

**Eroding the Absolute Character of the Principle of Non-Refoulement?
A Comparative Study of the Use of Diplomatic Assurances Against Torture**

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HR MA – LONG THESIS

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Executive Summary

The present thesis analyses whether and how instances of state practice regarding diplomatic assurances against torture have had an eroding effect on the principle of non-refoulement, and this through a comparative analysis of three different jurisdictions, building on primary and secondary sources. This detailed review and analysis of jurisprudence at international level (the UN Human Rights Committee, the UN Committee Against Torture), at regional level (the European Court of Human Rights) and at national level (the United Kingdom) has allowed to draw certain conclusions with regard to such a potential clash of diplomatic assurances with the principle of non-refoulement. While the present case-law of relevant international human rights bodies did not really reveal such a trend, the impressive jurisprudence at both the level of European Court of Human Rights and before the UK courts points towards the fact that diplomatic assurances against torture have become a ‘hot issue’. Crucially, none of the jurisdictions analysed have principally outlawed or labeled the use of these assurances as illegal.

The widened use of diplomatic assurances against torture and ill-treatment, the implicit tolerance of these assurances by the human rights bodies analysed, and their attempts to ‘regulate’ rather than outlaw these diplomatic undertakings, do appear to a certain extent to have an eroding effect on the absolute and non-derogable character of the principle of non-refoulement. However, it remains to be seen whether this controversial issue will continue to be addressed by the judiciary along the same lines in the future, or whether a strong affirmative stance of the obligation not to refoule will become visible in subsequent judicial decisions of these mechanisms.

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List of Abbreviations

- CAT Committee: UN Committee Against Torture
- CCTV: closed-circuit television
- CoE: Council of Europe
- DWA: Deportation With Assurances
- ECHR: European Convention on Human Rights
- ECtHR: European Court of Human Rights (Strasbourg Court)
- EU: European Union
- EWCA: England and Wales Court of Appeal
- EWHC: England and Wales High Court
- FCO: UK Foreign and Commonwealth Office
- GID: General Intelligence Directorate (here: Jordan)
- ICCPR: International Covenant on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- ICJ: International Court of Justice
- JHA: Justice and Home Affairs (EU)
- MoU: Memorandum of Understanding
- NGO: non-governmental organization
- NCHR: National Commission of Human Rights (here: Jordan)
- NHRC: National Human Rights Commission (here: India)
- OAS: Organisation of American States
- OAU: Organisation of African Unity
- PKK: Kurdistan Workers' Party (Partiya Karkerên Kurdistan)
- SIAC: Special Immigration Appeals Commission
- UK: United Kingdom
- UN: United Nations
- UN CAT: UN Convention Against Torture
- UNHCR: United Nations High Commissioner for Refugees
- UN HRC: UN Human Rights Committee
- US: United States of America

Introduction

“I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment.”¹

“Let no one be in any doubt that the rules of the game are changing [...] we believe we can get the necessary assurances from the countries to which we will return the deportees against their being subject to torture”²

The above statements clearly illustrate the polarized debate about the use of diplomatic assurances. Condemned by some and championed/supported by others, diplomatic assurances are clearly out there and are not likely to disappear. This begs the question: how did diplomatic assurances line themselves up to become such a contested form of state practice? A short reflection on the historical events that took place at the beginning of this century might shed some more light on this.

It is difficult to underestimate the impact of the 9/11 events on our lives. The terrorist attacks in New York and the subsequent bombings in Madrid and London shaped the beginning of this 21st century in a way that probably no other event could have done. People and governments in developed countries became very much aware of their vulnerability and lack of protection, softened by decades of peace, welfare and absence of conflict on their national territory. Confronted with these challenges, the reactions of governments were somewhat panicky. This resulted in important changes in an array of policies, including the

¹ UN High Commissioner for Human Rights, Louise Arbour, “Statement to the Council of Europe’s Group of

² Tony Blair, “Prime Minister’s Press Conference,” (5 August 2005), available at www.directgov.co.uk.

field of security policy, immigration and asylum policy, human rights and various others, while at the same time leading to the birth and/or reinforcement of new policy fields, such as counter-terrorism and anti-terrorism policy. Numerous articles have been written about the impact of this so-called ‘war on terror’ on human rights and human rights protection.³ What is essential is that countries increasingly started seeing a sharp trade-off between national security and human rights, something they did not experience before the 9/11 era.

In order to resolve this conundrum, states became increasingly creative in trying to find solutions, both by internal measures (such as the more frequent use of CCTV cameras, more resources for police authorities and counter-terrorism units...) and external measures (such as the use of concepts like safe countries of origin and safe third countries as well as tools like diplomatic assurances and extraordinary extradition programs...). More specifically, the focus seemed to be on stopping security threats at the border, and preventing them from entering the country in the first place. The necessary corollary of this practice is the extradition or surrendering of so-called ‘unwanted security threats’ to countries of origin or states able to start a criminal case against them.

One of the solutions states came up with relates to the practice of diplomatic assurances. Within the context of transferring people between states, the UN Refugee Agency (UNHCR) defined diplomatic assurances as follows:

*“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 obligations under international law.”*⁴

³ René Bruin and Kees Wouters, “Terrorism and the Non-derogability of Non-Refoulement” in *Counter-terrorism and International Law*, ed. K. L.H. Samuel and N. D. White (Farnham: Ashgate, 2012), 377 – 401; Kent Roach, “Sources and Trends in Post-9/11 Anti-terrorism Laws” in *Security and Human Rights*, ed. B. J. Goold and L. Lazarus (Oxford: Hart, 2007), 227 – 255; Andrew Ashworth, “Security, Terrorism and the Value of Human Rights” in *Security and Human Rights*, ed. B. J. Goold and L. Lazarus (Oxford: Hart, 2007), 203 – 226.

⁴ UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at: <http://www.unhcr.org/refworld/docid/44dc81164.html> [accessed 9 March 2013], 2.

In other words, diplomatic assurances refer to a practice whereby a state who wants to send a person back to his or her country of origin (for a variety of reasons, including being a potential terrorist suspect or more generally forming a security threat) asks the government of the receiving state for certain promises. These could include for example a prohibition to apply the death penalty, promises that the person in question will not be tortured, assurances of a fair trial in case the person is being charged with certain crimes, etc. While these diplomatic assurances have been around for some time, they were originally mostly used by (European) countries in the context of extradition for common (non-political) crimes, especially against the death penalty.⁵ In the post-9/11 era, these diplomatic assurances have gained new momentum, thereby also creating new challenges for the courts that have to interpret their validity.

At a first glance, one would not condemn such practices but rather consider them as praiseworthy efforts by the sending States. Then what exactly is problematic with regard to diplomatic assurances? Well, first of all, it is crucial to point out that there is such a thing as ‘an obligation not to refoule’ or ‘a principle of non-refoulement’. This principle forms part of refugee law and implies that it is forbidden for states to send refugees fleeing from persecution back to countries where they might run the risk of ‘torture or cruel, inhuman or degrading treatment or punishment’ and where their rights ‘to liberty and security of person’ might be in danger.⁶

While this is an absolute principle from which no derogations or exceptions are allowed, it leaves the door open “if there are reasonable grounds for a refugee to be considered as a

⁵ Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence,” *Columbia Human Rights Law Review* 42 (2010): 235.

⁶ UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=438c6d972> [accessed 5 September 2013].

danger for national security or to the community of the country of refuge.”⁷ In addition, both the principle of non-refoulement and the prohibition of torture are very much linked. Even if there are exceptions to the principle of non-refoulement available to countries, the absolute nature of the prohibition of torture poses great limits to their room to manoeuvre in this area.

Secondly, numerous observers and human rights organizations have identified a variety of problems with diplomatic assurances, especially when they are used as a protection mechanism against torture. These concerns include, among others, constraints with regard to their reliability and problems related to the enforcement of diplomatic assurances. In short, what seems like an innocent practice of states in their search for a strengthened national security appears to be conditioned by a number of important international law provisions, as well as several intrinsic practical problems related to use of diplomatic assurances.

Certainly therefore, it is clear that this is an area of human rights law in which boundaries are moving. This (new) dynamic makes it interesting and opens at the same time a Pandora’s box in terms of a range of possible developments that might take place in the near future. Thus, the existence of such a clear field of (legal) tension between the absolute protection against refoulement and a state’s responsibility to ensure national security is incredibly interesting from a human rights viewpoint.⁸

Having laid out the context, the main research question for this thesis is whether and how instances of state practice regarding diplomatic assurances against torture have had an eroding effect on the principle of non-refoulement.

In this context, it is interesting to note the attitude of the main human rights instrument within the European legal space, the European Court of Human Rights (ECtHR). A recent decision from the ECtHR in the high profile *Othman (Abu Qatada)* case has revived the

⁷ René Bruin and Kees Wouters, “Terrorism and the Non-derogability of Non-Refoulement” (2012): 377.

⁸ Id., 378.

debate about diplomatic assurances. From the classical jurisprudence of the European Court on this issue, it appeared at first sight that the Strasbourg Court took quite a restrictive and non-approving stance towards the use of diplomatic assurances by High Contracting Parties (member states) to the European Convention on Human Rights. Examples of this earlier case law include the *Chahal v. UK case (1996)* and *Saadi v. Italy case (2008)*. However, the recent *Abu Qatada case* gives the impression of a ‘turn around’ in the European Court’s approach towards diplomatic assurances, demonstrated by its non-rejection of the diplomatic guarantees in the case at hand as well as the spelling out of a whole list of criteria that the Court will take into account when assessing assurances. One of the sub-questions that will be answered in this thesis is whether this is really a novel approach by the Court or whether the truth is rather more nuanced?

While there is a lot of literature available about the principle of non-refoulement as well as about the impact of anti-terrorism and counter-terrorism policies on human rights protection, most of the work on diplomatic assurances comes from human rights watchdogs such as Human Rights Watch or international organisations such as the UN Refugee Agency (UNHCR). The number of scholarly articles focusing on the impact of diplomatic assurances on human rights protection is rather limited, although a small revival has occurred in the wake of the *Othman (Abu Qatada) decision* of the European Court of Human Rights. However, an extensive review and analysis of the European Court’s jurisprudence on this issue in light of the recent proclaimed ‘turn around’ does not appear to have taken place yet. It is therefore clear that more scholarly work on the issue of diplomatic assurances will be welcomed in order to fill these gaps.

In its core, this thesis will argue that the widened use of diplomatic assurances against torture is to a certain extent eroding the absolute and non-derogable character of the principle

of non-refoulement (and therefore indirectly also the prohibition of torture), building on a detailed review and analysis of the jurisprudence at international level (from the UN Human Rights Committee and the UN Committee Against Torture), at regional level (from the European Court of Human Rights) and at national level (in the United Kingdom). It will be highlighted that the use of diplomatic assurances has increased and widened in scope over the years. The analysis of the ECtHR's case law will demonstrate that the recent 'turn around' by the European Court of Human Rights in the Abu Qatada case should not be considered as an 'actual' turn around, but is rather the result of a misperception since the Court has never explicitly ruled out diplomatic assurances as such (but rather considered them as a 'relevant factor'). In addition, it will become clear that subsequent UK governments had and continue to have an active policy of promoting and legitimizing the use of diplomatic assurances, reflected by an abundant case law on the national level as well as a series of cases and interventions before the European Court of Human Rights.

