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In its jurisprudence, the Committee consistently repeats that the complainant who seeks to avoid removal based on the risk of torture "must show a foreseeable, real and personal risk of torture. Such a risk must rise beyond mere theory or suspicion, but does not have to be highly probable".[24]

2.3. International Law of Detainee Transfers by Troops Abroad

The international law surrounding detainee transfers by peacekeeping troops may differ from the laws applicable to transfers from the territory of a state to the territory of another. Some argue that international human rights law does not apply to troops acting outside their national territory. The extraterritorial applicability of international human rights law is a controversial issue and could easily fill a book of its own. However, decisions by the Human Rights Committee,[25] ECtHR[26] and also, recently, a domestic court in the United Kingdom[27] suggest that such law can apply extraterritorially to the troops of a country when a person is detained by those troops. The question of whether it applies to troops mandated by UN Security Council resolutions is far from clear-cut.[28] But, the UN Charter and, for most cases, resolutions mandating peacekeeping forces (implicitly) require that human rights norms are respected by troops acting on UN mandate.[29] Human rights standards such as the rules of *non-refoulement* are, thus, relevant for the transfer of detainees by these troops.

---

24) *See e.g. Attia* v. *Sweden*, CAT/C/31/D/199/2002, 24 November 2003, para. 4.11.

25) Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10: "[…] a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".

26) In *Öcalan* v. *Turkey*, ECtHR, application no. 46221/99, 12 March 2003, the Court finds the Convention to be applicable outside the territory of the state due to the effective control of the state officials over the persons concerned.

27) *Al-Skeini and Others* v. *Secretary of State Defence*, House of Lords, 13 June 2007, <www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm>, visited on 2 January 2008.

28) Regarding the responsibility of the state contributing troops, *cf.* Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) para. 10 with the ECtHR cases of *Behrami* v. *France*, application no. 71412/01, and *Saramati* v. *France, Germany and Norway*, application no. 78166/01, decided on 31 May 2007 and the analysis by Prof. Greenwood in relation to the pending case on detainee transfers by Canadian troops in Afghanistan, *supra* note 7, *see* <www.bccla.org/antiterrorissue/afghan.htm>, visited on 3 February 2008.

29) *See e.g.* Security Council resolution 1776 (2007) adopted at its 5744th meeting on 19 September 2007, stating that the aim of the mission is to promote human rights, and UN Charter Article 1(3) that establishes the promotion of human rights as a core object of the organisation. A working group within the UN DPKO is currently (February 2008) developing a directive containing specific rules for detention by UN peacekeeping troops.

Furthermore, if there is an armed conflict ongoing in the country in which the troops act, one or more of the Geneva Conventions of humanitarian law might apply.[30] It may, therefore, be noted that also they contain rules of *non-refoulement*: prisoners of war may not be transferred where they will be treated inhumanely,[31] and civilians may not be removed to a country where they have reason to fear persecution for political or religious reasons.[32]

2.4. Challenges to Non-Refoulement in the War on Terror

The UN Security Council, in its resolution 1373,[33] shortly after the 9-11 terrorist attacks, called upon states to ensure that terrorists be excluded from refugee status.[34] As mentioned, numerous asylum seekers have been exempted from protection on grounds of connections to organisations involved in terrorist activities. Terror suspects have, however, so far, not been exempted from the protection from *refoulement* when there is a substantial risk of torture. In *Tapia Paez* v. *Sweden*,[35] the Committee Against Torture held that Article 3, containing the principle of *non-refoulement*, is absolute and that "the nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under Article 3 of the Convention".[36] Accordingly, someone involved in terrorist activities enjoys the protection of *non-refoulement* according to CAT.

In the case *Chahal* v. *United Kingdom* before the ECtHR, the UK government argued

> that the guarantees afforded by Article 3 (art. 3) [are] not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which require […] an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there [i]s an implied limitation to Article 3 (art. 3) entitling a Contracting

30) It has been argued that when humanitarian law applies, human rights law does not. This claim has, however, been refuted by the International Court of Justice. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, para. 106, and Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11. The International Committee of the Red Cross has written extensively on the relationship between the two. *See* <www.icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_and_human_rights>, visited on 31 January 2008.

31) Geneva Convention Relative to the Treatment of Prisoners of War, 75 *UNTS* 135, entered into force 21 October 1950, Articles 12 and 13.

32) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 *UNTS* 287, entered into force 21 October 1950.

33) Adopted by the Security Council at its 4385th meeting on 28 September 2001, S/RES/1373(2001).

34) *Ibid.*, para. 3(g).

35) *Tapia Paez* v. *Sweden*, Communication No. 39/1996, 28 April 1997, CAT/C/18/D/39/1996.

36) *Ibid.*, para. 14.5.

> State to expel an individual to a receiving State even where a real risk of ill-treatment exist[s], if such removal [i]s required on national security grounds.[37]

In support of this stance, the UK government referred to the exceptions in the Refugee Convention. As an alternative argument, it held that "the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3 (art. 3)".[38] The Court upheld the absolute nature of *non-refoulement* to torture, stating:

> Article 3 (art. 3) enshrines one of the most fundamental values of democratic society […]. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. […] the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[39]

While the Court upheld the ban in *Chahal* v. *United Kingdom* in 1996, the 9-11 attacks, however, set off the 'War on Terror', and with that the proponents of compromising human rights in the name of security have turned louder. Former UK Prime Minister Tony Blair declared that "the rules of the game are changing",[40] and former UK Home Secretary Charles Clarke stated (in response to criticism of suggestions withdrawing the prohibition on *non-refoulement* for terrorism suspects) that "[t]he human rights of those people who were blown up on the Tube in London on July 7 are, to be quite frank, more important than the human rights of the people who committed those acts…I wish the UN would look at human rights in the round rather than simply focusing all the time on the terrorist".[41]

Furthermore, in the 'War on Terror', the desire of states to remove persons deemed 'security threats' from their territory has increased. Persons exempted from refugee status on grounds of terrorist affiliation may be protected from *refoulement* because a risk of torture on removal, but perhaps evidence is not sufficient for a criminal prosecution. Governments then must find an alternative means to handle these people if they feel wary letting them out on the streets. As a consequence, some countries have instigated systems of detaining people

---

37) *Chahal* v. *United Kingdom*, European Court of Human Rights, application no. 70/1995/576/662, 15 November 1996, para. 79.
38) *Ibid.*
39) *Ibid.*, para. 80.
40) J. Simon, 'The rules of the game are changing', *The Guardian*, 5 August 2005, <www.guardian.co.uk/attackonlondon/story/0,16132,1543359,00.html>, visited on 2 February 2008.
41) MacAskill *et al.*, 'Expulsions illegal, UN tells Clarke', *The Guardian*, 25 August 2005, available at <politics.guardian.co.uk/terrorism/story/0,1555931,00.html>, visited on 5 December 2007.

without charge.[42] Such systems have, however, been struck down on human rights grounds by national courts and are now a less attractive alternative to removal.[43]

A desire to prevent practices of detention without charge was a main argument in favour of creating guidelines for the accepted use of diplomatic assurances against torture within the framework of the Council of Europe.[44] Such guidelines would namely enable removals to places where the removed would risk torture without the use of diplomatic assurances. The arguments express a sense of urgency amongst governments in dealing with 'security threats' on their territory in the War on Terror. Government officials have also repeatedly expressed the pressured nature of the situation. The secretary of former Prime Minister Tony Blair wrote regarding the removal of certain Egyptian terror suspects: "In general, the Prime Minister's priority is to see these four Islamic Jihad members returned to Egypt. We should do everything possible to achieve it".[45] In a similar vein, the former German Minister of Interior, claimed, after a court had struck down an attempt to remove a terrorist suspect due to risk of torture, that "the right of a state to expel a foreigner in order to protect national security" should be the priority.[46]

Several states have defended removals to risk of torture referring to the post 9-11 Security Council resolution 1373, mentioned above, encouraging states to deny safe havens for terrorists. These arguments have so far won no sympathy with committees.[47] It has, *inter alia*, been highlighted as a counterargument that subsequent resolutions regarding terrorism contain express references to compliance with human rights norms in any measures to combat terrorism.[48] To this

---

42) *See e.g.* the Canadian system of 'security certificates', Immigration and Refugee Protection Act (2001), paras. 33–34, 76–85 and 112 and the UK system of 'control orders', The Prevention of Terrorism Act (2005), chapter 2, <www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1>, visited on 2 February 2008.

43) *See e.g. Hani El Sayed Sabaei Youssef and The Home Office*, Case No. HQ03X03052, 2004 *EWHC* 1884 (QB), 30 July 2004, para. 20. Online: <www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm>, visited on 18 December 2007.

44) Council of Europe, Steering Committee for Human Rights, Group of Specialists on Human Rights and the Fight Against Terrorism, *Position paper of the European Group of National Institutions for the Protection and Promotion of Human Rights on the use of diplomatic assurances in the context of expulsion procedures and the appropriateness of drafting a legal instrument relating to such use*, DH-S-TER(2005)016, Strasbourg, 6 December 2005, available at <www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20%28dh-s-ter%29/working%20documents/2005/dh-s-ter(2005)016.asp#P153_18356>, visited on 20 November 2007.

45) *Hani El Sayed Sabaei Youssef and The Home Office*, *supra* note 43, para. 20.

46) Joint Statement German Federal Ministry of Interior and Ministry of Interior of North Rhine Westphalia, 'Schily and Behrens Regret Decision of OLG Duesseldorf in Kaplan Case', in the Human Rights Watch report, *Empty Promises* (Berlin, 27 May 2003).

47) *See e.g. Attia* v. *Sweden*, CAT/C/31/D/199/2002, 24 November 2003, and *Pelit* v. *Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005, 5 June 2007.

48) *See e.g.* Security Council resolution 1456 (2003), adopted on 20 January 2003, at its 4688 meeting, para. 6: "States must ensure that any measure taken to combat terrorism complies with all their

could be added that, provided we accept the claim that the principle of *non-refoulement* to torture holds the status of *ius cogens*, it owns priority in cases of conflicting directives emanating from a Security Council resolution.

The proponents of an exception to the principle of *non-refoulement* have, however, won one legal victory. The Supreme Court of Canada stated as *obiter* in a 2002 case: "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified".[49] So far no deportations have been made with support of this exception – the use of diplomatic assurances against torture has, presumably, diminished the need for it to be invoked.

Within Europe, the ban on removal when there is risk of torture remains challenged. The Commission of the European Communities recommended, in a 2001 document on the relationship between internal security and human rights, that the ECtHR jurisprudence banning removal to torture should be revisited.[50] Also, the United Kingdom Special Immigration Appeals Commission expressed criticism of the *Chahal* judgement stating an absolute ban on *refoulement* in a decision of April 2007.[51] In a case currently pending in the ECtHR, *Ramzy* v. *The Netherlands*,[52] regarding removal proceedings of an Islamist extremist, several European states have intervened, arguing for an exception to the rule of *non-refoulement* to torture.[53]

---

obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." *See* <ods-dds-ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement>, visited on 22 December 2007.

49) *Manickavasagam Suresh* v. *The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh* v. *Canada)*, Supreme Court of Canada, 1. File No. 27790, 11 January 2002.

50) Commission of the European Communities, *The relationship between safeguarding internal security and complying with international protection obligations and instruments*, *European Commission Working Document* COM (2001) 743 (final).