As became clear from the thesis statement above, the scope of this thesis will consist in a comparative analysis of three different jurisdictions. Firstly, the international framework regarding non-refoulement and prohibition of torture will be analysed. Also, international 'best practices' in terms of diplomatic assurances will be identified, including by looking at the case law before the UN Human Rights Committee (UN HRC) and the UN Committee Against Torture (CAT Committee).

Secondly, the practice of diplomatic assurances and its impact on the principle of non-refoulement will be examined at the regional level, namely in relation to states that are parties to the European Convention on Human Rights (ECHR). Since it is nearly impossible to discuss human rights practices in European countries without looking at the jurisprudence of the European Court of Human Rights, this is an absolute must.

Thirdly, a Council of Europe member state example (the United Kingdom) will be highlighted. Since not all domestic cases reach the ECtHR, UK case law provides additional insights. In addition, the UK is chosen because it has a very active and pronounced stance on the use of diplomatic assurances and the validity of the non-refoulement principle, for example in the case of terrorist suspects.

It is necessary to look at all these three levels of jurisdiction, since they are mutually overlapping and tend to cross-fertilize each other (in the sense that international law obligations are also relevant for the Strasbourg Court and national states, while at the same time state practice by national states to a large extent defines the activity before these supranational tribunals, since all cases originate at the national level).

The main methodology used for this thesis will be a comprehensive analysis of both primary and secondary sources. With regards to primary sources, I will primarily look at relevant legislation at domestic level, EU legislation, Conventions, resolutions, guiding documents and jurisprudence (case law) at the level of the Council of Europe (ECtHR) and at the international level. Concerning secondary sources, these will consist mainly out of scholarly articles on the issue of diplomatic assurances, reports issued by civil society organizations on relevant cases etc.

The remainder of this thesis is built up out of five substantive chapters, followed by an extensive conclusion. A first chapter will consist in elaborating the meaning and role of diplomatic assurances. The focus here will lie on explaining what diplomatic assurances are, the context in which they present themselves, their modalities and how they function. I will look at the specific challenges associated with diplomatic assurances. In addition, I will show

to which extent states are actually using this tool in practice, and whether there is an evolution noticeable here in the post-9/11 era.

The second chapter will look at the global and regional standards of non-refoulement. This part of the work will consist in elaborating the conceptual framework that was briefly introduced in the present introduction. The focus will lie on the obligations of states following both from international and regional human rights instruments, in the field of torture and refoulement. I will try to identify what the legal conditions are under which states are operating, when and how they can extradite or expulse unwanted aliens and which options they have at their disposal to do that, as well as whether there exists something as a ‘jus cogens’ norm of non-refoulement.

The third, fourth and fifth chapter of this thesis will build on this theoretical and legal framework of non-refoulement, torture and diplomatic assurances and look at the *practice* of diplomatic assurances. Both at the level of the relevant international human rights instruments, at the level of the European Court of Human Rights, and at country level, I will look at the case law and identify relevant tendencies and approaches.

Finally, some concluding observations will be presented, with the aim to provide an assessment of the validity of diplomatic assurances in light of the fundamental international human rights obligations of non-refoulement and prohibition against torture.

Chapter I: The Practice of Diplomatic Assurances

“The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment.”⁹

As pointed out in the introduction to this thesis, in the aftermath of 9/11 and with the ‘war on terror’ raging on, countries increasingly started to experience the existence of a sharp trade-off between national security and the respect for human rights. In order to get around this trade-off, states showed a remarkable inventiveness in trying to find alternative mechanisms to deal with security threats and terrorist suspects without thereby breaching their international human rights obligations. One of the solutions that states came up with in this context is the practice of requesting diplomatic assurances when extraditing an unwanted foreign national.

In this chapter, the focus will lie on explaining what diplomatic assurances exactly are, what their modalities are and how they function in practice. In addition, looking at the practice of diplomatic assurances, an evaluation will be made of the extent to which states are actually using this tool in practice, and whether there is an evolution noticeable here. Lastly, the specific challenges associated with the practice of diplomatic assurances against torture will be analysed.

⁹ Report by Mr. Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his Visit to Sweden, April 21-23, 2004, Council of Europe, CommDH (2004) 13, 8 July 2004.

1. The context in which diplomatic assurances operate

Before going into detail about what diplomatic assurances exactly are, it is essential to provide some clarity about a number of terms and concepts that are being used interchangeably in this area. Together these concepts form the context in which states resort to diplomatic assurances.

First of all, there is the concept of '*extradition*'. According to the UNHCR, extradition refers to "a formal process involving the surrender of a person by one State to the authorities of another for the purpose of criminal prosecution or the enforcement of a sentence."¹⁰ Nowadays the field of extradition is quite extensively regulated, with extradition agreements usually providing for so-called 'refusal grounds' which allow or oblige the requested state to refuse the extradition of a person in a particular situation. Important to note however is that historically, human rights considerations did not figure in this extradition equation. Rather there existed a so-called '*rule of non-inquiry*' into the human rights conditions prevailing in states requesting the extradition.¹¹ In short, it took states quite some time before they started to take into account human rights concerns when extraditing individuals.¹² Once this hurdle was taken however, diplomatic assurances became a frequently used practice in the area of extradition.

In addition to the area of extradition, assurances took up an increasingly important role in the areas of *expulsion*, *deportation* and (*extraordinary*) *rendition*. For the remainder of this thesis, it is important to clarify what exactly the difference is between these various terms.

¹⁰ UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at: <http://www.unhcr.org/refworld/docid/44dc81164.html> [accessed 9 March 2013], 2.

¹¹ Jeffrey G. Johnston, "The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11," *International Criminal Law Review* 11 (2011): 3.

¹² According to Johnston, the 1989 judgment of the European Court of Human Rights in the case of Soering "marked the dawn of modern extradition law under which the decision to extradite must take into account human rights considerations." (See Johnston, "The Risk of Torture for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11," 5)

Again, the UN High Commissioner for Refugees can be considered an authoritative source in this regard:

“Unlike extradition, which requires formal acts of two States, expulsion and deportation are unilateral procedures of the sending State. They are, however, subject to safeguards and guarantees, including, in particular, the requirement that they have a basis in national law which must conform to international standards, and that individuals concerned be given an opportunity to challenge the lawfulness of such procedures.”¹³

On the other hand, there is the practice of ‘rendition’ or ‘extraordinary rendition’, which refers to certain practices “where individuals are transferred to other countries through *informal measures* which do not offer any procedural safeguards.”¹⁴ In other words, the crucial difference between expulsion and deportation on the one hand and (extraordinary) rendition on the other hand is the presence of certain procedural safeguards. Certainly in the area of removal of terrorist suspects, the latter practice has been increasingly relied on by states, in an attempt to circumvent the checks and balances in traditional extradition or deportation procedures.

2. Defining diplomatic assurances

Giving a single, comprehensive definition of what exactly ‘diplomatic assurances’ are is not as straightforward as it seems. The term refers more to an extensive and varied area of state practice rather than a concrete, clearly delineated format. One of the most detailed definitions is the one put forward by the UN Refugee Agency (UNHCR), an international authority in the field of refugee issues. They define diplomatic assurances in the following way:

¹³ UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, 2.

¹⁴ *Id.* (italic added)

“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 obligations under international law.”¹⁵

In other words, the concept refers to a practice whereby the government of a state who wants to send a person back to his or her country of origin (for a variety of reasons, including being a potential terrorist suspect or more generally forming a security threat to that country) imposes certain conditions on the government of the receiving state. These could for example take the form of promises not to apply the death penalty, promises that the person in question will not be tortured, assurances of receiving a fair trial in case the person is being charged with certain crimes etc.

It is important to note that these diplomatic assurances were not invented in the post-9/11 context. Rather, they were an existing and quite frequently used practice by Western states, albeit with a different purpose. As Izumo rightly notes, “[b]efore diplomatic assurances against torture became a hot topic in ‘the war on terror,’ European countries utilized diplomatic assurances primarily in the context of extradition for common (non-political) crimes.”¹⁶ Mostly these assurances took the form of diplomatic guarantees against the application of the death penalty, whereby requesting such assurances was generally considered as a not particularly contentious/controversial practice.¹⁷ Criticism by human rights organisations and NGO’s in this field was virtually non-existent.¹⁸ Part of the reason for this lack of controversy relates to the fact that assurances against the death penalty are easier to monitor and breaches of these assurances can be identified (and avoided) before the

¹⁵ UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at: <http://www.unhcr.org/refworld/docid/44dc81164.html> [accessed 9 March 2013], 2.

¹⁶ Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence,” *Columbia Human Rights Law Review* 42 (2010): 235.

¹⁷ Amnesty International, Human Rights Watch and International Commission of Jurists, “Reject rather than regulate – Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment” (2 December 2005): 12.

¹⁸ Human Rights Watch for example acknowledged that “the use of assurances against the death penalty simply acknowledges the different legal approaches of two states” and that “it is much easier to monitor an assurance against the death penalty—and protest such a breach—before an execution happens.” (see Human Rights Watch, “Diplomatic Assurances against Torture – Questions and Answers” (November 2006): 2).

violation takes place.¹⁹ Another factor of importance is that several cases involved extradition to United States, where the death penalty is still in operation but its reliable human rights record implied that one could safely rely on diplomatic assurances being respected in such cases.²⁰

In other words, it is evident that states did not start from scratch and they did not reinvent the wheel when they started to use diplomatic assurances in cases involving a risk of torture when removing terrorism suspects. As highlighted above, extensive experience in dealing with diplomatic assurances already existed in the area of extradition, mostly in death penalty cases, with little or no contention surrounding this. Not only did states frequently use these practices, but also courts (including the European Court of Human Rights) had various opportunities to pronounce themselves on these issues, resulting in a clear level playing field with regard to death penalty cases.²¹ This then raises the question why diplomatic assurances became such a controversial practice in cases where they were requested to address a risk of torture?

3. The presence of diplomatic assurances in practice

Before answering this question, it is crucial to note that the events of 9/11 constituted a fundamental ‘breaking point’ in the use of diplomatic assurances. Both scholars²² as well as

¹⁹ Human Rights Watch, “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” Vol. 17 No. 4 (April 2005): 18 (footnote).

²⁰ See for example the cases of *Cipriani v. Italy* (ECtHR, admissibility decision, No. 22142/07, 30 March 2010), *Einhorn v. France* (ECtHR, admissibility decision, No. 71555/01, 16 October 2001).

²¹ Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence,” 253. Examples of such cases in front of the European Court of Human Rights include the cases of *Einhorn v. France*, *Cipriani v. Italy* (see footnote 12), as well as *X v. Netherlands* (ECtHR, No. 15216/89, 16 January 1991), *Soering v. United Kingdom* (ECtHR, No. 14038/88, 7 July 1989), *B. v. France* (ECtHR, 13706/88, 9 December 1988).

²² Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence,” *Columbia Human Rights Law Review* 42 (2010): 237 – 238; Lena Skoglund, “Diplomatic Assurances Against Torture – An Effective Strategy?,” *Nordic Journal of International Law* 77 (2008): 332.

human rights NGO's such as Human Rights Watch ²³ have recognized that in the aftermath of 9/11 a new situation arose. Not only did the practice of diplomatic assurances gain new momentum (in terms of frequency of use) after the attacks of 9/11 but there was also a thematic expansion of the use of diplomatic assurances, from death penalty cases towards the area of terrorism cases. Assurances were increasingly being used as safeguards against torture and other forms of ill treatment, provoking a storm of protest from a variety of actors as well as creating new challenges for the courts that had to interpret the validity of these assurances.

Having said this, the hypothesis of an increasingly frequent use of diplomatic assurances by states is however seldom supported by empirical evidence in scholarly articles. For example, a case in point is the very comprehensive article of Johnston, which notes the increased use of diplomatic assurances since 9/11 but does not provide empirical evidence to sustain this claim.²⁴ Rather, reference is being made to public statements pointing to this trend from authoritative sources such as the former and current UN High Commissioners for Human Rights, Louise Arbour and Navanetham Pillay.

The most detailed accounts of the use of diplomatic assurances come from the hand of human rights NGO's, notably from various overviews provided by Human Rights Watch.²⁵ Nonetheless, it is clearly difficult to provide exact numbers of the actual use of diplomatic assurances, since states are not under any obligation to report or make these assurances available to the public in any way. Human Rights Watch acknowledges this when highlighting that:

²³ Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture," Vol. 17 No. 4 (April 2005): 3.

²⁴ Jeffrey G. Johnston, "The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11," *International Criminal Law Review* 11 (2011).

²⁵ However, even Human Rights Watch highlighted in their reports that these did not form exhaustive surveys but only reflect relevant information available to them.

“[t]he use of diplomatic assurances is not well-documented and practice appears to vary among states, regions, and legal jurisdictions. Few jurisdictions expressly provide for the use of diplomatic assurances in law.”²⁶

This lack of transparency contributes to a large extent to the mysterious atmosphere surrounding the use of assurances, with negotiations taking place at political level and the assurances being subject to typical trade-offs and compromises. One possible recommendation therefore could be to address this lack of transparency through obliging states to report on their use of diplomatic assurances. Various options for such reporting could be envisaged: one option would be through registering them centrally at the United Nations by means of a harmonized procedure, but a more simple and easier implementable option would be to include such reporting on ‘diplomatic assurances’ as an element of states reporting obligations under one of the United Nations mechanisms (for example in the Universal Periodic Review process or in the reporting guidelines under the UN Convention against Torture (UN CAT)).

Therefore, as a concluding note, one can state that diplomatic assurances are clearly not a novel phenomenon (both for states in using them as for courts in interpreting their validity). However, they have become a much more widely debated issue given their application in the context of the war on terror.²⁷ Exact figures of how extensively diplomatic assurances are being used by states are unfortunately not available, with some information being delivered by human rights NGO’s.²⁸ This is mostly due to the high level of secrecy and non-transparency associated with these practices. One option therefore would be to oblige states

²⁶ Human Rights Watch, “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” Vol. 16 No. 4 (April 2004): 6.

²⁷ Diplomatic assurances have not only been discussed in legal scholarship but have become a topic of debate in the media as well. See for example The Guardian, “Amnesty attacks UK no-torture pacts” (<http://www.theguardian.com/uk/2010/apr/12/amnesty-torture-deportation-diplomacy>), 12 April 2010; The Guardian, “Abu Qatada deported from UK” (<http://www.theguardian.com/world/2013/jul/07/abu-qatada-deported-from-uk>), 7 July 2013.

²⁸ In a publication from January 2007 for example, Human Rights Watch provides an overview of the evolutions in 11 cases involving diplomatic assurances against torture. (see Human Rights Watch, “Cases Involving Diplomatic Assurances against Torture,” No. 1 (January 2007)).

to report when they resort to diplomatic assurances. The next section will present an in-depth overview of the challenges that diplomatic assurances pose.

4. The challenges associated with diplomatic assurances

A survey of the literature on diplomatic assurances reveals several problematic aspects of the use of diplomatic assurances against torture and other forms of ill treatment. Some of these challenges address the question whether effective protection can be achieved through diplomatic assurances; others raise more fundamental questions about the engagement with States whose very record of human rights violations makes such assurances necessary. The present section will present an overview of the main arguments against the use of diplomatic assurances to mitigate the risk of torture. In this respect, the following summary by Larsaeus is illustrative of the challenges associated with diplomatic assurances:

“[...] the critique so far has primarily revolved around three main arguments: the prohibition of torture is absolute; assurances are used in relation to States that torture and therefore cannot be trusted; monitoring is hard or impossible.”²⁹

In what follows, these points of criticism will be discussed in greater detail.

A first set of challenges *contra* the use of diplomatic assurances with regard to torture risks situate themselves in the legal sphere. As Johnston rightly notes, a fundamental question is “[...] whether reliance on assurances in [the] context [of torture] is permissible under international human rights law.”³⁰ More fundamentally, a first challenge relates to the question whether diplomatic assurances could ever be reconciled with the absolute prohibition of torture and ill-treatment under international law. In other words, are diplomatic assurances legal? This is an important consideration to make, since if diplomatic assurances

²⁹ Nina Larsaeus, “The use of diplomatic assurances in the prevention of prohibited treatment” (MSc. Diss., Refugee Studies Centre (University of Oxford), 2006): 2-3.

³⁰ Jeffrey G. Johnston, “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11,” *International Criminal Law Review* 11 (2011): 13.

are considered an illegal practice under international law, states would have a hard time justifying their use. Johnston conducts a comprehensive analysis on this question, which he concludes with an affirmative response. Reviewing scholarly opinions, statements of authoritative persons in this field as well as decisions reviewing deportation and extradition orders involving assurances, his analysis ends as follows:

“[...] the practice by states of relying on diplomatic assurances against torture as conditions of removing persons to other countries, including through extradition, is not precluded under international human rights law. Rather, assurances form a relevant consideration in assessing whether a removal decision would expose a person to be returned to a substantial danger of being tortured.”³¹

Indeed, academic scholars seem to be in agreement that international human rights law, notably the UN Convention against Torture (UN CAT) and its Article 3, does not exclude the possibility of states resorting to diplomatic assurances. Article 3 lays out a prohibition of refoulement in case of ‘substantial grounds’ for believing that someone would be in danger of being subjected to torture, and specifies that authorities have to take into account ‘relevant considerations’. While the provision specifically highlights one specific relevant consideration that states might take into account (a pattern of systematic gross human rights violations), this does not preclude taking into account other relevant considerations, including the presence of diplomatic assurances.³²

In addition, the jurisprudence from the UN Human Rights Committee (*Alzery v. Sweden*), the UN Committee against Torture (*Agiza v. Sweden*) and the European Court of Human Rights (in the cases of *Chahal* and *Saadi*) shows that the legality ‘as such’ of states requesting and obtaining diplomatic assurances is not questioned. The jurisprudence of both

³¹ Johnston, “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11,” 17.

³² See among others Michael John Garcia, “Renditions: Constraints Imposed by Laws on Torture” (2005); A. John Rasdan, “A More Regular Process for Irregular Rendition” (2006); Robert M. Chesney, “Leaving Guantanamo: The Law of International Detainee Transfers” (2005-2006).

international and European human rights bodies will be looked at into more detail in a later section of this thesis, but at this stage, it is important to note that human rights bodies have not declared the practice of diplomatic assurances illegal. Even a renowned skeptic of the use of diplomatic assurances like former UN Special Rapporteur on Torture Theo van Boven agreed that “resort to diplomatic assurances should not be ruled out *a priori*.”³³

Having said this, the fact that it is not as such illegal to resort to assurances against torture does not speak to the variety of challenges associated with their functioning in practice. Apart from the crucial question regarding the legality of diplomatic assurances, other legal arguments *contra* mostly speak to the legal unenforceability of such assurances. When assurances are breached – in other words when a person is tortured despite assurances of the contrary – “there is no mechanism [...] that would enable a person subject to the assurances to enforce them or hold the sending or receiving government accountable.”³⁴ The fact that they are the product of a diplomatic exercise between two states – which has not been subscribed to by the person in question, contributes to a great extent to this legal unenforceability.

Some observers and human rights watchdogs however go a step further and assert that diplomatic assurances have therefore no legal effect at all.³⁵ This is worth investigating somewhat deeper, since it is highly relevant for the question whether diplomatic assurances are having the effect of eroding international human right norms, such as the principle of non-refoulement.

³³ UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment*, 1 September 2004, A/59/324, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement> [accessed 28 March 2013]: paragraph 40.

³⁴ Amnesty International, Human Rights Watch and International Commission of Jurists, “Reject rather than regulate – Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment” (2 December 2005): 19. See also Human Rights Watch, “Still at Risk,” 26.

³⁵ Human Rights Watch, “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” Vol. 17 No. 4 (April 2005): 21.

Noll performed an interesting analysis in this regard, looking at the *'aide-mémoires'*³⁶ in the case of Ahmed Agiza and Muhammed El Zary, deported by Sweden to Egypt through means of diplomatic assurances. His analysis is constructed on the observation that one first has to answer 'the question of the binding nature' of these instruments before starting to look at their relation and impact on the broader human rights regime. To see whether these are legally binding instruments, Noll verified whether the diplomatic assurances in this case were exchanged 'with the intention to create obligations under international law'. Both the fact that "the guarantees were a *sine qua non* for the legality of removal"³⁷ and that "certain elements of the guarantees exceed pre-existing Egyptian obligations under international treaty law"³⁸, pointed in the direction that Sweden and Egypt did indeed intend to create obligations under international law.

Even though Noll's conclusion that "it must be presumed that states therefore generally intend to create binding obligations when signing up to such diplomatic assurances"³⁹ appears to go too broad and might seem premature in light of the limited scope of his analysis, it does highlight a very important element with regard to the legal status of diplomatic assurances. There appears to be a fundamental distinction between the 'legal enforceability' of diplomatic assurances on the one hand and their intended 'legal effects' on the other hand. Both terms are not identical and incorporate a substantively different meaning. In this sense, while states appear to have the intention to create obligations under international law when concluding diplomatic assurances, the practical application of these assurances seems to indicate that it is very difficult for the person – who constitutes the actual

³⁶ An 'aide-mémoire' is generally defined as "a memorandum summarizing the items of an agreement. It contains key points made by a diplomat in an official conversation." (see U.S. Legal Dictionary, <http://definitions.uslegal.com/>)

³⁷ Gregor Noll, "Diplomatic Assurances and the Silence of Human Rights Law," *Melbourne Journal of International Law* 7 (2006): 10.