51) "We have given this decision anxious consideration in view of the risks which the Appellants could face were they returned, and those which the UK, and individuals who can legitimately look to it for the protection of their human rights, would face if they were not. We must judge that matter, at least in relation to Article 3 ECHR, by considering only the risks which the Appellants could face on return, no matter how grave and violent the risks which, having chosen to come here, they pose to the UK, its interests abroad, and its wider interests. Those interests at risk include fundamental human rights. The decision of the ECtHR in Chahal in 1996 provides the framework for that decision. It clearly requires us to consider matters in that way, however slight its reasoning or negligible its response to the substantial minority dissent on the problems posed by a direct threat comparable to that arising here to the interests of the country Seeking removal, and on the protection to the human rights of others which the deportation of the Appellants would afford. That decision is part of its established jurisprudence, and in reality we are bound by it." *DD and AS* v. *The Secretary of State for the Home Department*, SC/42 and 50/2005, 27 April 2007, <www.bailii.org/uk/cases/SIAC/2007/42_2005.html>, visited on 20 December 2007, paras. 430 *et seq*.

52) *Ramzy* v. *The Netherlands*, ECtHR, application no. 25424/05.

53) European Court of Human Rights, *Press Release: Application Lodged with the Court, Ramzy* v. *The Netherlands*, published 20 October 2005.

So far, however, the principle of *non-refoulement* to torture remains absolute. Today, the fact that a person is suspected of terrorism may actually be a reason to grant protection since terrorism suspects often are particularly at risk of being subjected to torture. The context of intensive challenge to the ban on removal to torture and ambience of urgency of dealing with terror suspects is, however, important to keep in mind when studying the use of diplomatic assurances against torture. Diplomatic assurances have appeared as the solution to a pressing problem for governments wanting to rid themselves of 'security threats', who would otherwise be irremovable according to the principle of *non-refoulement*.[54]

3. Diplomatic Assurances – Qualities and State Practice

3.1. The Practice of Demanding Diplomatic Assurances

Use of diplomatic assurances in removal proceedings is not a new phenomenon. Assurances against the death penalty have, for example, long been used in the extradition context.[55] The UN Model Treaty on Extradition from 1990 contains an explicit right to refuse extradition unless the requesting state gives a sufficient assurance that the death penalty will not be imposed.[56] Such clauses are included in several multilateral extradition treaties.[57] In the decision *Judge* v. *Canada*,[58] the UN Human Rights Committee even declared it a violation of the ICCPR for countries that have abolished the death penalty to remove someone to a risk of death sentence *without* obtaining an assurance that such a sentence will not be carried out.

Diplomatic assurances in order to protect against torture have, to some extent, been sought since the introduction of the obligation of *non-refoulement* to

54) The ambience of a pressing need to solve the problem is expressed by former UK Prime Minister Tony Blair, when asked how he would react if the practice of using diplomatic assurances was struck down in court: "Should legal obstacles arise we will legislate further, including if necessary amending the Human Rights Act." W. Patrick, 'Blair vows to root out extremism: Lawyers and Muslim groups alarmed', *The Guardian*, 6 August 2005, para. 1.

55) Amnesty International, *USA: No Return to Execution – The US Death Penalty as a Barrier to Extradition*, 2001, pp. 5–6, available at <web.amnesty.org/aidoc/aidoc_pdf.nsf/index/EUR630012002ENGLISH/$File/EUR6300102.pdf>, visited on 2 December 2007. A removal from a European state to face death penalty would be contrary to their obligations under the European Convention on Human Rights Protocols Nos. 6 and 13.

56) UN Model Treaty on Extradition, adopted by General Assembly resolution 45/116, subsequently amended by General Assembly resolution 52/88, Article 2(11), <www.unodc.org/pdf/model_treaty_extradition.pdf>, visited on 25 November 2007.

57) *See e.g.* the extradition agreement between the EU and the US of 2003, Article 13.

58) *Judge* v. *Canada*, CCPR, Communication No. 829/1998, 13 August 2003, CCPR/C/78/D/829/1998.

torture.[59] However, several sources witness of a major increase in their use the last few years, following the 'War on Terror' and their new usage in detainee transfers by peacekeeping troops.[60] The extent to which such assurances are employed is difficult to establish since the procedure of obtaining the assurances often is kept secret.[61] The CAT committee has started requesting information from states regarding their use of diplomatic assurances against torture.[62] Thus, we might expect to have a clearer view in a few years time. Some light has been shed on the extent of the application by an inquiry performed by the Council of Europe Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER).[63] Furthermore, NGOs such as Human Rights Watch and Amnesty International have reported extensively on the issue.[64] The reports reveal that diplomatic assurances against torture are resorted to widely in the US and Canada, in several European countries and have also been employed by certain states in Central Asia and Russia. A review of the known instances of sought assurances reveals that they are sought when a removal or transfer of the person would otherwise be excluded due to risk of torture. Often, the assurances are sought from countries where the practice of torture is a serious problem. Breaches of diplomatic assurances against torture have been credibly alleged in a number of cases, for example in the cases of *Agiza* and *Arar*, described below, and in cases discussed in a number of reports from human rights NGOs.[65]

---

59) R. Chesney, 'Leaving Guantánamo: "The Law of International Detainee Transfers" ', 40 *University of Richmond Law Review* (2006) pp. 694 *et seq*.

60) *See e.g.* the reports cited by Human Rights Watch, Amnesty International and the Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), *Compilation of the Replies to the Questionnaire on the Practice of States in the Use of Diplomatic Assurances*, DH-S-TER(2006)002bil, 15 March 2006, <www.icj.org/IMG/pdf/CoE-Diplomatic_Assurances.pdf>, visited on 4 December 2007.

61) M. Jones, 'Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings', 8:1 *European Journal of Migration and Law* (2006) p. 12. For example, US officials have reported that diplomatic assurances are sought in cases of removal to risk of torture, but in which cases are to a large extent kept secret.

62) *See e.g.* Committee Against Torture, *Conclusions and Recommendations: Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, CAT/C/CR/33/3, 10 December 2004, section 5(i), <www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.3.En?OpenDocument>, visited on 5 December 2007.

63) Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), *Compilation of the Replies to the Questionnaire on the Practice of States in the Use of Diplomatic Assurances*, *supra* note 60, p. 43.

64) *See e.g.* Human Rights Watch, *Empty Promises*…, *Still at Risk*… and *Cases Involving*… and Amnesty International, *Detainees transferred*…, *supra* notes 5 and 10.

65) *See e.g.* Human Rights Watch, *Ill-Fated Homecomings A Tunisian Case Study of Guantanamo Repatriations*, September 2007, Vol. 19, No. 4(E), available online at <hrw.org/reports/2007/tunisia0907/>, visited on 2 February 2008. Human Rights Watch, *The "Stamp of Guantanamo" The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, March 2007, Vol. 19, No. 2(D), <www.hrw.org/reports/2007/russia0307/>, visited on 2 February 2008, and Amnesty International, *Afghanistan, Detainees transferred to torture: ISAF complicity?*, 13 November 2007, <web.amnesty.org/library/pdf/ASA11011 2007ENGLISH/$File/ASA1101107.pdf>, visited on 17 November 2007.

3.2. A 'Grey Area of International Law'

Whereas the use of diplomatic assurances against the death penalty, as mentioned, often is regulated, there exists no such regulation regarding assurances against torture. On the national level, only the US has any regulation regarding the use of diplomatic assurances against torture.[66] Such assurances are not mentioned in international human rights treaties, and have not been contained in extradition- or other treaties concerning transfers of persons. Their use, thus, largely remains a 'grey area of international law'.[67]

Sweden, among other states, asked the Council of Europe Steering Committee for Human Rights to consider developing guidelines for the use of diplomatic assurances against torture.[68] Presumably, the states wanted to move the use of assurances against torture out of the grey zone, rendering them an accepted practice for removals to countries where the removed otherwise is at risk of torture. The Committee rejected the idea of drafting such guidelines. As a main reason for the rejection, the Committee referred to the lack of a common position on the issue amongst the member states.[69] The use of diplomatic assurances against torture, accordingly, remains unregulated; however, case law is increasingly contributing to the formation of a law for their application.

3.3. Form and Content of the Assurances

The Office of the UN High Commissioner for Refugees (UNHCR) explains how "[t]he term 'diplomatic assurances', as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights

---

66) US Regulation 8 C.F.R. para. 208.18(c)(1) (2005), *Implementation of the Convention Against Torture, Code of Federal Regulations – Title 8: Aliens and Nationality (December 2005).* For further discussion on the US regulation, *see* Chesney, *supra* note 59, pp 691 *et seq*. An initiative to regulate the use of diplomatic assurances against torture is currently discussed in Georgia. *See* Human Rights Watch, *Georgia, Do Not Develop Guidelines for Diplomatic Assurances*, 19 September 2007, <hrw.org/english/docs/2007/09/19/georgi16932.htm>, visited on 12 December 2007.

67) As expressed by The Committee on International Human Rights of the Association of the Bar of the City of New York *et al.*, *Torture by Proxy International and Domestic Law Applicable to Extraordinary Renditions*, 2004, <www.chrgj.org/docs/ TortureByProxy.pdf>, visited on 4 December 2007.

68) U. B. Andersson, *Europas hemligheter* (Europe's Secrets), Arenagruppen, 6 February 2007, <www.arenagruppen.se/ag5/default.asp?ID=2839&type=2&cat=arenagruppen>, visited on 11 December 2007.

69) Council of Europe, Steering Committee for Human Rights, Group of Specialists on Human Rights and the Fight Against Terrorism, *Report, the 1st meeting*, DH-S-TER(2005)018, Strasbourg, 7–9 December 2005, available at <www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20%28dh-s-ter%29/meeting%20reports/DH-S-TER(2005)018.asp#TopOfPage>, visited on 22 November 2007.

obligations under international law".[70] The form and content of the assurances vary significantly. As to the form, the diplomatic assurances usually consist of formal written promises from one government official to another.[71] However, the guarantees have also been merely verbal.[72]

Generally, diplomatic assurances against torture have been sought and offered for individual cases. The use has, however, lately been 'systematised' through the completion of general 'memoranda of understanding', framework agreements containing assurances covering all detainee transfers between the countries. Such agreements have been concluded by the United Kingdom with Jordan, Lebanon and Libya.[73] Several countries contributing troops to the ISAF mission have completed such agreements concerning detainee transfers with the Afghan authorities.[74] The new practice of framework agreements for systematised use of assurances against torture indicate a possible future increase in the amount of transfers relying on such assurances.

The content of the assurances vary. Sometimes they simply reiterate obligations under human rights law, whereas they sometimes contain arrangements such as post-return monitoring of the treatment. In order to remove the Egyptians Agiza and Alzery, the Swedish government simply asked the Egyptian authorities that the men would *"not be subjected to inhuman treatment or punishment of any kind"*.[75] The Egyptians replied: "We, herewith, assert our full understanding to all the items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their persons and human rights. This will be done according to what the Egyptian constitution and law stipulates".[76] The framework assurances negotiated by the UK are substantially more elaborate. For example the memoranda signed with Jordan contains, apart from a general assurance that the state will "comply with their human rights obligations under international law", provisions for the monitoring of the removed. The removed is guaranteed "prompt and regular visits from the representative of an independent

---

70) UN High Commissioner for Refugees, *Note on diplomatic assurances and international refugee protection*, Protection Operations and Legal Advice Section, Division of International Protection Services, Geneva, August 2006, <www.unhcr.dk/se/Protect_refugees/pdf/Diplomatic_assurances_Int_Ref_protection.pdf>, para. 1.

71) *See e.g.* the assurances issued by Egypt and Turkey described below.

72) *E.g.* the alleged assurances regarding post-return monitoring in the case of Ahmed Agiza, *Agiza* v. *Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 24 May 2005.

73) *See e.g.* Amnesty International, *United Kingdom, Human Rights: A Broken Promise*, *supra* section 3.1.