³⁸ *Id.*

³⁹ *Id.* at 11.

subject of the arrangement – to make these obligations ‘hard’ in a legal way through holding the respective governments accountable for breaches of the assurances in question.

A second set of challenges *contra* the use of diplomatic assurances can be grouped under the heading of ‘moral’ arguments. One of the most fundamental challenges is that concluding these diplomatic assurances with states who practice torture might be perceived as implicitly condoning the systematic nature of such torture practices. *Yuval Ginbar*, legal advisor to Amnesty International used a very powerful metaphor in his observations about the use of diplomatic assurances: “[a]sking for the creation of such an island of protection comes dangerously close to accepting the ocean of abuse that surrounds it.”⁴⁰ In other words, the fact that a sending country resorts to diplomatic assurances implies that it takes a very realistic perspective on the human rights situation in the receiving country, at least acknowledging that there is a systematic problem of torture. One could therefore wonder whether diplomatic assurances are in such a situation not the easy way out?

Another challenge relates to the element of ‘good faith’ or trust which forms a core concept in the practice of diplomatic assurances, regardless of the fact whether these have legal effect or not. The argument human rights NGO’s often put forward is that states that violate their customary international law obligations – especially the prohibition of torture – in most cases even deny that torture is taking place. An excerpt from Human Rights Watch is illustrative in this regard: “Indeed, states that torture routinely accompany their flagrant violations with insistent denials of abuse, often despite overwhelming evidence to the contrary”⁴¹

In other words, the fact that these states not only commit torture but also that they are consistently lying about it, implies that diplomatic assurances concluded with such states

⁴⁰ Yuval Ginbar, cited in Human Rights Watch, “Still at Risk,” 23.

⁴¹ Human Rights Watch, “Still at Risk,” 22.

cannot be considered to meet the ‘good faith’ threshold. In addition, some commentators also point towards the lack of ‘good faith’ on the part of the sending state when concluding diplomatic assurances with reputed torture states. In a way this argument comes down to the inherent contradiction implicit in the use of diplomatic assurances as referred to in the introduction. Why would one have to resort to diplomatic assurances against torture if these states have already committed themselves under the international law obligations not to resort to torture? Thus, what is the added value of diplomatic assurances in this regard?

A third and final category of challenges *against* the use of diplomatic assurances can be grouped under the heading of ‘practical implementation’. Human Rights Watch for example points to a number of such practical problems, a first one being the limits of diplomacy. Diplomacy as a lever for human rights protection presents a conundrum, since:

“[t]he tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection. The fundamental right to be free from torture, however, is not negotiable or permitting of compromise.”⁴²

Diplomatic relations are in their nature an exercise in dancing on a tight rope, with diplomats being focused on maintaining friendly relations with partner governments rather than confronting them with touchy issues of potential friction, such as cases of non-respect for human rights. In addition – as already referred to above – diplomatic relations are characterized by a strong degree of confidentiality and lack of transparency, which is not really conducive for their public accountability.

Another practical challenge is linked to the lack of incentive on the part of both governmental sides to come forward and admit breaches of diplomatic assurances – and therefore instances of torture. As highlighted before, receiving governments that either condone or systematically practice torture will not be particularly inspired to reveal this to the outside world since this would imply admitting a breach of their international law

⁴² Human Rights Watch, “Still at Risk,” 19.

obligations. Rather, they will continue to deny that abuse is taking place. On the other hand sending governments will also not feel very comfortable in revealing breaches of diplomatic assurances, mostly for two reasons. Firstly, there is the difficult diplomatic balancing exercise that needs to take place, during which human rights very often are not in the top drawer. Secondly, discovery of torture in a case where diplomatic assurances were concluded would have as a logical consequence that the sending state would be shamed in having to acknowledge that it violated the principle of non-refoulement.

All of this makes that states are unlikely to take steps in response to non-compliance with assurances, mainly because of the lack of incentives. At least one author even broadened this conclusion to human rights treaties in general, referring to the fact that “[h]uman rights law [...] stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms.”⁴³ In other areas of international law, either financial incentives push states towards complying with international obligations, or the danger of so-called ‘retaliatory non-compliance’⁴⁴ deters states from free riding.⁴⁵ Indeed, the most effective instrument in the arena of human rights law appears to be the practice of ‘naming and shaming’, with loss of reputation and international prestige as the most important (negative) incentive for states to comply with human rights law.

Finally, a third practical challenge is often referred to as the inherent limitations of post-return monitoring. It has to be said that certainly not all situations of diplomatic assurances are characterized by a monitoring mechanism after return to the receiving state.⁴⁶ Both

⁴³ Oona Hathaway, “Do Human Rights Treaties Make a Difference,” 111 Yale L.J. 1935 (June 2002), p. 1938, cited in Human Rights Watch, “Still at Risk,” 21.

⁴⁴ The phenomenon of retaliatory non-compliance has been well described in an article by Posner and Sykes: “[...] nations may comply even if, other things being equal, they would benefit from deviating, because deviation on their part can lead to deviation by other nations in retaliation. This incentive for compliance requires that the costs of retaliation by others outweigh the benefits of deviation.” (see Eric A. Posner and Alan O. Sykes, “Efficient breach of international law: Optimal Remedies, “Legalized Noncompliance,” and related issues,” *Michigan Law Review* 110 (2011): 254).

⁴⁵ *Id.*

⁴⁶ “The vast majority of written diplomatic assurances contain no provision for independent monitoring of a person after he or she is returned.” (Human Rights Watch, “Still at Risk,” 24).

through heightened pressure of human rights NGO's as well as a result of heightened judicial scrutiny, sending states are now increasingly incorporating post-return monitoring mechanisms as an additional safeguard in their assurances.⁴⁷ Such a monitoring role can either be taken up by members of the diplomatic staff of the sending state *sur place* or – ideally – by an independent monitoring institution (often in the form of a local human rights NGO) appointed in the actual assurances themselves and tasked to perform this function.

Generally it is assumed that these monitoring schemes serve a dual purpose: on the one hand they should act as a disincentive, discouraging the receiving state to act contrary to the assurances since breaches might be detected more easily; on the other hand they are intended to serve as an accountability mechanism. However, critics point – rather philosophically – to the inherent contradiction that is associated with the use of such monitoring mechanisms, since the use of these already implies a certain distrust on the part of sending states with regard to the effectiveness of diplomatic assurances as such. This skeptical view is best illustrated by a statement from Louise Arbour (former UN High Commissioner for Human Rights) on the effectiveness of post-return monitoring mechanisms:

*“[s]hort of very intrusive and sophisticated monitoring measures, such as around-the-clock video surveillance... there is little oversight that could guarantee that the risk of torture will be obliterated in a particular case.”*⁴⁸

Crucially however, the assumptions underlying the above-mentioned basic functions that these monitoring schemes should fulfill, are inherently flawed. The assumption that instances of torture are easy to observe does not correspond with the reality on the ground: torture is mostly taking place in secret, performed by people who are often specialists in concealing it. Therefore, it seems highly unrealistic to expect that untrained diplomatic personnel would be able to detect such abuse. Also, torture victims are often afraid to speak up and reveal abuse,

⁴⁷ For example, in the recent Abu Qatada case, a local Jordanian NGO (the Adaleh Centre for Human Rights Studies) was tasked with monitoring the assurances. (UN High Commissioner for Human Rights Louise Arbour 2005)

⁴⁸ Statement by UN High Commissioner for Human Rights Louise Arbour, New York, 7 December 2005.

since they might be subjected to retaliation afterwards. In light of these critical points, Amnesty International, Human Rights Watch and the International Commission of Jurists came to the conclusion that “post-return monitoring arrangements are largely symbolic.”⁴⁹

Concluding remarks

A number of fundamental observations with regard to the practice of diplomatic assurances against torture can be made after reviewing this chapter. Firstly, diplomatic assurances against torture operate in a specific context, with a variety of terms and concepts that are being used interchangeably such as extradition, expulsion, deportation and (extraordinary) rendition. Having a clear view on what the differences are between these situations is crucial in order to fully understand the bigger picture in which diplomatic assurances come to play. Secondly, a comprehensive definition of the concept of ‘diplomatic assurances’ has been put forward. In addition, it has become clear that this phenomenon has not been invented in the post-9/11 era, but rather that extensive experience already existed with regard to diplomatic assurances against the death penalty, and this in a non-controversial way. In other words, the ‘war on terror’ resulted in a wider application of the use of diplomatic assurances, with such assurances being used as well to protect individuals against torture when they were being extradited or deported.

Another observation is that the hypothesis of an increased use of diplomatic assurances has been seldom supported by empirical evidence. However, this seems to be logical when taking into account the framework in which these assurances operate, namely the ‘inherent’ secrecy of diplomatic exchanges, the absence of an obligation to report and in short, a fundamental lack of transparency with regard to their use in general.

⁴⁹ Amnesty International, Human Rights Watch and International Commission of Jurists, “Reject rather than regulate – Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment” (2 December 2005), cited in Johnston, “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11,” 23.

A final observation is that while the practice of diplomatic assurances against the death penalty may have been fairly non-controversial, the use of diplomatic assurances against torture presents some specific challenges that are difficult to address. These can be grouped together in categories of respectively legal, moral and practical issues. While it does not appear to be illegal under international law to resort to diplomatic assurances and states seem to have the intention to create international law obligations when doing this, the legal unenforceability of diplomatic assurances poses a fundamental problem. It is unclear in the case of a breach of an assurance where and how an individual can enforce the treatment specified in the diplomatic assurances in question. Moral challenges relate to the fact that it appears that sending states are condoning a situation of systematic torture through resorting to diplomatic assurances, as well as the problematic rationale of relying on the 'good faith' argument in such situations where torture is being practiced already. Lastly, practical challenges have to do with the inherent limits and inadequacy of diplomacy as a tool for human rights protection, the lack of incentives for both sending and receiving states to admit breaches of the assurances, and a variety of problems associated with the post-return monitoring of diplomatic assurances. It will be interesting to see to which extent the relevant judicial bodies have managed to address these specific challenges.

In addition to the challenges enumerated above, a more fundamental controversy has arisen around whether diplomatic assurances against torture have an impact on established international legal norms, and more specifically the principle of non-refoulement. What exactly the content and scope of this principle is, how it relates to the prohibition of torture and other general human rights instruments, and whether it can be considered as a peremptory norm of international law will be some of the core questions addressed in the next chapter.

Chapter II: Global and Regional Standards of Non-refoulement

“Any extradition, expulsion, deportation, or other transfer of foreigners suspected of terrorism to their country of origin or to other countries where they face a real risk of torture or ill-treatment violates the principle of non-refoulement [...]”⁵⁰

“The principle of non-refoulement contains a paradox. While states have committed to respecting the principle by joining the 1951 Refugee Convention and key human rights conventions, its content is not established in international law. In other words, states have committed to a principle the content of which is indeterminate. Since no common definition exists, in practice, national and international bodies have extensive powers of discretion to give content to the terms ‘persecution’, ‘torture’, ‘degrading’ or ‘cruel’ treatment.”⁵¹

One of the challenges of academic writing consists in presenting complex concepts in an understandable way to a wide public of readers. This definitely applies to the concept of non-refoulement, which at first sight might appear ‘incomprehensible’ to a neutral reader. However, in reality the obligation of States ‘not to refoule’ is rather straightforward and not so difficult to understand. Various definitions of the non-refoulement principle are available

⁵⁰ Address of Louise Arbour, UN High Commissioner for Human Rights, *International and Comparative Law Quarterly* 55 (2006): 517.