74) Amnesty International, *Afghanistan, Detainees transferred to torture*, *supra* note 5.

75) Human Rights Watch, *Still at risk*, *supra* note 10.

76) *Ibid*. Noll rightly points out that the referral to domestic law limits the scope of the promise, and the peculiarity in the Swedish government accepting the disclaimer, considering that reservations referring to national laws are routinely objected to by Sweden within the area of human rights law. *See* G. Noll, 'Diplomatic Assurances and the Silence of International Human Rights Law', 7:1 *Melbourne Journal of International Law* (2006) p. 7.

body nominated jointly by the UK and Jordanian authorities […] at least once a fortnight […] and will include the opportunity for private interviews with the returned person".[77] The monitoring body shall, according to the memoranda, give a report of its visits to the authorities of the sending state. The memorandums have also been complemented by agreements containing further details regarding the monitoring.[78]

3.4. Legal Character

The character of diplomatic assurances under international law – whether they are legally binding or mere promises of a political, non-binding character – is debated. How the parties refer to the agreement does not have to be decisive. According to the Vienna Convention on the Law of Treaties (VCLT)[79] Article 2(1)(a), a treaty is "an international agreement concluded between States in written form and governed by international law, […] whatever its particular designation". The decisive requisite is, in most cases, "governed by international law". The general consensus, as articulated by the International Law Commission[80] and endorsed by the International Court of Justice,[81] is that the *intent* of the parties is decisive for whether an agreement constitutes a binding treaty "governed by international law". Thus, a diplomatic 'agreement' or 'memoranda of understanding' may qualify as a binding treaty, provided that was the intention of the states. There are, however, vast arrays of agreements between states that are considered non-binding,[82] and diplomatic assurances against torture may place in this category.

The UN High Commissioner for Human Rights, Louise Arbour, as well as the UN Special Rapporteur on Torture, Manfred Nowak, both argue that diplomatic assurances are non-binding.[83] They draw this conclusion primarily from the fact that the assurances generally contain no mechanism for their enforcement or

---

77) *See* para. 4 of the Memoranda, on file with the author.

78) *Infra.* case of *Omar Othman*, section 5.4.3.

79) Opened for signature 23 May 1969, 1155 *UNTS* 331 (entered into force 27 January 1980), <untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>, visited on 27 November 2007.

80) Sir A. Watts, *The International Law Commission 1949–1998*, Volume Two: The Treaties, Part II (1999) p. 623, in Noll, *supra* note 76, section III.

81) *New Zealand* v. *France*, ICJ, General List no. 59, 20 December 1974, para. 46.

82) N. Larsaeus, 'The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment', in *Refugee Studies Centre Working Paper* No. 32, Queen Elizabeth House, Department of International Development, University of Oxford, October 2006, p. 10.

83) *See* Address by Louise Arbour, UN High Commissioner for Human Rights, at Chatham House and the British Institute of International and Comparative Law, 15 February 2006, <www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20(dh-s-ter)/working%20documents/2006/DH-S-TER(2006)004.asp>, visited 15 January 2008 and the Report of the Special Rapporteur on Torture, E/CN.4/2006/6, 23 December 2005, p. 2.

remedy for their breach. The lack of enforcement mechanisms or remedies can certainly indicate the intent of the negotiating states. For example, the presence of such mechanisms would be a strong indicator of an intention to form a binding agreement. However, such features are mere indicators and do not reveal the *actual* intent of the state – *i.e.* whether the agreement is binding.

Noll[84] and Larsaeus[85] have both examined the legal character of diplomatic assurances. Both conclude that diplomatic assurances must be considered binding treaties under international law simply because they otherwise would bring no 'added value' to the risk of torture assessment. Noll states:

> Either the guarantee is legally binding and may, therefore, alter the risk assessment undertaken by a removing state, or it is not binding, and will not affect the risk assessment, in which case removal would constitute a violation of pertinent human rights norms. Therefore, the exchange of aide-mémoires must be seen as a binding instrument of international law, falling within the ambit of the VCLT. By the same token, it must be presumed that states generally intend to create binding obligations when giving and receiving such diplomatic assurances.[86]

There seems to be scope to question this conclusion. Certainly, the conclusion is correct if the alternative to a legally binding agreement would be a mere expression of intent to work *towards* a certain goal. There is, however, little to suggest that diplomatic assurances against torture generally constitute such expressions of intent.

The language of those assurances publicly available indicate that they are promises meant to be kept.[87] However, certain states have clearly expressed that they do not view the agreements as legally binding – they have no intent of creating a treaty under international law when founding these agreements,[88] the reason being that treaties in many legal systems have to be passed through parliament, a procedure they want to avoid. Some diplomatic assurances, thus, appear to be promises meant to be kept but not binding under international law. Certain states may, however, form the agreements with intent of creating a treaty. Most likely there exist diplomatic assurances of both kinds.

Below, I will argue that the leverage added by the assurances is to be found essentially on a diplomatic level: the accountability mechanism that could render

84) Noll, *supra* note 76, section III.
85) Larsaeus, *supra* note 81, pp. 9 *et seq.*
86) Noll, *supra* note 76, section III.
87) The assurances I have studied are all expressed in absolute terms. *See e.g.* the memorandums signed by the UK with various states which assert that the parties 'will' comply with human rights obligations, memoranda with Jordan on file with author, and the assurances issued by Turkey in the case of Ms. Kesbir (*see infra*) that state "there shall be no doubt that".
88) *E.g. Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement*, Appeal No. SC/15/2005, 26 February 2007, <www.siac.tribunals. gov.uk/Documents/QATADA-FINAL-7-FEB-2007.pdf>, visited on 18 December 2007, paras. 180 *et seq*.

them effective is not primarily legal but political. Therefore, it may be questioned what weight should be attached to the issue of whether they are legally binding. The important question is whether they are meant to be kept. If this is the case, it means that political promises can affect the legal assessment concerning risk of torture upon return. I will return to this issue in section 6 below.

4. Endorse, Reject or Use Only with Caution and/or Safeguards: The Ongoing Debate

As mentioned, there is wide disagreement as to whether and/or when diplomatic assurances should be used. Even within the UN system differences in approach are represented. Here, the approaches will be presented in three categories: government endorsements, those advocating a complete rejection and, finally, those suggesting there may be scope for their use if used with caution and/or safeguards.

4.1. Government Endorsements

Those defending assurances against torture have primarily been governments applying them to enable removals. Former British Prime Minister Tony Blair supported the use of diplomatic assurances against torture in order to transfer terror suspects.[89] The prime minister personally intervened several times to have the Home Office seek assurances in order to remove a group of Egyptians in 1999.[90] Blair also held that the assurances should be taken at face value and, thus, a simple promise with no other safeguards was sufficient.[91] The US President George W Bush supports the use of diplomatic assurances against torture, reiterating that assurances are sought before risky removals to honour human rights obligations.[92] The US system expresses reliance on the face value of assurances: once a diplomatic assurance against torture has been obtained, there is no opportunity to challenge the reliability of the promise.[93] Other proponents of applying diplomatic assurances have been the governments of Sweden and Germany. The

89) The framework Memorandas of Understanding assuring against torture were initiated during his time as prime minister. *See also H Youssef* v. *The Home Office*, High Court of Justice, Queen's Bench Division, Case No. HQ03X03052 [2004] *EWHC* 1884 (QB), 30 July 2004, <www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm>, visited on 18 December 2007.

90) *H Youssef* v. *The Home Office*, *ibid.* Human Rights Watch, *Still at risk*, *supra* note 10, p. 70.

91) *See* Human Rights Watch, *Still at risk*, *supra* note 10, p. 70.

92) *See e.g.* Press Conference by the President, 16 March 2005, available online <www.whtehouse.gov.news/releases/2005/03/20050316-2.html>, visited 20 October 2007.

93) The Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277), 8 *C.F.R.* para. 208.18(c)(3).

German government wanted to transfer a Turkish citizen despite a court ruling precluding extradition with assurances against ill-treatment, insisting that the Turkish assurances were in fact adequate.[94] As mentioned, Sweden initiated a process for developing guidelines for their use within the Council of Europe. The states appear to find diplomatic assurances to offer an effective safeguard against torture. However, there is reason to suspect that decisions to apply diplomatic assurances are not always guided by a genuine belief in their effectiveness. The secretary of Blair wrote to relevant officials regarding the removal of the above-mentioned group of Egyptians: "He [Blair] believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts".[95] The note suggests that the interest of having the men deported outweighs any human rights concerns. Furthermore, a US official has stated the following as regards the practice of seeking diplomatic assurances: "They say they are not abusing them, and that satisfies the legal requirement, but we all know they do".[96] Where this attitude holds true, the use of assurances is just another means to push the agenda challenging the ban on *refoulement* for terrorist suspects.

4.2. Reject Completely

Human rights NGOs have forcefully campaigned for a complete rejection of diplomatic assurances against torture. Well known organisations such as Human Rights Watch and Amnesty International have made the rejection of the practice a priority, releasing several reports on the issue and intervening in most of the cases discussed below.[97] Human Rights Watch states: "Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture. The practice should stop".[98]

The NGOs have been supported in their position for a complete rejection of the assurances by authoritative institutions in the human rights community. The UN High Commissioner for Human Rights Louise Arbour holds: "Diplomatic assurances do not work as they do not provide adequate protection against torture

---

94) Joint Statement German Federal Ministry of Interior and Ministry of Interior of North Rhine Westphalia, *infra* note 109.

95) *H Youssef* v. *The Home Office*, *supra* note 89, para. 38.

96) Priest Dana & Gellman Barton, 'US decries abuse but defends interrogations', *Washington Post*, 26 December 2002. Regarding the removal of Maher Arar to Syria with diplomatic assurances (*see* section 6 *infra*), a US official stated: "You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary", Hawkins, *supra* note 113, p. 25.

97) *See e.g.* their campaign websites: <hrw.org/doc/?t=da> and <web.amnesty.org/library/index/engact400212005>, both visited 5 December 2007.

98) *See* Human Rights Watch, *Still at risk*, *supra* note 10, p. 3.

and ill-treatment, nor do they, by any means, nullify the obligation of *non-refoulement*".[99] Furthermore, the UN Special Rapporteur on Torture Manfred Nowak has repeatedly condemned the practice: "[D]iplomatic assurances, which attempt to erode the absolute prohibition on torture in the context of counter-terrorism measures […] are not legally binding and 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".[100] The standpoint of the rapporteur is supported by the European Union Network of Independent Experts on Fundamental Rights, who have claimed that "this is the only acceptable position under international law".[101]

Furthermore, the Council of Europe High Commissioner for Human Rights, Thomas Hammarberg, has forcefully rejected reliance on assurances against torture: "Diplomatic assurances, whereby receiving states promise not to torture specific individuals if returned, are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practised. Such pledges are not credible and have also turned out to be ineffective in well-documented cases. […] the principle of *non-refoulement* should not be undermined by convenient, non-binding promises of such kinds".[102] To summarise, the proponents of a complete rejection of diplomatic assurances against torture include human rights NGOs and several of the most authoritative human rights institutions.

4.3. Use Only with Caution and Safeguards

The human rights society does not stand united in wholly rejecting the application of diplomatic assurances against torture. A common stance in the debate has been not to exclude their use but to reject their use under certain circumstances and/or to assert that the assurances must have a specific form or specific safeguards.

---

99) UN High Commissioner for Human Rights, Address by Louise Arbour the meeting of Council of Europe Group of Specialists on Human Rights and the Fight Against Terrorism, 29–31 March 2006, <www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20%28dh-s-ter%29/working%20documents/2006/HC%20stmt2%20on%20DAs.asp#TopOfPage>, visited on 11 December 2007.