⁵¹ Jari Pirjola, “Shadows in Paradise – Exploring Non-Refoulement as an Open Concept”, *International Journal of Refugee Law* 19 (2007): 639.

throughout the academic literature in the field of refugee law⁵², but the most comprehensive conceptual definition is the following one put forward by Lauterpacht and Bethlehem:

*“Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.”*⁵³

In other words, non-refoulement is a principle that prohibits or imposes limits on governments to expel or return non-citizens / aliens (whether they are asylum seekers or refugees) to other countries where their life or physical well-being might be endangered. It is broadly accepted that non-refoulement only applies to non-nationals or ‘aliens’ (both terms will be used interchangeably throughout this thesis). From the outset, this is important to note because an entirely different regime applies to nationals. This is most clearly reflected in the fact that a state cannot expel its own nationals.⁵⁴ Unfortunately the scope of this paper does not allow going into detail on this different regime applying to nationals.

Having already briefly introduced the concept and a working definition of non-refoulement in this introductory section, the focus of the remaining part of this chapter will lie on introducing the legal framework in which states operate with regard to non-refoulement. Through the discussion of both specific refugee instruments as well as general human rights instruments, the exact scope of the prohibition of non-refoulement will become clear. On the one hand, there are a number of specific legal instruments that deal with the issue of non-refoulement of refugees, either in the form of treaties (conventions) or in the

⁵² Goodwin-Gill refers to the principle of non-refoulement as “prescribing, broadly, that no refugee should be returned to any a country where he or she is likely to face prosecution, other ill-treatment, or torture.” See G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edition), (Oxford: Oxford University Press, 2007), 201.

⁵³ E. Lauterpacht and D. Bethlehem, “The Scope and Content of the Principle of Non-Refoulement” in *Refugee Protection in International Law (UNHCR’s Global Consultations on International Protection)*, ed. E. Feller et al. (Cambridge: Cambridge University Press, 2003), 89.

⁵⁴ Worster identifies two main reasons for the rule that “states do not have a right to expel their own nationals”, namely the fact that “states cannot infringe on the sovereignty of other states,” and – more importantly from a human rights perspective – the fact that “nationals have a human right to residence in their state of nationality.” (W. T. Worster, “International Law and the Expulsion of Individuals with More than One Nationality,” *UCLA Journal of International Law and Foreign Affairs* 14/2 (2009): 427).

form of soft law (recommendations, resolutions, reports from Special Rapporteurs...). On the other hand – and on another level – numerous general human rights instruments provide for an additional layer of protection, by means of their wide ratification and applicability. Several of these general human rights instruments contain provisions that are relevant for interpreting the scope of the non-refoulement principle.

This section will start by analyzing the specific instruments dedicated to refugees and how they address the issue of non-refoulement; in a second part, the relevant general human rights standards will be introduced with a focus on the way they have broadened the interpretation and applicability of the non-refoulement principle. Finally, a third sub-section will address the question whether one can consider the non-refoulement principle as a norm of customary international law, before ending with some concluding remarks on the scope of the non-refoulement principle.

1. The 1951 Convention and 1967 Protocol relating to the Status of Refugees

As non-refoulement is a principle primarily developed in the context of refugee law, it is not surprising that the most important specific instruments dealing with the issue are the 1951 Refugee Convention and its subsequent 1967 Protocol. Both the Convention and the Protocol were adopted through a UN General Assembly resolution. The Convention provided an overview of the rights of refugees and codified in a comprehensive manner the content of previous attempts to establish refugee regimes.

As such, the Convention is – combined with the Protocol – the most valuable refugee instrument with international applicability. Thus, the Convention and the Protocol are to be considered to form the core of the international community's response with regards to the protection of refugees, also because of their wide ratification (see below). In addition, the UN General Assembly as well as several regional organizations such as the Council of Europe

(CoE) and the Organisation of American States (OAS) have frequently called upon their members to become Parties to these instruments. It is therefore difficult to overestimate their importance. The next section will look at what type of rights the Convention and Protocol put forward.

1.1. The scope of the rights contained in the Convention and Protocol

In terms of the actual content of the various provisions in these instruments, both the Convention and Protocol provide for a workable definition of the term ‘refugee’ and also set minimum standards for the treatment of persons that are considered to be falling within this category of refugees. On the one hand, these standards relate to “the legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return or refoulement, to a territory where their lives or freedom would be threatened.”⁵⁵ On the other hand, they also specify “States’ obligations, including a duty to cooperate with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.”⁵⁶

The provisions contained both in the Convention and its subsequent Protocol specify a variety of rights, albeit with a different character. Some of the rights enumerated in the Convention and Protocol are universal human rights, and basically form reiterations of rights mentioned in crucial human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and its counterpart in the area of socio-economic and cultural rights, the ICESCR. Such rights include for example the right to religious freedom, the right to protection against discrimination, the right to work and education. Other rights are typically designed for a refugee situation, and include rights such as the prohibition for states to impose penalties on refugees who entered the territory unlawfully (Article 31 of the Refugee

⁵⁵ UN High Commissioner for Refugees (UNHCR), *Refugee Protection: A Guide to International Refugee Law* (1 December 2001), 10.

⁵⁶ *Id.*

Convention), the prohibition for states to expel lawful refugees apart from the exceptions of national security and public order (Article 32) and the non-refoulement principle contained in Article 33.

1.2. The content of the principle of non-refoulement

Having at this point some insight in the different types of provisions contained in the Refugee Convention, the principle of non-refoulement can be identified and explained. Indeed, the most commonly and widely cited treaty source for the principle of non-refoulement is Article 33 of the 1951 Refugee Convention. This principle should be considered as “the primary response of the international community to the need of refugees to enter and remain in an asylum state”⁵⁷. It consists of two sub-provisions, with the former outlining the principle as such and the latter defining the exceptions that are allowed. Article 33 (1) outlines the principle and reads as follows:

*“No 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.”*⁵⁸

As laid out here, the principle contains a number of distinctive elements. Firstly, the object of the provision is clearly specified in referring to ‘refugees’. An analysis of what exactly this means will be presented below. Secondly, there is a clear reference to ‘a threat for someone’s life or freedom’. Thirdly, the provision lists a number of so-called ‘Convention grounds’ of persecution, notably ‘race, religion, nationality, membership of a particular social group or political opinion’.

⁵⁷ James Hathaway, *The Rights of Refugees under International Law*, (Cambridge: Cambridge University Press, 2005), 300.

⁵⁸ UN General Assembly, *Convention Relating to the Status of Refugees, Article 33 (1)*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> [accessed 14 December 2012].

Taking into account that this provision has to be read in the context of the Convention as a whole, a number of crucial observations can be made with regard to its applicability. Firstly, as an evident rule in international law, the Refugee Convention and its subsequent Protocol – like any other treaty – only binds those states that are Party to the treaty. This is important since it means that Article 33 will only apply to those States that are party to one or both of these instruments.⁵⁹ Having said this, the Refugee Convention presents itself as one of the most widely ratified treaties when it comes to rights of aliens, and therefore has considerable influence.⁶⁰

Apart from the fact that the Refugee Convention and subsequent Protocol present themselves as widely ratified international instruments with considerable influence, another remarkable feature is the fact that the non-refoulement obligation contained in Article 33 has to be read as a non-derogable obligation in the context of both the Convention and the Protocol.⁶¹ Both legal instruments contain a ‘reservation’ provision, which clearly specifies that it does *not* allow any reservations to Article 33.⁶² From a public international law perspective, the fact that no reservations are allowed to the non-refoulement principle is a clear indication of its broad acceptance and might indicate the emergence of a ‘jus cogens’ norm. Whether this is actually the case will be explored at a later stage in this thesis.

1.3. Who is protected by the prohibition of refoulement?

⁵⁹ Lauterpacht and Bethlehem, “The Scope and Content of the Principle of Non-Refoulement”, 106.

⁶⁰ According to the UN treaty database, currently 145 states are Parties to the 1951 Refugee Convention and 146 states are Party to the 1967 Protocol. An important exception is the United States which is only Party to the 1967 Protocol, and not to the original Convention. (See United Nations Treaty Collection, website consulted on 13/12/2012).

⁶¹ Lauterpacht and Bethlehem, 107; Hathaway, 96.

⁶² Article 42 of the Convention Relating to the Status of Refugees puts forward that “any state may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36 – 46 inclusive”. Article VII of the Protocol Relating to the Status of Refugees reaffirms this: “[...] any state may make reservations [...] in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1), and 33 thereof [...]”

Going back to the distinctive elements identified above as part of the non-refoulement provision in Article 33, it clearly refers to ‘a refugee’ as the subject of this provision. Therefore, before being able to adequately assess the scope of this provision, it is essential to determine who exactly ‘a refugee’ is. One of the major contributions of the Refugee Convention is that it spells out a clear, comprehensive and workable definition. Reading Article 1 of the Convention and Article 1 of the Protocol in conjunction, one can distill the following definition of a ‘refugee’:

*“any person who [...] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it [...]”*⁶³

Clearly a number of fundamental elements are present in this definition. First of all, there is the element of ‘being outside the country of his or her nationality or former habitual residence’. Nationality here refers to citizenship and is meant to make the distinction between persons who have a nationality versus stateless persons. The phrase referring to ‘country of former habitual residence’ is of application to stateless people. This first element of the definition is crucial since “it is a general requirement that international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.”⁶⁴

However, this does not translate itself into the requirement that the person in question should have left his country in an illegal manner, or on the basis of a well-founded fear. It is possible for a person not to be a refugee when he or she left his country, but to become one at a later date. A person becomes such a ‘*refugee sur place*’ either due to circumstances arising

⁶³ UN General Assembly, *Convention Relating to the Status of Refugees*, Article 1; *Protocol Relating to the Status of Refugees*, Article 1.

⁶⁴ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011), available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html> [accessed 18 December 2012], paragraphs 88 and 94 – 96.

in his country of origin during his absence (such as regime changes or coup d'états) or as a result of his own actions (such as by expressing his political views in his current country of residence).

Secondly, a key part of the definition refers to the element of a 'well-founded fear of being persecuted'. The element of fear is a subjective notion, considered to be a state of mind and requiring an evaluation of the applicant's statements. However, this subjective element of fear is complemented by the adjective 'well-founded', implying that the state of mind must be grounded in an objective situation. Both elements therefore play a role when determining refugee status.