100) Report of the Special Rapporteur on Torture, E/CN.4/2006/6, 23 December 2005, p. 2. *See also* Report of the Special Rapporteur on the Question of Torture, UN Commission on Human Rights, 62nd Session, E/CN.4/2006/6, p. 2.

101) EU Network of Independent Experts on Fundamental Rights, Opinion n° 3-2006: *The Human Rights Responsibilities of the EU Member States in the Context of the C.I.A. Activities in Europe ('Extraordinary Renditions')*, 25 May 2006, <www.europarl.europa.eu/comparl/tempcom/tdip/studies/cfr_cdf_opinion3_2006_en.pdf>, visited on 12 December 2007, pp. 14–15.

102) Council of Europe High Commissioner for Human Rights, Thomas Hammarberg, *Torture can never, ever be accepted*, 27 June 2006, available online at <www.coe.int/t/commissioner/Viewpoints/060626_en.asp>, visited on 23 December 2007.

The United Nations High Commissioner for Refugees declared in a 2006 note on diplomatic assurances that "the sending State acts in keeping with its human rights obligations only if such assurances effectively remove the risk that the individual concerned will be subjected to violations of the rights guaranteed therein".[103] The note suggests that there is scope for applying such assurances where they can be deemed effective. When assessing the effectiveness, issues such as the general human rights situation in the country and the position of the official giving the assurance should be taken into consideration, according to the note.[104]

The former UN Special Rapporteur on Torture Theo Van Boven did not rule out the use of diplomatic assurances; however, he stated that they can not be resorted to for removals to countries where torture is systemic,[105] that they must be "an unequivocal guarantee" against torture and that a post-monitoring system must be put up to ensure the adherence to the guarantees.[106] Although not wholly rejecting the use of diplomatic assurances, the rapporteur has in later reports questioned "whether the practise of resorting to assurances is not becoming a politically inspired substitute for the principle of *non-refoulement,* which […] is absolute and non-derogable".[107]

The Committee Against Torture, to which we will return below, takes a similar stance. In their recommendations and conclusions to the US government in July 2006, they stated: "When determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the State party should only rely on 'diplomatic assurances' in regard to states which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case".[108] The Committee implies that the use of assurances against torture is accepted with regards to some countries, if great caution is applied. Also the Human Rights Committee has implicitly accepted certain usage, by stating that "[t]he State party should exercise the utmost care in the use of diplomatic assurances […]".[109] Accordingly, several human rights institutions have left scope for using diplomatic assurances under certain conditions. It is important to note, however, that many of those taking this position reject the use of diplomatic assurances where torture is systemic. As assurances today are often employed

---

103) United Nations High Commissioner for Refugees, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=44dc81164>, visited on 12 December 2007, para. 20.

104) *Ibid.*, para 21.

105) Report of the Special Rapporteur on Torture, A/59/324, 1 September 2004, paras. 31 and 40.

106) *Ibid.*, para. 35.

107) *Ibid.*, para 31.

108) CAT, Concluding Observations/Comments, CAT/C/USA/CO/2, 7 July 2006, <tb.ohchr.org/default.aspx 'CAT/C/USA/CO/2'>, visited on 14 December 2007, para. 21.

109) Human Rights Committee, Concluding Observations: United States of America, CCPR/C/USA/CO/3, 15 September 2006, <tb.ohchr.org/default.aspx 'CCPR/C/USA/CO/3'>, visited on 14 December 2007, para. 16.

precisely for removals to such countries, their position represents a substantially narrower scope for use than that of current practice.

4.4. The Contribution of Academia

As mentioned, surprisingly little academic writing has been produced on the topic of diplomatic assurances against torture. In my research, I have encountered four pieces, each with a different approach to the topic. In an article expressing harsh criticism of the current employment of diplomatic assurances against torture, Jones concludes by calling for guidelines governing their use, thus, not wholly rejecting their application.[110] Larsaeus finds that diplomatic assurances can bring an 'added value' in the risk of torture assessment, but she finds the reliability of the assurances to hinge on factors such as post-return monitoring.[111] Noll holds that the purpose of the assurances is for the removing society to ensure themselves of their compliance with human rights norms, whereas the removed is 'abandoned'.[112] In her article, Hawkins examines 20 cases in which the US has transferred individuals by so-called renditions, transfers outside of the legal immigration or extradition frameworks, allegedly using diplomatic assurances.[113] Based on allegations of torture in a large majority of cases and certain testimonies of US officials, Hawkins concludes that "diplomatic assurances from countries known to torture prisoners do almost nothing to reduce the risk of torture".[114] To summarise, amongst the articles written, the use of diplomatic assurances as a mere promise to be trusted at face value is rejected by all authors. Only Larseaus discusses whether there may be scope for their use with extra safeguards, and finds that they can have an added value in the risk assessment.

5. Diplomatic Assurances in Courts and Committees

5.1. Some General Remarks

The use of diplomatic assurances against torture in order to enable transfers of persons has been under review by courts and human rights committees on a few occasions. Cases are, however, still rather scarce. One reason is that the most frequent user of diplomatic assurances, the US, has not ratified instruments to allow

110) Jones, *supra* note 61, pp. 9–39.
111) Larsaeus, *supra* note 81.
112) Gregor, *supra* note 76.
113) K. R. Hawkins, 'The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition', 20 *Georgetown Immigration Law Journal* (Winter 2006).
114) *Ibid.*, p. 29.

for individual complaints under the Convention Against Torture, the International Covenant on Civil and Political Rights, or the American Convention on Human Rights. Due to the scarcity of cases at the international level, I will also review some interesting cases from domestic courts. Also here jurisprudence from the US is lacking. As mentioned, there is no scope for judicial review of diplomatic assurances within the removal proceedings. Furthermore, when the issue has arisen in civil proceedings against the state, the 'state secrets privilege' has been invoked, hindering trial due to the sensitive nature of the information that might be revealed.[115] Also, a difficulty follows the decisions that exist: important information has been omitted from documentation due to claims of national security.[116] Certain domestic cases have not been analysed due to lack of translations.

5.2. CAT and HRC: Reject Where Proper Enforcement is Lacking

The perhaps most controversial cases involving diplomatic assurances against torture in international forums are the cases of the Egyptians *Agiza* and *Alzery*.[117, 118] The two men applied for asylum in Sweden, but were rejected under the national security exception of the Refugee Convention. The Swedish authorities found that the men were at substantial risk of torture upon removal and decided to seek assurances against torture to enable removal. From the Swedish submissions regarding one of the cases: "After careful consideration of the option of obtaining assurances from the Egyptian authorities with respect to future treatment, the State party's government concluded it was both possible and meaningful to inquire whether guarantees could be obtained that Mr. A and his family would be treated in accordance with international law upon return to Egypt".[119] The written assurances contain, *inter alia*, promises that the men will be treated humanely upon return and receive fair trials. Later it was also agreed that the men could be visited by Swedish officials when detained in Egypt, where they were to face detention due to allegations of illegal involvement in Islamist groups. A controversial aspect of the case is that the removal of the two men was carried out in great haste and in a brutal manner by US Central Intelligence Agency agents.

---

115) The 'state secret privilege' was invoked in *Arar* v. *Ashcroft. See Assertion of State Secrets Privilege in Arar* v. *Ashcroft*, Declaration of James B. Comey, Acting Attorney General, 18 January 2005, C.A. No. 04-CV-249-DGT-VVP, <www.fas.org/sgp/jud/arar-notice-011805.pdf>, visited on 15 December 2007.

116) Particularly the cases of *Agiza and Attia* v. *Sweden* below contain frequently the following passage: "These reasons are omitted from the text of this decision at the State party's request and with the agreement of the Committee."

117) Alzery is sometimes spelt al-Zery or el-Zary.

118) *Alzery* v. *Sweden*, HRC Communication No. 1416/2005: Sweden, CCPR/C/88/D/1416/2005, 10 November 2006. *Agiza* v. *Sweden*, CAT Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 24 May 2005.

119) *Attia* v. *Sweden*, *supra* note 24, para. 4.6.

After the removal, both men have, with supporting evidence,[120] alleged being tortured by Egyptian officials.

In connection with the removal and assurances issued in this case, there are three relevant decisions to be analysed: those regarding the two men, and a decision concerning the removal of Attia, the wife of Agiza, a case inextricably linked to the two others since all three removals were to rely on the same assurances against torture. The case of *Attia* was the first to be challenged in a human rights body, the Committee Against Torture, in November 2003.[121] In its decision, the Committee finds that Attia has not substantiated a sufficient risk of torture upon removal. It declares that, "[i]n light of the passage of time, the Committee is satisfied by the provision of guarantees against abusive treatment, […] that are, at the present time, regularly monitored by the State party's authorities *in situ*".[122] Apparently, the Committee was convinced by the Swedish claims that the assurances had been effective for Agiza, and this was crucial for the outcome.

The case of *Agiza* was reviewed in a submission to the Committee Against Torture in May 2005. In this case, the Committee concluded that the Swedish government had violated the ban on *refoulement* to substantial risk of torture by removing Agiza. The assurances were not accepted at face value, and were not found a sufficient safeguard against torture in the case. The Committee explains the differing outcomes of the two nearly analogous cases, primarily with new facts available to them in the *Agiza* case.[123] The Committee, *inter alia*, points to information withheld from them in the case of *Attia*, revealing how Agiza had complained of ill-treatment on the first visit from Swedish officials and the circumstances of the removal. Thus, it might have come to a different conclusion in the previous case were these circumstances disclosed then. Furthermore, the Committee points to "the progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad".[124] The statement seemingly indicates that, as measures such as deploying diplomatic assurances against torture are turning into a pattern, they undermine the prohibition of *non-refoulement*. The statement could be seen to indicate that diplomatic assurances might not henceforth be accepted as a means of mitigating risk of torture upon transfer.

120) When Agiza was examined by a doctor after alleging torture during his re-trial in Egypt, the doctor found physical injuries, but could not establish how they occurred. *See* Human Rights Watch, *Still at Risk*, *supra* note 10. Furthermore, the mother of Agiza, when visiting him in detention, claimed that "he walked with difficulty and was supported by a prison officer. He seemed pale, weak, seemingly in shock and near breakdown. His eyes, cheeks and feet were allegedly swollen, with his nose larger than usual and bloodied", *see Attia* v. *Sweden*, *supra* note 24, section 7.1.

121) *Attia* v. *Sweden*, *supra* note 24, para. 4.4.

122) *Ibid.*, para. 4.11.

123) *Agiza* v. *Sweden*, *supra* note 72, section 13.4.

124) *Ibid.*, 13.5.

However, the wording of its conclusion suggests such a conclusion would be in error: "The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk".[125] The wording suggests that the conclusion might have been different were there a "mechanism for their enforcement". What such mechanisms could be will be returned to below. Other facts the Committee noted that affected the outcome are: a breach of the assurances relating to a fair trial, which in their words "goes to the weight that can be attached to the assurances as a whole", and an "unwillingness of the Egyptian authorities to conduct an independent investigation" into the allegations of torture.[126] In summary, it seems the Committee does not rule out the use of diplomatic assurances against torture, but there has to, at least, be some form of enforcement mechanism. Since many factors are mentioned as contributing to the conclusion in the case, it is possible that, according to the Committee, there is a substantial scope for their use in different circumstances.