In addition, it is important to note that there is only one motive that is being singled out here, namely 'a well-founded fear of persecution'. As a matter of definition of refugee status, this rules out all other types of motivations that persons might have when leaving their respective countries, such as famine, the occurrence of natural disasters (flooding, hurricanes...) or simply people that migrate for economic reasons. Especially this last category of so-called 'economic refugees'⁶⁵ forms a substantial part of contemporary migratory flows. Also, it is difficult to come up with a consistent definition of what is understood by 'persecution'. While it is clear from Article 33 of the Refugee Convention that a threat to life or freedom will be considered as persecution, it is less clear which other forms of threats or actions would fall under this category.

Thirdly and lastly, the refugee definition as laid out previously refers to a number of grounds for persecution, notably 'race, religion, nationality, membership of a particular social group or political opinion'. These grounds are also called Convention-grounds and are reiterated throughout the Refugee Convention in a number of important clauses, including the non-refoulement provision. In most situations there will be considerable overlap between

⁶⁵ Goodwin-Gill and McAdam, *The Refugee in International Law*, 15.

these categories, since a person will often be persecuted for a variety of reasons.⁶⁶ For example, it is not so difficult to imagine a refugee context concerning a member of a particular social group in a country characterized by religious diversity, or a member of the political opposition in such a religiously fragmented country.

While indeed there might be a lot of overlap in terms of Convention grounds in individual cases, it is however worth highlighting the ‘membership of a particular social group’ as a crucial ground. This forms the one ground that is not static but rather dynamic in nature (together with the element of political opinion – however this to a lesser extent). Race, religion and nationality on the other hand can be considered as more ‘permanent’ or static elements of a person’s identity. Therefore, the ‘membership of a particular social group’ ground is *the* Convention ground that continues to make the Refugee Convention relevant today and is likely to do so in the distant future.

All the above might lead us to the conclusion that the prohibition not to refoule only applies to persons who have been formally recognized as refugees. This is an often made mistake and it is clearly not the case: *the obligation not to refoule does not depend on a status determination of whether a person is a refugee or not*. Article 33 does not refer to the issue of ‘recognition’ of a refugee. Indeed, as mentioned in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status:

*“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. [...] Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”*⁶⁷

⁶⁶ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, paragraph 67.

⁶⁷ *Id* at paragraph 28.

Simply stated, this implies that a person is a refugee even if that person has not yet been formally recognized through the necessary administrative procedures. If this were not the case, states could basically circumvent the protective regime established by the Refugee Convention through postponing or refusing refugee status altogether.⁶⁸ Therefore, one has to consider the receipt or attribution of refugee status as something of declaratory nature rather than of constitutive nature.

1.4. Limitations to the principle of non-refoulement

As mentioned before, Article 33 of the Refugee Convention is structured in a particular way, with the main principle of non-refoulement being spelled out in Article 33 (1) and the exceptions to this principle contained in Article 33 (2). In the previous sections, the focus has been on the first subparagraph of Article 33. The drafters of the Convention however found it necessary to limit the scope of the principle of non-refoulement, by including a second subparagraph in Article 33, which reads as follows:

*“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”*⁶⁹

This paragraph lays out two grounds for limiting or restricting the applicability of the non-refoulement principle, namely when the refugee constitutes a danger to the security of the host country (established on the basis of so-called ‘reasonable grounds’) *or* when he or she forms a danger to the community of that country (confirmed by a final conviction for committing a serious criminal offence). These two exceptions can be typified under the form of the ‘criminality exception’ and the ‘national security exception’.⁷⁰ An example of the national security exception could be a person who is considered to be a potential terrorist

⁶⁸ Lauterpacht and Bethlehem, “The Scope and Content of the Principle of Non-Refoulement”, 116 – 117.

⁶⁹ UN General Assembly, *Convention Relating to the Status of Refugees*, Article 33 (2).

⁷⁰ Among others, Hathaway uses these terms in *The Rights of Refugees under International Law*.

suspect, while an example of the criminality exception could be an alien who has been criminally convicted for manslaughter.

The provision clearly allows for some margin of appreciation for Contracting States since it speaks of ‘reasonable grounds’. In other words, there is no clear one-size-fits-all standard for determining whether a refugee can be considered a danger to the security or community of a country. Both exceptions are also clearly formulated as prospective threats, resulting in a certain element of prophesy-making (looking into the future). Noteworthy also is that the provision does not specify the type of acts that form a threat to the national security, nor does it specify what should be considered as a ‘particularly serious’ crime. What is clear is that in the latter case it should concern a ‘final judgment’, meaning a judgment from which there is no possibility of appeal anymore.⁷¹ Mere suspicions are therefore not considered as sufficient basis.

In light of this provision (Art. 33 (2)) it becomes clear that the prohibition of non-refoulement is not phrased in absolute terms. The Convention itself allows Contracting States a certain room to manoeuvre, in the sense that the provisions are formulated in a way that they leave states some scope in assessing other imperatives. The impact of the exceptions provided for in Article 33(2) should certainly not be underestimated, since it allows for the asylum country “to expel or return even refugees who face the risk of extremely serious forms of persecution”.⁷² However, section 2 will illustrate that through the impact of general human rights standards, a rather restrictive interpretation of these exception clauses has been generally accepted.

In addition to these two exceptions explicitly contained in the text of Article 33, it is crucial to note that there is also a general exception with regards to the applicability of the Convention contained in Article I, point F of the Convention. In this sense, it is required that

⁷¹ Lauterpacht and Bethlehem, “The Scope and Content of the Principle of Non-Refoulement”, 135.

⁷² Hathaway, *The Rights of Refugees under International Law*, 344.

a person does not fall within one of the exclusion grounds of Article 1 (F) in order to get the possibility to have the other enumerated right clauses applied to him. This illustrates the importance of reading the Convention and Protocol in a comprehensive, all-encompassing manner. Article 1(F) relates to the definition of the term refugee, and reads as follows:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”⁷³*

In other words, the drafters of this provision appear to have had the intention to avoid a situation of abuse of rights, where for example war criminals or leaders of dictatorial regimes characterized by human rights violations would be able to apply for protection under the Refugee Convention.⁷⁴ Sub-paragraph 1(F)(a) provides for an explicit exclusion of war criminals and persons having committed crimes against peace or crimes against humanity. It is not surprising that this was the initial focus of the drafters after the experiences of World War II and the Nuremburg tribunal.

Sub-paragraph (b) however is the more controversial and practical one in this exclusion clause, referring to the commission of serious non-political crimes prior to recognition as a refugee and outside the host refuge country. The idea behind Article 1(F)(b) clearly was to “ensure that refugee law does not benefit fugitives from justice.”⁷⁵ Again, this is a provision allowing for a wide margin of interpretation in determining what exactly a *serious crime* is.

⁷³ UN General Assembly, *Convention Relating to the Status of Refugees*, Article 1 (F).

⁷⁴ “At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order.” (UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, paragraph 148).

⁷⁵ Hathaway, *The Rights of Refugees under International Law*, 344.

The fact that the crime has to be of ‘non-political’ nature is clearly intended to avoid having to take difficult decisions about what exactly constitutes a political crime and what not.

In addition to the difficulty of defining such a political crime, there are also inherent dangers in having developed (Western) countries pronouncing themselves on political affairs of third countries, thereby for example unwillingly or unknowingly legitimizing certain political regimes and practices associated with these regimes. More importantly however, since ‘political opinion’ is listed as a possible ground for persecution under the non-refoulement clause, it would make absolutely no sense to consider ‘political’ crimes as a ground for exclusion of the applicability of the Refugee Convention.

2. General human rights standards and their impact on the principle of non-refoulement

As mentioned previously, the obligation ‘not to refoule’ does not only figure in specific refugee instruments, such as the 1951 Refugee Convention and its 1967 Protocol extensively discussed in section 1. In addition to this, both general human rights instruments as well as international customary law also speak towards the issue of non-refoulement, often through provisions related to the prohibition of torture. Referring to this “widened scope of non-refoulement under international law”, Goodwin-Gill uses the term ‘*complementary protection*’, referring to “States’ protection obligations arising from international legal instruments and custom that complement – or supplement – the 1951 Refugee Convention.”⁷⁶ Hathaway even poses the question “whether the rights regime set by the Refugee Convention retains any independent value in the modern era of general guarantees of human rights?”⁷⁷

⁷⁶ Goodwin-Gill, *The Refugee in International Law*, 285.

⁷⁷ Hathaway, *The Rights of Refugees under International Law*, 120.

Answering this question goes beyond the scope of this thesis, but it is worth highlighting the most important general human rights provisions that speak to the issue of non-refoulement. These are Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT Convention).⁷⁸ In addition, regional human rights instruments also address the prohibition of refoulement, including through Article 3 of the European Convention on Human Rights (ECHR), Article II (3) of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa and Article 22 (8) of the 1969 American Convention on Human Rights.⁷⁹

Firstly, the International Covenant on Civil and Political Rights (ICCPR) addresses non-refoulement through its Article 7, which states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. This is a non-derogable provision and to interpret what exactly this means, the General Comments issued by the UN Human Rights Committee⁸⁰ (UN HRC) are instructive. With regards to the prohibition of torture contained in Article 7 of the ICCPR, the UN HRC produced a General Comment No. 20 in which it touched upon the issue of non-refoulement, stating the following: “[...] States

⁷⁸ See Goodwin-Gill, *The Refugee in International Law*, 296.

⁷⁹ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007), available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [accessed 5 March 2013], paragraph 13.

⁸⁰ “The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”.

In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol. The full competence of the Committee extends to the Second Optional Protocol to the Covenant on the abolition of the death penalty with regard to States who have accepted the Protocol. The Committee meets in Geneva or New York and normally holds three sessions per year. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work.” (Source: Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/hrc/>)

parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁸¹ In other words, the absolute prohibition contained in Article 7 of the ICCPR also concerns refoulement of people.

Switching to the Convention against Torture. Article 3 (1) reads as follows: “[n]o 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”⁸² More importantly, this provision is formulated in absolute terms – in contrast to the 1951 Refugee Convention – and does *not* allow for exceptions to the prohibition of refoulement. Also, the principle of refoulement in this case only relates to torture as such, and not to inhuman or degrading treatment (such as in the case of the provisions in the ICCPR and the ECHR), thereby rendering its scope a bit more restrictive. What exactly constitutes torture is comprehensively defined in Article 1 of the UN CAT Convention. Crucial however is the threshold or standard of proof specified in Article 3 of the UN Convention Against Torture, which speaks of ‘*substantial grounds*’. This implies a ‘foreseeable, real and personal risk’ of torture”⁸³, which is generally assessed on the basis of the person’s activities (both in his or her country of origin as well as the current country of residence) but also by taking into account the general human rights situation in the country of return. The next paragraph will show that there has been considerable interaction between the UN CAT and one of the most impressive regional systems of human rights protection, the ECHR.

⁸¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel or Degrading Treatment or Punishment)*, 10 March 1992, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5> [accessed 12 March 2013], paragraph 9.

⁸² UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://treaties.un.org/doc/publication/UNTS/Volume%201465/v1465.pdf> [accessed 12 March 2013], Article 3.

⁸³ Goodwin-Gill, *The Refugee in International Law*, 304.