The case of *Alzery* was reviewed by the UN Human Rights Committee under the ICCPR in November 2006. The Committee found that "[t]he 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".[127] It noted that the state party conceded that a risk of torture was at hand before the removal, and that they "relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on *refoulement*".[128] Furthermore, the Committee noted that "the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation".[129] It particularly pointed out that the visits by Swedish officials had started weeks after the return, and that the visits fell short of norms of good practice for such human rights monitoring. Already the focus on the enforcement mechanisms indicates that the Human Rights Committee, like the Committee Against Torture, could accept reliance on assurances against torture were they differently modelled. This position is further reinforced in their conclusion, where they write that the state party has not shown that the assurances were sufficient "in the present case" to mitigate sufficiently the risk of torture. The Committee suggests rather strongly that there is scope for using diplomatic assurances where proper enforcement mechanisms

125) *Ibid.*, para. 13.4.
126) *Ibid.*
127) *Alzary* v. *Sweden*, HRC Communication No. 1416/2005: Sweden, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.3.
128) *Ibid.*, para 11.4.
129) *Ibid.*, para 11.5.

are included. In referring to international good practices of abuse monitoring, they hint that their approval may hinge on whether such monitoring accompanies the assurances.

In June 2007, the Committee Against Torture reviewed another case concerning a removal relying on diplomatic assurances against torture, namely *Pelit* v. *Azerbaijan.*[130] Ms. Pelit was removed from Azerbaijan to Turkey, in spite of initially accepting Committee requests for an interim halt of the removal while reviewing the case. The Committee found:

> [T]he Azeri authorities received diplomatic assurances from Turkey going to issues of mistreatment, an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment. While a certain degree of post-expulsion monitoring of the complainant's situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise (see its approach in Agiza v Sweden), nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy. In these circumstances, and given that the State party had extradited the complainant notwithstanding that it had initially agreed to comply with the Committee's request for interim measures, the Committee considers that the manner in which the State party handled the complainant's case amounts to a breach of her rights under article 3 of the Convention.[131]

The Committee stated that it would have needed to assess the 'satisfactoriness' or (referring to the *Agiza* case, presumably) enforcement mechanisms of the assurances or the details of actual monitoring. Accordingly, these factors could have affected the outcome of the case.

5.3. ECtHR: Reject Where Torture is 'Endemic'

The first case involving diplomatic assurances against torture in the ECtHR was *Chahal* v. *United Kingdom* in 1999, the case cited above as establishing the absolute nature of *non-refoulement* under the ECHR.[132] The UK wanted to remove the Sikh activist to India, relying on diplomatic assurances that he would not be tortured upon return. The Court noted that torture upon those in police custody in the region at issue has been described as 'endemic', and, therefore, concluded: "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 NHCR [Indian National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere

130) *Pelit* v. *Azerbaijan*, CAT Communication No. 281/2005, CAT/C/38/D/281/2005, 5 June 2007.
131) *Ibid.*, para. 11.
132) *Chahal* v. *United Kingdom*, *supra* note 37.

in India is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety".[133] The decision highlights an important issue concerning the reliance on diplomatic assurances against torture: the official rendering the assurance may not sufficiently control all potential torturers and can, thus, not uphold the promise even if given in good faith. From the decision cannot be established whether the rejection of reliance on assurances against torture applies only where torture is 'endemic' (or "a recalcitrant and enduring problem"), or if such assurances would be rejected also in other circumstances.

The second case of the ECtHR involving diplomatic assurances is *Matmakulov and Askarov* v. *Turkey* in February 2005.[134] The two men were extradited by Turkey to Uzbekistan with diplomatic assurances against torture and unfair trial – in defiance of a request from the Court of an interim hold while the case was reviewed. The Court noted information submitted to it regarding the extensive occurrence of torture in Uzbekistan, but found that the information did not support risk of torture in the individual cases.[135] After noting that assurances were rendered and that medical reports were issued from doctors at the Uzbek prison where the men were held, showing no signs of mistreatment, the Court held that, "[i]n light of the material before it, the Court is not able to conclude that substantial grounds existed at the aforementioned date for believing that the applicants faces a real risk of treatment proscribed by Article 3".[136] Instead, the Court found Turkey in breach of the Convention through its defiance of the request for an interim hold of the transfers. The diplomatic assurances as well as the medical reports were 'noted' by the Court, but the reasoning suggests that these factors did not affect the outcome.[137] The statement regarding lack of evidence as to the personal risks for the men indicates that the risks of torture were not sufficiently substantiated in the first place. Thus, there would have been no breach of *non-refoulement* even if no assurances were sought. With this understanding, the diplomatic assurances carried no weight for the outcome of the case, and thus the case holds little interest for further analysis here.[138]

---

133) Para. 37.

134) *Mamatkulov and Askarov* v. *Turkey*, application nos. 46827/99 and 46951/99, 4 February 2005.

135) *Ibid.* paras. 72–73. A personal risk must be establish for the principle of non-refoulement to apply. *See e.g.* section 1 of general principles in the case at hand.

136) *Mamatkulov and Askarov* v. *Turkey*, *supra* note 134, para. 77.

137) Regarding the medical reports, further aspects support this conclusion: firstly, the point in time on which to determine the risk is the time of removal (even though subsequent events may be given certain consideration) and, secondly, their credibility can be questioned since they were not issued by independent doctors. These aspects can hardly have been overlooked by the Court.

138) In the UK domestic case of Oman Othman, *see infra*, para. 494, the case is cited as indicating that diplomatic assurances can be relied on as a guarantee against torture. According to this analysis, I disagree with this conclusion.

Two months later, the Court reviewed a similar case, the extraditions of *Shamayev and 12 Others*[139] from Georgia to Russia. Also in this case, the men were removed in defiance of a request by the Court for an interim halt while the case was pending review. The Russian authorities offered assurances, which *inter alia* guaranteed against the death penalty, against torture and that they would have access to the ECtHR. When the ECtHR had found the application admissible and wanted to carry out a fact finding mission to Russia, its officials were denied access to the detainees.[140] That part of the assurances was, thus, breached. In its decision, the Court emphasises that the assurances were rendered by the prosecutor general, of high authority and in charge of prosecutions, and states: "In fact, the Court finds nothing in the evidence submitted by the parties and obtained by its delegation in Tbilisi which could reasonably have given the Georgian authorities grounds to doubt the credibility of the guarantees provided".[141] Unfortunately, the Court makes no separate analysis regarding the assurances granted against the death penalty and regarding torture.[142] Clearly, the fact that the official giving the promises was the prosecutor general is of substantially more relevance in relation to the credibility of the assurances against the death penalty. Subsequently, the Court states that it has received no complaints of ill-treatment.[143] In conclusion, the Court finds that "the representatives of the men have failed to submit sufficient information" for them to establish that a sufficient risk of torture was at hand.[144] The emphasis on the 'representatives failing to submit sufficient information' regarding risk of torture indicates that a sufficient risk of torture was not substantiated in the first place. Thus, the assurances were seemingly of no importance for the decision of the Court as to risk of torture, but only in relation to the death penalty. Thus this case brings little to my analysis of the position of the Court in relation to diplomatic assurances against torture. What the cases show is that assurances are 'noted', thus considered as one factor amongst many in the risk assessment of the Court. Also in this case, the Court found the removing country in breach of its obligations under the

139) *Shamayev and 12 Others* v. *Georgia and Russia*, application no. 36378/02, 12 April 2005.

140) Registrar of the European Court of Human Rights, *Shamayev and 12 Others* v. *Georgia and Russia*, (application no. 36378/02), *Press Release* No. 528, 24 October 2003, <www.echr.coe.int/Press/Eng/query.idq?CiRestriction=528&CiScope=E%3A%5Cdata%5Cinternet%5Cechr%5Ceng%5CPress&CiMaxRecordsPerPage=10&TemplateName=query&CiSort=rank%5Bd%5D&HTMLQueryForm=query.htm>, visited on 15 December 2007.

141) *Shamayev and 12 Others* v. *Georgia and Russia*, *supra* note 139, para. 343.

142) I will later argue (*see* section 6.5) that assurances hold substantially different characteristics in the two different contexts and, thus, separated analysis is essential.

143) This line of argument is somewhat questionable. Whereas subsequent events may be of help in determining the previous risk, the point of time in which to assess the risk is pre-departure. Moreover, as the Court notes, the applicants may not have had an opportunity to file any complaint.

144) *Shamayev and 12 Others* v. *Georgia and Russia*, *supra* note 139, para. 350.

Convention due to the defiance of the interim request. A possible understanding of the outcomes is, consequently, that where a removal already has been carried out, the Court finds it difficult to assess the risk at point of removal and, instead, chooses to find a breach of the Convention in this regard.

In summary, the Court finds that diplomatic assurances may not be resorted to where torture is 'endemic'. They do not fully reject their use, but seem to consider assurances as a factor amongst others rather than trusting the promises at face value.

5.4. Cases in Domestic Courts: Use Only with Caution and Safeguards

5.4.1. Canada

Some of the most interesting cases evaluating diplomatic assurances against torture come out of Canadian courts. The Canadian Supreme Court dealt with diplomatic assurances against torture in the above-mentioned case of *Suresh*.[145] Mr. Suresh had been granted refugee status in Canada but was, according to a decision by a minister delegate, to be deported on security grounds due to his involvement with a Tamil organisation labelled as terrorist. The Supreme Court of Canada set aside the decision on the ground that he had not been offered sufficient procedural safeguards.[146] The government had accepted a diplomatic assurance from Sri Lanka assuring that he would not be tortured upon his return there. The Supreme Court established that where diplomatic assurances were used by the government, the person to be removed must be given the opportunity to challenge the reliability of these.[147] Furthermore, the Court commented in *obiter:*

> We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.[148]

The Court does not exclude reliance on diplomatic assurances against torture, but expresses certain reservations in relation to their use. Firstly, it expresses hesitation regarding reliance on such assurances from a state that "has engaged in illegal torture" before. The review of state practice of employing diplomatic assurances showed that they are used when there would otherwise be a risk of

145) *Manickavasagam Suresh* v. *The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh)*, SCC 1. File No. 27790, 11 January 2002.
146) *Ibid.*
147) *Ibid.*, para. 123.
148) *Ibid.*, para. 124.

torture, and almost exclusively for removal to countries where torture is a serious problem. Were diplomatic assurances not to be employed for such situations, there would be little scope for their use. Furthermore, the statement emphasises the difference between assurances against the death penalty and against torture, a discussion to which we will return below. The court also highlights the crucial issue in *Chahal* v. *United Kingdom:* the difficulty of controlling all officials. This problem was also decisive for the courts in two European domestic cases involving diplomatic assurances: the case of *Kaplan*,[149] to be extradited from Germany to Turkey, and the case of *Zakaev*,[150] regarding extradition from the United Kingdom to Russia.

In *Suresh,* the Canadian Supreme Court expressed hesitation regarding reliance on diplomatic assurances against torture. Subsequently, the strong reliance on diplomatic assurances against torture has been struck down by three lower courts in Canada which deemed removal decisions on that basis 'patently unreasonable'.[151] The bases were that too much reliance was put on assurances from countries where torture has been practiced before,[152] that the issuing state 'failed to explain' why the case at hand would be different[153] and, in the third case, that the assurances lacked 'essential requirements' to secure their effectiveness.[154] The courts indicate that assurances should not be taken at face value, but that there might be scope for their use if their protection value is assessed with regard to previous torture practice of the country, they contain an 'explanation' for upholding their use and/or contain enforcement mechanisms.

5.4.2. The Netherlands, Austria, Germany

Another case of interest, in which a removal decision was struck down due to faltering reliability of assurances against torture, is the Dutch case of *Kesbir* who was to be extradited to Turkey.[155] The assurances obtained contained a guarantee that Ms. Kesbir would "enjoy the full rights" emanating from the ECHR.[156]

---

149) Oberlandesgericht Duesseldorf, in the case of Metin Kaplan, 4Ausl (a) 308/02-147.203-204.03III, 27 May 2003.

150) *The Government of the Russian Federation* v. *Akhmed Zakaev*, Bow Street Magistrates' Court, decision of Hon. T. Workman, 13 November 2003, <www.tjetjenien.org/Bowstreetmag.htm>, visited on 23 December 2007.

151) *Minister of Justice for Canada* v. *Rodolfo Pacificador*, Court of Appeal for Ontario, No. C32995, 1 August 2002, *Mohammad Zeki Mahjoub* v. *Minister of Citizenship and Immigration*, IMM-98-06, 2006 FC 1503, 14 December 2006, and *Lai Cheong Sing et al* v. *the Minister of Citizenship and Immigration*, IMM-2669-06 2007 FC 361.

152) *Mahjoub* v. *Minister of Citizenship and Immigration*, *ibid.*

153) *Minister of Justice for Canada* v. *Pacificador*, *supra* note 151, para. 51.

154) *Sing et al* v. *the Minister of Citizenship and Immigration*, *supra* note 151, para. 139.

155) *Advies inzake N. Kesbir*, Hoge Raad der Nederlanden, EXU 2002/518, 02853/02/U-IT, 7 May 2004, in Human Rights Watch, *Still at risk*, *supra* note 10, p. 75.

156) *Ibid.*, p. 74.

In the case, the substantial problems of torture in Turkey were highlighted. The High Court concluded, in a decision upheld by the Supreme Court:

> [I]n view of the real risks that she [Kesbir] runs, there can only be a question of adequate assurances if concrete guarantees are given that the Turkish authorities will ensure that during her detention and trial, [Kesbir] will not be tortured or exposed to other humiliating practices by police officers, prison staff or other officials within the judicial system. None of the aforementioned assurances meets this requirement. These assurances imply no more than that [Kesbir] will be treated in accordance with the applicable human rights conventions and Turkish law. So not only do these assurances add nothing to the situation that would have prevailed without them … but they do not offer any solace for the above-mentioned problem that these laws and conventions apparently are not enforced at all times and in every respect.[157]

The Court does not rule out reliance on diplomatic assurances, but finds the assurances in the case insufficient. Where human rights norms are often violated, a mere promise that they will be upheld for the particular person are not considered sufficient. They must contain 'concrete guarantees' and 'offer solace' for the problem of torture. Perhaps the Court would have accepted the assurances had the Turkish officials explained how they would go about securing the safety of Ms. Kesbir.

So far the cases referred to have all struck down assurances as not offering sufficient protection against torture, while not rejecting altogether the use of diplomatic assurances against torture. There are, however, cases in which assurances have been deemed sufficiently effective to enable a transfer.

I have not been able to analyse three cases in which diplomatic assurances against torture were accepted due to lack of translations. In the case of *Kaplan*, to be extradited from Germany to Turkey, the Court firstly rejected the assurances as insufficient, but when the government sought and obtained enhanced assurances, these were deemed sufficient in all instances.[158] An Austrian court accepted assurances against ill-treatment in the case of *Akhmed A*, to be deported to Russia.[159] In the Austrian case of *Bilasi-Ashri*, to be extradited to Egypt, the court assessing risks upon removal conditioned the removal on obtaining assurances guaranteeing, *inter alia*, against torture.[160]

---

157) *Ibid.*, p. 75.

158) Unfortunately, I have not been able to find a translation of the case, and have, therefore, not been able to analyse the rulings further. R. Bernstein, 'Germany Deports Radical Long Sought by Turks', *New York Times*, 13 October 2004, <www.nytimes.com/2004/10/13/international/europe/13turkey.html>, visited on 17 December 2007. Oberlandesgericht Duesseldorf, in the case of Metin Kaplan, 4Ausl (a) 308/02-147.203-204.03III, 27 May 2003, in Human Rights Watch, *Empty Promises*, *supra* note 10.

159) *See* Human Rights Watch, *Still at risk*, *supra* note 10, p. 76.

160) *See* Human Rights Watch, *Empty Promises*, *supra* note 10, p. 32.

5.4.3. United Kingdom

In the United Kingdom, the question of whether the framework diplomatic assurances offer sufficient protection against torture came under review in 2007. The two cases hitherto are of particular interest for further analysis regarding the protection that can be granted by diplomatic assurances since the assurances are more developed than others and different aspects of their protection value are discussed at great length by the courts. In February, an immigration appellate court found that the assurances offered sufficient protection in order to remove Mr. Omar Othman (also known as Abu Qatada) to Jordan.[161] The court found that "[h]is deportation is necessary in the interests of national security, by which we mean here that it is necessary as a measure of defence for the rights of those who live here",[162] and that the legality of the removal depended on the obligation of *non-refoulement* as contained in the ECHR.[163] There was no doubt that a risk of torture would hinder removal but for the assurances obtained. As mentioned above, the memoranda contained a provision of monitoring, to be carried out by an independent human rights organisation. The forms for the monitoring were agreed upon by the governments: *inter alia*, that visits would be unannounced, in private with the detained, by experts to detect signs of ill-treatment and medical examination should be arranged if deemed necessary.[164] The capacities of the chosen human rights organisation to carry out the monitoring were discussed at great length.[165] The government officials admitted that the organisation chosen had no relevant experience.[166] To remedy this, the British government provided the centre with funding for relevant training. Other issues raised were, for example, that the organisation could be put under great government pressure in a country like Jordan. The UK government won the sympathy of the court with their arguments emphasising, *inter alia,* the good diplomatic relations between the two states, the preventive effect following the notoriety of the case and the effectiveness of the monitoring provided. Some of the main arguments will be further examined below.

The second case reviewing the British framework assurances, *DD and AS* v. *The Secretary of State for the Home Department*,[167] concerning removal to Libya, was

---

161) *Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement*, Appeal No. SC/15/2005, 26 February 2007, <www.siac.tribunals.gov.uk/Documents/QATADA-FINAL-7-FEB-2007.pdf>, visited on 18 December 2007.

162) *Ibid.*, para. 88.

163) The Court did, however, express scepticism as to whether this obligation actually was contained in the treaty, *see* paras. 111–112.

164) *Ibid.*, Annex II.

165) *Ibid.*, paras. 186 *et seq*.

166) *Ibid.*, para. 196.

167) *DD and AS* v. *The Secretary of State for the Home Department*, SC/42 and 50/2005, 27 April 2007, <www.bailii.org/uk/cases/SIAC/2007/42_2005.html>, visited on 20 December 2007.

decided in April 2007. In this case, the Government also argued that the importance of diplomatic relations would prevent the Libyans from violating their promise. The court held in this case that even though it was not probable that the assurances would be breached, there remained a "genuine risk" and, therefore that "[t]here is too much scope for something to go wrong, and too little in place to deter ill-treatment or to bring breaches of the MOU to the UK's attention".[168] The court found it sufficient that there was a genuine risk that the promise would be breached, even though it was not probable. Factors contributing to the finding of a genuine risk were a lack of depth in diplomatic relations between the two states and the risk that a breach could remain undetected, *i.e.* the effectiveness of monitoring was deemed insufficient,[169] something that was found to diminish incentives to uphold the promise.[170] Both British cases are currently in appeal.

In summary, no domestic court has expressed a complete rejection of diplomatic assurances, while none has accepted the promises at face value. Rather, the courts have generally found that they can render sufficient protection, if complemented by adequate safeguards such as monitoring.

6. An Examination of the Arguments

6.1. The Context of the Assurances: "Promises of Torturers"

As mentioned, an examination of practice concerning the seeking of diplomatic assurances against torture shows that they are applied where the principle of non-*refoulement* would otherwise prevent a transfer of the person at hand. Countries from which assurances are sought include Egypt, Morocco, Algeria, Uzbekistan, Turkey, Syria and Jordan. All of these have poor human rights records with regard to the universal ban on torture. This background led Hawkins to label reliance on diplomatic assurances as *"The Promises of Torturers"*.[171] As mentioned above, Canadian courts have deemed reliance on diplomatic assurances 'patently unreasonable', where officials have failed to acknowledge how the inherent problem of such assurances affects the risk of torture assessment. The context of their application is important to consider while assessing diplomatic assurances against torture: they have to be sufficiently effective to mitigate a risk of torture otherwise present in the context of a country that frequently is responsible for torture.

168) *Ibid.*, paras. 371 and 428.
169) *Ibid.*, para. 330.
170) *Ibid.*, para. 365.
171) Hawkins, *supra* note 113.

6.2. Protection Over and Above Human Rights Law

In one of the Canadian domestic cases cited above, the judge asks: "If a country is not prepared to respect a higher legal instrument that it has signed and ratified […], why would it respect a lower-level instrument such as a diplomatic note?".[172] The question is justified: often the diplomatic assurances simply reiterate obligations of human rights law to which the assuring state is already bound but regularly flouts. It may be questioned then why a diplomatic assurance on top of the human rights convention would affect how the state behaves. This is a main argument forwarded against reliance on diplomatic assurances against torture. Human Rights Watch states that "[i]t defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case".[173]

I have identified a few ways in which diplomatic assurances may have the potential to render protection against torture over and above international human rights law. The assurances can contain an agreement on what protective measures are required in the specific case, they can contain protective measures over and above the imperatives of the law or they can be complemented by enforcement mechanisms stronger than those of international law. Furthermore, diplomatic assurances may hold incentives for states to respect the promise given different from those connected to respecting their commitments in international human rights law. These sources of potential added protection against torture deserve further attention.

6.3. An Agreement On, or Beyond, the Imperatives of International Human Rights Law

Opponents of diplomatic assurances against torture often claim that they add nothing beyond human rights norms. An examination of available assurances so far applied reveals that in practice this is often true in regard to their material content: the assurances usually merely reiterate obligations under human rights law. However, they certainly can contain extra protective imperatives beyond those already in force.

In the case of *Kesbir*, cited above, the Dutch court indicated that the assurances should contain something to remedy the situation of general risk of torture, an explanation of how the promise would be implemented. When there exists an identified risk of torture in a specific case, human rights law already requires the state to actively take measures to prevent the risk from materialising. However, which of those measures should be taken and the extent to which they are required

172) *Sing et al* v. *the Minister of Citizenship and Immigration*, *supra* note 151, para. 147.
173) Human Rights Watch, *Still at risk*, *supra* note 10, p. 5.

is often not clear for a specific case. An assurance could represent an agreement on the content of human rights law as regards what protective measures are needed in the particular case. Furthermore, the assurances can contain promises of preventive measures beyond those required in law. Many international bodies have rendered advice on how to prevent torture by state officials. For example, the Human Rights Committee has, in a general comment, recommended video recording of all interrogations, that interrogations take place in the presence of a lawyer and that records are kept of all interrogators.[174] Furthermore, torture preventive training can be given to officials of relevant detention centres. These are examples of what a diplomatic assurance against torture can contain to render it more effective and perhaps bring protection beyond what human rights norms require in the case.

Diplomatic assurances can also add extra enforcement mechanisms beyond those contained in international human rights law. Perhaps the most acute problem of international human rights law is that it is connected with rather weak mechanisms for its enforcement. Upholding it depends almost exclusively on 'naming and shaming', political will and the monitoring and advocacy of NGOs and human rights bodies. Diplomatic assurances can potentially bring additional protection against torture by containing mechanisms for enforcement of the human rights imperative not to torture. I will return to this question below.