With regard to regional regimes of human rights protection, the present analysis focuses on the protection provided by the European Convention on Human Rights, since this is one of the main jurisdictions that will be looked at when analyzing the case law at a later stage in this thesis. The fact that there is no explicit non-refoulement provision in the ECHR does not mean that it has no jurisprudence on the matter. On the contrary, extensive jurisprudence regarding the prohibition of refoulement can be found in the ECHR case law, mostly under the heading of Article 3 of the ECHR. This article strongly resembles Article 7 of the ICCPR, which has been analyzed earlier. It reads as follows: “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Like Article 3 of the UN CAT it is phrased in absolute terms, as a non-derogable provision. In addition, it is expressly forbidden to derogate from this absolute prohibition of torture, inhuman and other degrading treatment, even in times of emergency.⁸⁴ Regarding its scope however, it can be considered to be wider than its corresponding provision in the Convention against Torture, since it encompasses not only torture but also other forms of inhuman and degrading treatment. What is clear is that the non-refoulement principle in the context of the ECHR is to a large extent judge-made.

While indeed most non-refoulement cases are brought under article 3 of the ECHR, the principle can also arise under other articles of the Convention. Indeed, “the European Court of Human Rights has [...] stated that the removal of a person from a State Party [...] may give rise to a protection issue under articles 2 (the right to life) or 3, and exceptionally under articles 5 or 6.”⁸⁵ In addition, claims under article 8 relating to the right to respect for private

⁸⁴ See Article 15 (2) of the ECHR, which reads as follows: “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”

(Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, Council of Europe Treaty Series, No. 5, available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf [accessed 12 March 2013], Article 15 (2)).

⁸⁵ Goodwin-Gill, *The Refugee in International Law*, 316.

and family life might also involve the principle of non-refoulement.⁸⁶ The lack of cases successfully brought under these headings is for a large extent due to the fact that most cases involve challenges on a variety of grounds, often including article 3. This has the effect that – when the ECtHR identifies a violation under article 3, which triggers protection against refoulement – it usually does not go on by analyzing “the protection capacity of the other provisions”.⁸⁷ It also begs the question whether it is in any way advisable to start examining the ‘refoulement protection capacity’ of these other Convention articles, since most of them take the form of qualified provisions (unlike article 3 which is framed in an absolute way).⁸⁸ Indeed, this might result in a weakening of the principle of non-refoulement.

As a last note, it is worth mentioning that the European Convention on Human Rights also contains a ‘*conformity clause*’ in Article 53. This means that the rights contained in the ECHR and their subsequent interpretation cannot go counter to the “human rights and fundamental freedoms [...] ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”⁸⁹ In other words, the rights contained in the ECHR have to be interpreted in line with international human rights agreements, such as the Convention against Torture and the ICCPR. This is visible in the ECtHR judgments, which frequently refer to such international instruments as authoritative sources.

To conclude, the variety of international and regional human rights instruments provide for ‘complementary protection’, by adding an extra layer of protection in terms of non-refoulement, often through provisions formulated in absolute and non-derogable way. This is

⁸⁶ Goodwin-Gill, *The Refugee in International Law*, 318 – 321 and Eva Kapustova, “Different perceptions of the obligation not to *refoule*: the European and the Canadian approach” (LL.M. thesis, Central European University, 2012): 8.

⁸⁷ Goodwin-Gill, *The Refugee in International Law*, 317.

⁸⁸ For example, article 8 of the European Convention on Human Rights (respect for private and family life) is a qualified right and involves a balancing test between the interest of the individual and the (potential) legitimate public interest(s).

⁸⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 53.

an important observation because it means that even when States make use of the non-refoulement exceptions contained in the 1951 Refugee Convention, they are constrained by their absolute obligations under these general international and regional human rights instruments. As clearly stated by the UNHCR in its ‘Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations’, “[t]he provisions of Article 33(2) of the 1951 Convention do not affect the host State’s *non-refoulement* obligations under international human rights law, which permit no exceptions.”⁹⁰

In addition, while the prohibition of refoulement is clear and outspoken in some of these instruments (for example in Article 3 of the UN Convention against Torture) with language that does not leave any doubts, it has been deducted in a rather implied manner in other instruments (for example through interpretations by the UN Human Rights Committee in relation to Article 7 of the ICCPR and through interpretation by the European Court of Human Rights in relation to Article 3 of the ECHR). In every provision analyzed above, the link with non-refoulement has been made through provisions against torture. Therefore, it can be asserted that “the principle of non-refoulement is a fundamental component of the prohibition of torture”.⁹¹ However, it seems that this does not exclude the possibility of the principle of non-refoulement popping up under other headings, both in the context of the ICCPR and the ECHR. Clearly, it can be said that the protection against refoulement now goes beyond the simple area of refugee law. Whether it can be considered as customary international law or even as a ‘jus cogens norm’, will be examined in the next section.

⁹⁰ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007), available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [accessed 5 March 2013], paragraph 11.

Hathaway (*The Rights of Refugees under International Law*, 370) confirms this line of thinking, adding that not only “[...] the insufficiency of the non-refoulement guarantee set by Art. 33 of the Refugee Convention is effectively remedied by the ability to invoke other standards of international law”, but that in addition these external norms and legal responsibilities limit states’ flexibility in using the exceptions contained in Article 33 of the Refugee Convention.

⁹¹ Lauterpacht and Bethlehem, “The Scope and Content of the Principle of Non-Refoulement”, 158.

3. Non-refoulement as a norm of customary international law?

Various scholars have put forward the hypothesis that non-refoulement can and should be considered at this stage as a norm of customary international law. Some even go further in stating that the principle can be considered as ‘jus cogens’. This is important because if non-refoulement is classified as a norm of customary international law, it is binding on all States, including the ones that are not party to the Refugee Convention or the Convention against Torture. In other words, this would give the obligation ‘not to refole’ a higher moral and legal character as well as making it binding on all countries, regardless of the conventions and treaties they have ratified. As will become clear, opinions vary on whether this is actually the case.

The threshold for a rule to become part of customary international law has been clearly formulated by the International Court of Justice in the *North Sea Continental Shelf Judgment*.⁹² Apart from ‘consistent State practice’, the existence of a norm of customary international law requires ‘*opinio juris*’, or “the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.”⁹³ With this in mind, the UNHCR for example clearly takes the view that the principle of non-refoulement satisfies these criteria and can therefore be considered as a rule of customary international law. In taking this position, it mainly refers to the non-refouling practice of non-signatory States to the Refugee Convention, the implicit acceptance through multiple responses, explanations and justifications by States to the UNHCR when performing acts of refoulement, and ministerial declarations referring to the customary international law character of the principle

⁹² See International Court of Justice, *North Sea Continental Shelf Judgment*, 1969, ICJ Reports: para.77, which outlined the threshold as follows: “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”

⁹³ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, paragraph 14.

of non-refoulement.⁹⁴ In addition, reference is being made to the prohibition of refoulement to a risk of torture, cruel, inhuman or degrading treatment or punishment as derivative and an intrinsic component of the general absolute rule prohibiting torture.⁹⁵ The latter norm is widely accepted as a norm of customary international law, and has even been accorded the status of so-called ‘peremptory norm’ or ‘jus cogens’.⁹⁶ According to UNHCR and Human Rights Watch this also points in the direction of the principle of non-refoulement being a norm of customary international law.⁹⁷

This last argument also forms the core of Lauterpacht and Bethlehem’s elaboration about the customary law character of non-refoulement. In their analysis, they managed to identify a central core⁹⁸ of the customary principle of non-refoulement, stating a clear conclusion that “non-refoulement must be regarded as a principle of customary international law.”⁹⁹

Bruin and Wouters consider the principle of non-refoulement to have an absolute or non-derogable character as well, insisting mainly on the fact that the different non-refoulement

⁹⁴ Ibid, paragraphs 15 – 16.

⁹⁵ Theo Van Boven, former UN Special Rapporteur on Torture, clearly highlighted that “[t]he principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.” (UN Commission on Human Rights, *Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly: Torture and other cruel, inhuman or degrading treatment or punishment*, 1 September 2004, A/59/324, available at: <http://www.unhcr.org/refworld/docid/4267be1b4.html> [accessed 25 March 2013]).

⁹⁶ Jeffrey G. Johnston, “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11,” *International Criminal Law Review* 11 (2011): 6.

⁹⁷ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, paragraphs 21 – 22.

⁹⁸ According to Lauterpacht and Bethlehem (“The Scope and Content of the Principle of Non-Refoulement”, 163 – 164), the essential content of the customary principle of non-refoulement consists of the following:

“(a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

(b) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. Save as provided in paragraph 3, this principle allows of no limitation or exception.

(c) Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.”

⁹⁹ Lauterpacht and Bethlehem, “The Scope and Content of the Principle of Non-Refoulement”, 149.

obligations cannot be seen separately but work rather in a mutually reinforcing way. In other words, even though the 1951 Refugee Convention contains grounds for exceptions, subsequent treaties (including human rights treaties) and interpretations provided through case law have an impact on the interpretation of these grounds contained in Article 33 (2). While clearly emphasizing the absolute nature of the obligation not to refoule, they also recognize that “[t]he major practical problem remains the burden of proof to be able to actually characterize the obligation of *non-refoulement* as a peremptory norm of general international law and to claim this in a court of law.”¹⁰⁰

Allain takes the debate even a step further by insisting on the *jus cogens* nature of non-refoulement. Indeed, “if it can be demonstrated that the notion of non-refoulement has attained the normative value of *jus cogens*, then states are precluded from transgressing this norm in anyway whatsoever.”¹⁰¹ Proclaiming the non-refoulement principle as ‘*jus cogens*’ would clearly strengthen the protection for individuals, but the fluid nature of the concept does not make it easy to come to such a conclusion. Allain departs from the point that the principle forms part of customary international law and then refers to a number of elements, including the UNHCR EXCOM (Executive Committee) conclusions¹⁰², the 1984 Cartagena Declaration on Refugees (which confirms the *jus cogens* nature of non-refoulement) and finally – as a secondary source of authority – the numerous international scholars and publicists who consider that non-refoulement has indeed achieved this status of *jus cogens*.¹⁰³ When confronted with the fact that there are so many violations of the principle of non-refoulement, Allain responds by insisting that this is “irrelevant for its legal standing”¹⁰⁴.

¹⁰⁰ René Bruin and Kees Wouters, “Terrorism and the Non-derogability of Non-Refoulement,” *International Journal of Refugee Law* 15 (2003): 26.

¹⁰¹ Jean Allain, “Insisting on the *Jus Cogens* Nature of Non-Refoulement” in *The Refugee Convention at Fifty – A view from Forced Migration Studies*, ed. J. van Selm et al. (Oxford: Lexington Books, 2003), 81.

¹⁰² More specifically, Allain refers to the EXCOM Conclusions 25, 55 and 79 adopted by the UNHCR in 1982, 1989 and 1996.

¹⁰³ Allain, *Jus Cogens Nature of Non-Refoulement*, 85.

¹⁰⁴ Ibid, 86.