6.4. Lifting the Issue to the Level of Diplomacy

Concern for 'international reputation' is proposed in many of the cases reviewed as an incentive for the receiving states to uphold their promise not to torture. If the argument refers to the general reputation of respect for international human rights law, it is flawed: the states concerned regularly flout their human rights commitments and do not seemed bothered enough about the consequences for them to change their practice. Regarding their reputations as bilateral collaborators, however, the stakes may differ. As mentioned, in several cases, the importance of diplomatic relations is forwarded as the strongest incentive for a state to uphold its promise contained in diplomatic assurances. The representative of the British government in the case of *Othman* cited above, argues that the questioning of what a non-legal commitment can add beyond a legal human rights one "involves a misunderstanding of how an MOU [memoranda of understanding] works in practice. States look not only to the legal status of international documents when deciding their behaviour but to the whole political context. […] This MOU, while imposing less than a legal obligation, was made with respect to one

[174] Human Rights Committee, General Comment No. 20, 10/03/1992, <www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument>, visited on 23 January 2008.

state only, with an exceptionally strong political commitment on the part of both governments".[175] The promise is more 'personal', being one between two states only, rendering a breach more of an insult to the particular promised state. Furthermore, the assurance brings the issue to the level of diplomacy and high politics. A breach, therefore, risks harming diplomatic relations between the two states, as well as the reputation of the state as a bilateral partner.[176] A negative impact on diplomatic relations, in turn, may bring economic and political consequences beyond those of a poor human rights record, and this threat is what can bring leverage to diplomatic assurances.

Moving the question to the diplomatic level thus has the potential to render protection against torture beyond that of human rights law. However, two issues substantially diminish the strength of this extra protection: the difficulty to control all potential torturing officials and the difficulty of detecting a breach.

6.5. Control over Possible Rogue Officials

The problem of a lacking control over officials is a recurring reason for courts to doubt the effectiveness of diplomatic assurances against torture.[177] The promise not to torture must entail all possible torturers – also over time. Where a culture of torture exists, the problem is systemic, and it may be very difficult to uphold the promise, no matter how strong the incentives are at a higher political level. The problem of control over officials brings the (slightly incongruous) effect that assurances against torture might be more trustworthy when issued by states where torture is more likely to be sponsored by leaders than where the risk emanates from officials at a lower level. As the ECtHR concludes in *Chahal*, any high-level incentive to uphold assurances against torture, such as concern for diplomatic relations, is of less worth where torture is endemic. The other major problem of the incentives-based argument, the problem of detection of a breach, applies to all contexts, *i.e.* also where the risk of torture emanates from high level officials.

6.6. The Problem of Detection

Arguments based on reputation or diplomatic relations as an incentive for respecting the promise not to torture only apply if the abuse risks being detected, not if it may go on in secret and news of it never reaches the state receiving the assurance. The weight of these arguments is therefore substantially diminished by the

175) *Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement*, *supra* note 88, para. 295.

176) Also Larsaeus argues that moving the case up to the level of diplomatic significance can bring an added value in the risk assessment. Larsaeus, *supra* note 81, p. 8.

177) *See* sections 6.3 and 6.4.1.

difficulty of detecting any breach of assurances against torture. The ban on torture is, as mentioned, perhaps the most established norm of international law. Torture is illegal, and the ban is universally accepted. Consequently, where torture occurs, it is practiced in secret and not admitted. If the assurance against torture is breached, the torturing state is very unlikely to talk about it. The victim of torture is also not very likely to speak of the abuse: they might be held incommunicado, or threatened to silence. Arar, who was sent to Syria by the US, allegedly with an assurance against torture, and Agiza, sent to Egypt by Sweden under similar conditions, claim that they were threatened into keeping quiet about their abuses.[178] In spite of credible claims to the contrary, both receiving countries deny abuses, and Egypt has refused to thoroughly investigate the claims in spite of international pressure.[179] This problem of any breach coming to the attention of the sending state is the reason why we must separate the practice of accepting assurances against the death penalty and assurances against torture.

6.7. Diplomatic Assurances Against Torture v. Death Penalty

The wide acceptance of assurances against the death penalty recurs in several cases as an argument in favour of deploying similar promises against torture.[180] The clandestine nature of torture and the problem of detecting a breach, however, constitute a substantial difference between the use of diplomatic assurances against torture and such assurances against the death penalty. As mentioned, the described qualities of torture dramatically mitigate the arguments forwarded in favour of assurances against torture. These qualities are not shared with the death penalty. The death penalty, when applied, is a legal punishment handed down openly by a court of law after a trial. The practice is not secret, and a breach is in most cases very easy to detect. In a study conducted by Massarch,[181] she encountered no known breaches of assurances against the death penalty, whereas breaches of assurances against torture, as mentioned, have been credibly alleged on several occasions. As the nature of torture is so different from that of the death

178) *See* Human Rights Watch, *Still at risk*, *supra* note 10, p. 25 and *Testimony of Maher Arar, Joint Oversight Hearing: Rendition to Torture: The Case of Maher Arar*, Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight with Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, United States House of Representatives, 18 October 2007, <www.foreignaffairs.house.gov/110/ara101807.pdf>, visited on 2 February 2008.

179) *Ibid.*

180) *See e.g.* in *Chahal* v. *United Kingdom*, *supra* note 37, where the British government refers to the practice of the Court with regards to diplomatic assurances against the death penalty.

181) A. Massarsch, *Are Diplomatic Assurances Adequate Safeguards of Human Rights? An examination of their protection against the death penalty and ill-treatment*, Irish Centre for Human Rights, 2006/2007 master thesis, on file with author.

penalty, it is important to separate any analysis of them in relation to the use of diplomatic assurances.[182]

6.8. Remedying the Problem of Detection? Post-Return Monitoring

The analysis of jurisprudence above shows how courts and committees have rejected simple promises not to torture as rendering insufficient protection, but in several cases indicated that certain safeguards could remedy the shortcoming. Governments have reacted to the decisions by developing assurances to include post-return monitoring of the transferred persons. Post-return monitoring could potentially mitigate the problem of detection, increasing the incentives to respect the assurances.

As pointed out by the Human Rights Committee in *Alzery*, the manner in which the monitoring is carried out carries substantial weight as to its efficiency. The Human Rights Committee[183] and the Committee Against Torture,[184] for example, have issued recommendations as to what safeguards might be taken in monitoring compliance with the ban on torture. There also exists an international instrument on the issue, the Istanbul Protocol.[185] The good practice recommendations include that the monitoring must be performed by experts at detecting abuse, that they must meet the detained in private, that they must visit regularly, that they must turn up unannounced and that the visits cannot be discontinued until the risk has entirely passed. The recommendations entail rather substantial commitments for the sending state and what might be regarded as intrusive measures for the receiving state. However, monitoring in accordance with these recommendations could potentially increase the level of protection rendered by the assurances.

Even if good practices are applied, there are limits to how effective post-return monitoring can be at detecting torture.[186] Since torture is illegal, any torturer will do their best to hide their practice, and rather sophisticated methods have been

---

182) As mentioned above, not all courts have diligently separated the two in cases where assurances guarantee against both. For further reading on the differences between the two, *see* Massarsch, *ibid.*

183) Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10/03/1992, <www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument> visited on 23 January 2008.

184) *See e.g.* the rules contained in the Optional Protocol, many of which are derived from Committee recommendations, <www.ohchr.org/english/law/cat-one.htm>.

185) *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <physiciansforhumanrights.org/library/istanbul-protocol.html>, visited on 23 January 2008.

186) This is highlighted by the Special Rapporteur on Torture, Manfred Nowak, in *Report of the Special Rapporteur on the Question of Torture, Manfred Nowak*, *Commission on Human Rights Sixty-second session*, E/CN.4/2006/6, 23 December 2005, para. 31(e).

developed for torturing in an undetectable way. Using electricity, sleep deprivation, waterboarding and mock killings are merely examples. Furthermore, post-return monitoring of single individuals cannot remove the risk that a torture victim keeps quiet in fear of retribution. Arar stated the following about the visits from Canadian officials while in custody in Syria: "After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there".[187] NGOs such as Amnesty International have emphasised how monitoring needs to be universal in order for any testimony to remain anonymous. However, to fulfil such requirements, the sending state would have to negotiate assurances for all prisoners of the facility to which the person is to be transferred, something that requires a whole new commitment from the two states.

Another difficulty involved with post-return monitoring is the question of who should carry out the monitoring. In the cases of *Agiza* and *Alzery*, a Swedish diplomat performed the monitoring. However, a representative of the sending state has little incentive to reveal a breach or to further investigate any suspicion of a breach. A detection of abuse means that the sending state presumably breached their commitment of *non-refoulement* to torture when removing the individual. There are therefore incentives to choose not to take notice of any signs of torture.[188] Events following the two above-mentioned cases of *Agiza* and *Arar* hint at the impact of such 'reversed' incentives. The US hastily accepted the reassurance of Syria that the allegations of torture were false.[189] The Swedish government, when brought before the Committee Against Torture, went so far as to hide evidence that they were aware of allegations of abuse.[190]

The above-mentioned cases suggest that the monitoring may be best carried out by an independent expert body. However, it may be difficult to locate a body that is willing to indirectly assist in the removal of persons to a country where they are at risk of torture. Major human rights organisations are unwilling to accept such missions.[191] The UK government has, as mentioned, had to settle with organisations without expertise in the area for carrying out the task in relation to their memorandums of understanding, providing the training themselves. To enable the organisations to carry out the mission, they have also funded them. With funding from the sending state, the independence of the organisation

187) Testimony of Maher Arar, Joint Oversight Hearing: Rendition to Torture: The Case of Maher Arar, Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight with Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, United States House of Representatives, 18 October 2007, <www.foreignaffairs.house.gov/110/ara101807.pdf>, visited on 2 February 2008.

188) This argument for a complete ban on diplomatic assurances against torture is discussed in length by Human Rights Watch in *Still at risk*, *supra* note 10, p. 27.

189) Hawkins, *supra* note 113, p. 216.

190) *Agiza* v. *Sweden*, *supra* note 72, paras. 13.4 *et seq*. *See also* Jones, *supra* note 61, p. 22.

191) *Witness statement of Julia A. Hall*, in case of Omar Othman, *supra* note 88, para. 22, <www.hrw.org/backgrounder/eca/ecaqna1106/witnessstatementjuliahall.pdf>, consulted 23 January 2008.

from that state can be questioned.[192] Furthermore, as discussed in the case of *Othman*,[193] there may be reason to doubt the independence of the organisation in relation to the receiving state when active in a regime known for flouting human rights. This context can bring disincentives for such bodies to reveal any abuse as well. This fact seemingly carried substantial weight for the rejection of the assurances in the case of *D.D and A.S.* above.

Another issue is who the monitoring body should report to. The British memorandums of understanding contain reporting obligations either to both states or just to the sending state – *i.e.* the parties lacking incentives to reveal information of abuse. Noll suggests that all reports be publicised – a better alternative for ensuring that disincentives do not hamper the publication of any abuse – but such an arrangement may be difficult to negotiate with the receiving state (and may not be very popular with the sending one either).

To summarise, an independent mechanism for post-return monitoring is hard to put in place and, according to good practice, contains rather substantial requirements for the sending and receiving states. Even so, there are limits to how effective post-return monitoring ever can be. The problem of detection remains the strongest impediment to diplomatic assurances against torture, even if it can be somewhat mitigated by post-return monitoring in accordance with good practices.

6.9. Remedies for an Alleged Breach

One problem often highlighted by human rights NGOs remains largely undiscussed in the reviewed cases: the issue of remedies for situations where a violation of the assurance is claimed. In the case of *Agiza*, the complaint of abuse to the Swedish ambassador did not lead to any measures being taken. No mechanism for complaints was set up in the agreement between the states, and no remedies were agreed upon. Such mechanisms are equally missing in the assurances obtained in the other reviewed cases. When Sweden eventually asked Egypt to make an independent investigation into the allegations, it refused.[194] Sweden had no means of enforcing remedies for the alleged breach. As US officials have admitted regarding the use of diplomatic assurances, once a person is removed from a country what transpires is out of their hands.[195] The sending state has no direct power in the occasion that breaches are disclosed or alleged. This problem can be

[192] This is discussed at length in the Othman case, *Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement*, *supra* note 88, para. 194.
[193] *Ibid.*, paras. 194 *et seq.*
[194] Human Rights Watch, *Still at risk*, *supra* note 10, p. 58.
[195] Hawkins, *supra* note 113, p. 261.

somewhat mitigated by adding rules regarding investigation of alleged breaches in the assurances[196] and automatic remedies on established abuse. As with most international agreements, it may be difficult to enforce, but an agreement provides a basis for pressuring the state to comply. However, as pointed out by the representative of the British government in the *Othman* case, there are diplomatic responses available to the state: "[I]f there were a major problem of delay in responding to a serious concern, the UK Government had levers which it could use, […] from its bilateral relationship with Jordan across a very wide range of military, economic, cultural, tourist and similar forms of cooperation".[197] The problem with reliance on diplomatic responses is that, as human rights NGOs have pointed out, human rights is but one of many concerns in these relations.

6.10. The Nature of Diplomacy

The discussion above suggests that a diplomatic assurance against torture must be rather extensive in scope for it to offer protection against torture effective enough to substantially change the risk of torture. As mentioned, diplomatic assurances against torture are used for removal to countries in which there would otherwise be a risk of torture. In many cases, it may be difficult to make these countries agree to such intrusive conditions. Both Austria and the UK have failed to remove persons to Egypt when the authorities refused to accept more 'refined' conditions of the assurances sought.[198] Furthermore, diplomatic considerations make it difficult to seek such substantial assurances: states are generally wary of showing each other distrust. On the question of why the Swedish ambassador waited five weeks before visiting Agiza in prison, he answered that showing up immediately would have been a demonstration of mistrust.[199] When British officials had sketched assurances to be sought from Egypt before a removal according to some of the general standards mentioned above, the prime minister responded through his secretary: "[W]e are in danger of being excessive in our demands of the Egyptians […] [W]hy [do] we need all the assurances proposed […] Can we not narrow down the list of assurances we require?"[200] Showing distrust in removal situations is diplomatically sensitive. For example, reports suggest that one of the discussed cases, in which a Canadian court refused extradition of a Chinese man,

---

196) Such a clause is included in the MOU of the Canadian government with the Afghan authorities. *See Afghanistan, Detainees transferred to torture: ISAF complicity?*, *supra* note 5, p. 18.

197) *Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement*, *supra* note 88, para. 284.

198) Human Rights Watch, *Still at risk*, *supra* note 10, pp. 70 *et seq.* and *Cases Involving Diplomatic Assurances*…, *supra* note 10, p. 2.

199) *Agiza* v. *Sweden*, *supra* note 72, para. 12.5.

200) *H Youssef* v. *The Home Office*, *supra* note 89, para. 18.

has damaged Canadian-Chinese relations.[201] The sensitivity of these issues suggests that asking for assurances with extensive monitoring and remedies for breaches might be very difficult in practice. Similarly, as an advisor of Human Rights Watch has pointed out,[202] these concerns may hamper the strength with which a state wants to push for investigations of alleged breaches or remedies of established violations. Within the sphere of diplomatic relations, there are other concerns that may be considered to outweigh the security of the person in the particular case. These are concerns to be attended to in the consideration of diplomatic assurances as a means to mitigate risks of torture for *refoulement*.

The secret nature of diplomacy, through which diplomatic assurances are sought, also affects the transparency of the procedure and thus the possibility of the individual to exercise his/her rights. As established in *Suresh*, the individual must be able to legally challenge the reliability of a diplomatic assurance. Such procedural safeguards are a requirement of the Convention Against Torture according to the CAT Committee.[203] To exercise that right the person to be deported needs to know the conditions under which assurances were given and other relevant details. However, in diplomacy, discretion is regarded as an essential feature and consequently governments may be reluctant to share relevant information in cases involving diplomatic assurances. Both the US and Sweden have demonstrated how states prefer to keep the circumstances of diplomatic assurances secret.[204]

In summary, the nature of diplomatic relations may make effective assurances against torture difficult to negotiate, can make the state reluctant to put pressure on the receiving state in case of alleged breach and challenge the legal rights of a fair review of the removal decision.

6.11. Conclusion and Discussion

The great majority of cases and decisions reviewed in this paper imply that although a simple promise not to torture can not be relied upon, certain extra safeguards attached to the assurances would render them sufficiently effective in

---

201) S. McDonald, *China says man fighting extradition from Canada to be treated fairly*, AP Beijing, 13 February 2007, <www.theglobeandmail.com/servlet/story/RTGAM.20070213.wchinacanada0213/BNStory/specialComment>.

202) *Witness statement of Julia A. Hall*, in case of Omar Othman, *supra* note 88, para. 11, <www.hrw.org/backgrounder/eca/ecaqna1106/witnessstatementjuliahall.pdf>, visited on 23 January 2008.

203) *Arkauz Arana* v. *France*, Communication No. 63/1997, CAT/C/23/D/63/1997, 9 November 1999, paras. 11.5 and 12.

204) In *Agiza* v. *Sweden*, *supra* note 72, the government is criticised for not sharing with the Committee substantial information about the circumstances due to them being classified. Similarly, the US has prevented Maher Arar to challenge his rendition in Court on grounds that it would challenge national security if information had to be revealed. Human Rights Watch, *Still at risk*, *supra* note 10, p. 34.

reducing risk of torture. This has led (and probably will lead more) governments to continue with the practice of deploying diplomatic assurances to transfer persons at risk of torture, but adding extra safeguards to the assurances sought. However, my examination of the expected benefit from such endeavours reveals that even modelling the assurances to render maximum protection (something that takes much effort from the sending state) can only render unreliable protection against torture. In certain cases, the protection granted might mitigate the risk of torture enough for it no longer to be 'substantial', thus rendering the transfer in accordance with the principle of *non-refoulement*. However, the risk assessment will be most insecure, and given the dramatic consequences of post-return torture, a safety margin ought to reasonably be applied in favour of the transferred person.

Consequently, I would from the perspective of ensuring adherence to the principle of *non-refoulement* recommend against reliance on diplomatic assurances against torture. If deployed, many returns risk being in breach of the principle, sometimes with horrific consequences. Moreover, there are other aspects in relation to the use of assurances against torture that affect the question of their compatibility with concerns for human rights and security.

Firstly, in the context of terror suspects, one might question if the transfer of the 'threats' do much in the way of making the world a safer place. If there is not sufficient evidence for a (fair) trial in the sending country, there will seldom be so in the receiving country either (exempting cases where other charges exist for which the sending state lacks jurisdiction). The person will remain a 'threat', but in a different place. In fact, as the examination of state practice reveals, the receiving states are often of a category that will have substantially fewer resources to address any terror threat. Therefore, the world may stay safer were the person to stay where s/he is.

Another concern has been raised by the human rights community, including the High Commissioner for Human Rights[205] and NGOs[206]: diplomatic assurances against torture may serve to undermine human rights law. The first argument is that negotiating for extra protective safeguards for one individual in the context of a country that is known to torture is a discriminatory practice, creating double standards for detainees in the country of return. This consequence is particularly disturbing considering the general human rights principle contained in

[205] UN High Commissioner for Human Rights, Address by Louise Arbour, Chatam House, London, 15 February 2006, <www.chathamhouse.org.uk/pdf/research/il/ILParbour.doc>, visited on 3 February 2008.

[206] *See* Amnesty International, *Campaign Factsheet – Diplomatic Assurances: No Protection Against Torture or Ill-treatment*, Index Number: ACT 40/021/2005, <www.amnesty.org/en/library/info/ACT40/021/2005>, visited on 3 February 2008 and Human Rights Watch, *Still at risk*, *supra* note 10.

the very first article (and the title) of the Universal Declaration of Human Rights*:* human rights are to be universal. The second argument presented is that asking a state known to flout its human rights obligations to make an exception in a particular case comes dangerously close to accepting the general situation in the country. While I certainly agree that the practice, in this view, is rather contradictory, the transferring state can mitigate or avoid this effect by emphasising their discontent with the general situation in negotiations with the receiving state. However, the argument highlights the fact that seeking diplomatic assurances for single cases does little to remedy the general situation in the country. Conversely, a refusal to transfer due to risk of torture may have the effect to put pressure on the government to enhance the general situation. This would particularly be the case in extradition proceedings where the state at hand has an explicit interest of gaining custody of the person. A recent example in this direction is how Rwanda recently banned capital punishment, presumably as a result of refused extraditions for prosecution of suspected war criminals.

In summary, diplomatic assurances against torture may, in certain very rare cases, fill their expected function, namely to render the risk of torture below the legal limit and thus a transfer to be in accordance with the principle of *non-refoulement*. However, the tool is unreliable, takes substantial effort and may be hard to negotiate with the receiving state. Furthermore, considering the general consequences in terms of security and respect for human rights, it seems more in line with state obligations (such as, for example, that in the UN Charter Article 2(4) to not act inconsistently with the purposes of the UN, of which promoting human rights is one (Article 1(3)) to abstain from deploying them and instead focus attention on remedying the general situations in the countries of return. I, accordingly, find that the approach taken by the courts and committees, pointing towards a development of the assurances, is dangerous: it will lead governments to continue to deploy this unreliable tool of protection, consequently sending persons to face torture, while challenging general concerns of human rights and security.

But, of course, any measures taken by a state to prevent torture abroad are taken in an international, or humanistic, context – their own citizens will not be the subject of these transfers. In fact, any person considered for removal has already been deemed, in some respect, unwelcome in the country. The question of whether to transfer someone at risk of torture thus represents a conflict between national interest on the one hand and international responsibility on the other. The outcome of this conflict (*i.e.* prioritising of national interest) might go some way to explaining why governments in cases such as those reviewed might choose not to give great weight to evidence pointing towards the weaknesses of the system of diplomatic assurances.

Appendix: Recent Developments

Since this article was written, a couple of relevant cases have been decided. The ECtHR established, in the case *Saadi* v. *Italy*,[207] that "the immense difficulties" that states face in protecting their citizens from terrorism in modern times "must not […] call into question the absolute nature of Article 3 [the prohibition of torture]". The British government had intervened in the case, arguing against this stance. As regards diplomatic assurances, which had been received from the Tunisian government in the case, the Court stated that such assurances do not automatically offset an existing risk. The Court found that the assurances given did not provide sufficient protection, as these merely stated that Mr. Saadi would be treated in accordance with law, and that existing law had not provided sufficient protection in other similar cases. The Court leaves open whether diplomatic assurances may, in certain cases, sufficiently reduce an existing risk of torture. However, it has yet to accept reliance on such assurances once a risk of torture has been established. Also, the two British domestic cases cited in the article have recently been decided in appellate courts. In the case of *Othman*,[208] the Court overturned the decision cited in the article, in which assurances given were deemed sufficiently reliable. The appellate court decided the case on the basis of the risk of unfair trial (evidence obtained through torture), and largely ignored the assurances given by Jordan's authorities. In the case of *AS and DD*,[209] the Court upheld the decision of SIAC, finding the risk of torture to hinder the removal, in spite of diplomatic assurances received.

---

207) Application no. 37201/06, judgment of the Grand Chamber, 28 February 2008, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited on 3 May 2008.

208) *Othman (Jordan)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 290; [2008] WLR (D) 103.

209) *AS and DD (Libya)* v. *Secretary of State for the Home Department*, Court of Appeal, [2008] *EWCA* Civ 289; [2008] *WLR* (D) 104.