Stronger even, in line with the reasoning laid out by the International Court of Justice, these violations (which can be considered as instances of state practice) do not threaten it, but rather reinforce its nature as *jus cogens* norm (if they are treated as actual violations).

However, other prominent scholars, such as Hathaway, clearly disagree with this reasoning, criticizing the rather liberal interpretation of the two elements that give rise to a customary norm, namely state practice and *opinio juris*. Illustrative of his position is the following quote: “[c]ustomary law is not simply a matter of words, wherever spoken and however frequently recited: custom can evolve only through interstate practice in which governments effectively agree to be bound through the medium of their conduct. This standard simply is not yet met in the case of the duty of non-refoulement.”¹⁰⁵ Various elements are put forward to back up this claim, notably the fact that when reviewing state practice, refoulement forms to this date rather the norm than the exception; the fact that the large majority of states on the Asian continent have not accepted that there is such a thing as an obligation of non-refoulement; and the fact that – while yes, most countries are now bound by a certain type of non-refoulement duty – the great variety in the nature of these various legal obligations makes that one cannot speak of a common ‘*opinio juris*’. Hathaway also points to the dangers of what he calls “the persistent overstatement of the reach of custom”¹⁰⁶, including the possible rejection by courts of claims presented in such a way as well as the more fundamental risk of diluting the value of customary law as a whole by rendering it rhetorical rather than actually legally binding. His conclusion is fairly straightforward, by stating that “[t]here is insufficient evidence to justify the claim that the duty to avoid the refoulement of refugees has evolved at the universal level beyond the scope of Art. 33 of the Refugee Convention.”¹⁰⁷

¹⁰⁵ Hathaway, *The Rights of Refugees under International Law*, 363.

¹⁰⁶ Ibid, 365.

¹⁰⁷ Ibid, 363.

As a concluding note, from the short literature review presented here it becomes clear that declaring the principle of non-refoulement as a norm of customary international law (let alone as a peremptory norm of general international law or ‘jus cogens’) is far from a straightforward exercise. One rationale for trying to establish such a clear consensus about the jus cogens nature of this principle, is that it would have serious implications in practice, rendering any conflicting treaty obligation or norm ‘void’¹⁰⁸. However, given the wide overlap and additional protection provided by other international law standards (as demonstrated in section 2 of this chapter), it is questionable whether this exercise should actually be undertaken, taking into account the risk of diluting customary international law as demonstrated by Hathaway. Therefore, the protective regime with Art. 33 of the Refugee Convention as a central core complemented by the various human rights standards which speak to the issue of non-refoulement, already seems to provide an extensive and sufficient protection to refugees. While indeed there may be something to be gained by having non-refoulement recognized as a jus cogens norm, the costs related to the quest towards this might outweigh the benefits.

Concluding remarks

Some concluding observations are definitely at their place after this extensive analysis of the principle of non-refoulement. Looking at the relevant refugee instruments, the principle can – at first sight – not be considered as an absolute principle. Although no reservations are allowed to Article 33 of the 1951 Refugee Convention – the primary source of the principle, the provision itself already contains certain exceptions, notably a so-called ‘criminality’ and a ‘national security’ exception. In addition, the Refugee Convention also specifies certain

¹⁰⁸ Article 53 of the 1969 Vienna Convention on the Law of Treaties says the following about treaties conflicting with ‘jus cogens’: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

exclusion grounds (in Article 1 (F)), which may result in a person being entirely excluded from the protection offered by any of the enumerated rights in the Convention. Furthermore, both provisions are formulated in a way that they allow states a certain margin of interpretation and room to manoeuvre.

However, the Refugee Convention and its Protocol are not the only instruments in which the principle of non-refoulement is laid out. Both general human rights instruments as well as international customary law also speak towards the issue of non-refoulement, often through provisions related to the prohibition of torture. It has become clear that the variety of international and regional human rights instruments provide for a certain ‘complementary protection’, by adding an extra layer of protection in terms of non-refoulement, through provisions often formulated in absolute and non-derogable way. This implies that even when States make use of the non-refoulement exceptions contained in the 1951 Refugee Convention, they are constrained by their absolute obligations under these general international and regional human rights instruments. Clearly, it can be stated that the protection against refoulement now goes beyond the simple area of refugee law.

Declaring the principle of non-refoulement as a norm of customary international law (let alone as a peremptory norm of general international law or ‘jus cogens’) is however far from a straightforward exercise. While it would have some implications in practice – rendering any conflicting treaty obligation or norm ‘void’, such an exercise seems to a certain extent redundant with regard to the principle of non-refoulement. This is mainly because the protective regime with Art. 33 of the Refugee Convention as a central core complemented by the various human rights standards which speak to the issue of non-refoulement already seems to provide an extensive and sufficient protection to refugees.

Chapter III: The Legality of Diplomatic Assurances against Torture before International Human Rights Bodies

“[diplomatic assurances] are not legally binding, undermine existing obligations of States to prohibit torture and are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States.”¹⁰⁹

The next chapters will consist in building on the theoretical and legal framework regarding non-refoulement, torture and diplomatic assurances by means of analyzing the available case-law involving diplomatic assurances. Such an analysis is justified on the basis that this case-law is a clear-cut indication of the prominence and importance of diplomatic assurances. In this respect, the claimed increase in the practice of diplomatic assurances since 2001 – as described in Chapter I – has been reflected in a growing number of cases before human rights bodies in which the legality of such assurances was at stake.

An important indication of the extent to which the practice of diplomatic assurances risks eroding the non-refoulement obligation is therefore provided by the jurisprudence of relevant international human rights bodies. From the discussion in Chapter II it has become clear that a number of key general human rights standards are relevant for interpreting the scope of the obligation of non-refoulement. On the international level, these are in particular Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT). The corresponding (quasi-) judicial bodies that provide both

¹⁰⁹ UN General Assembly, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment Manfred Nowak*, 14 August 2006, A/61/259, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/468/15/PDF/N0646815.pdf?OpenElement> [accessed 11 June 2013]: paragraph 2.

authoritative interpretations of the scope of these international standards through means of General Comments as well as adopt views on individual petitions are the UN Human Rights Committee (UN HRC) in relation to the ICCPR on the one hand and the UN Committee against Torture (CAT Committee) in relation to the above-mentioned Convention Against Torture (UN CAT) on the other hand.

1. The case-law of the UN Committee against Torture

Starting with the relevant jurisprudence of the CAT Committee, a number of cases can be identified in which the relevance of diplomatic assurances against torture and other ill treatment has been considered. All of these cases revolved around the legality of a deportation or extradition under Article 3 of the UN Convention Against Torture.

A first important case in this regard was the 2003 case of *Attia v. Sweden*.¹¹⁰ Mrs. Hanan Attia submitted – while in hiding – a petition to the CAT Committee in the aftermath of her husband Ahmed Agiza’s expulsion from Sweden to Egypt. She claimed that her removal would constitute a violation by Sweden of Article 3 of the UN CAT, since she would run the risk of being tortured because of the link with her husband.

In its analysis, the CAT Committee highlighted that it “must take into account *all relevant considerations*, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights.”¹¹¹ At the same time however, the Committee focused on determining whether the individual in question ran a ‘*personal risk*’ of being tortured in case of being send back. In other words, the existence of a dire human rights record in a state is as such a highly relevant but insufficient ground to

¹¹⁰ *Attia v. Sweden*, Communication No. 199/2002, CAT/C/31/D/199/2002, 17 November 2003.

Mrs. Hanan Attia is the wife of Ahmed Agiza, which case will be discussed further in this chapter.

¹¹¹ *Attia v. Sweden*, Communication No. 199/2002, CAT/C/31/D/199/2002, 17 November 2003, paragraph 12.2.

determine whether someone runs a personal risk of being subjected to torture in case of being sent back to the country in question.

The CAT Committee continued its analysis by emphasizing the existence of regular monitoring by Swedish Embassy personnel and family, adequate medical care and conditions of detention, the fact that the diplomatic assurances also extend to Mrs. Attia, and highlighted prior jurisprudence that the existence of family ties as such do not constitute sufficient grounds for a claim under Article 3 of the UN CAT. Therefore, given the absence of a ‘substantial personal risk’ of torture, the Committee found that returning *Hanan Attia* to Egypt would *not* violate Article 3.¹¹² The crucial element of this decision appears to be the fact that family ties with a suspected terrorist do not constitute sufficient personal grounds to be considered at risk of torture, even in a country with a dubious human rights record. In order to find a violation, there needs to be a demonstrated personal risk for the person in question to be subjected to torture or ill treatment.

The CAT jurisprudence has been further complemented by the case of *Agiza v. Sweden* (2005), which was intrinsically linked to the *Attia* case.¹¹³ Ahmed Agiza was an Egyptian national – suspected and tried in Egypt for possible terrorist involvement – whose asylum application in Sweden was rejected. As a result of this, he was deported back to Egypt.

In the adoption of its Views, the CAT Committee used the same language as in *Attia v. Sweden* regarding the importance of a ‘personal risk’ of being tortured in order to find a violation of Article 3 of the UN CAT. However, it came to an entirely different conclusion, both in terms of finding a violation as in terms of the assessment of the diplomatic assurances involved. Referring to the awareness of the Swedish government of the existence of widespread torture practices in Egyptian prisons, the fact that its own security intelligence

¹¹² *Attia v. Sweden*, Communication No. 199/2002, CAT/C/31/D/199/2002, 17 November 2003, paragraph 12.3.

¹¹³ *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005.

services considered Agiza as a terrorist threat as well as the fact that the intelligence services of two other States were highly interested in Agiza, made the CAT Committee conclude the following:

*“the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”*¹¹⁴

In a remarkable paragraph, the Committee also referred back to its Views adopted in the *Attia v. Sweden* case of two years earlier, where it considered the diplomatic assurances as being satisfactory. With the facts of both cases being closely linked, the Committee found it necessary to outline the crucial differences that resulted in its adoption of a different conclusion. Of particular significance in this regard was the fact that “the Swedish government had failed to fully disclose [to the Committee] a January 2002 monitoring report”¹¹⁵ containing evidence of mistreatment of Ahmed Agiza while in Egyptian custody. The Committee made it clear that this constituted a flagrant violation of the State party’s obligation to fully cooperate with the Committee.

In addition, the CAT Committee appeared to take into account the increasing amount of available information regarding the rendition programme led by the US government together with numerous states in the context of the ‘war on terror’ post 9/11.¹¹⁶ By the time the *Agiza* case reached the Committee, more and more information about these practices had become publicly available. In addition, it had become evident by this time that Egypt had already breached the fair trial guarantee contained in the diplomatic assurances, which the Committee considered as being indicative and “going to the weight that can be attached to the assurances

¹¹⁴ *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, paragraph 13.4.

¹¹⁵ Amnesty International, “Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture” (April 2010), 16.

¹¹⁶ See the reference 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” in *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, paragraph 13.5.

as a whole.”¹¹⁷ At the same time Egypt had also shown itself unable or unwilling to initiate an independent investigation into the torture allegations, as repeatedly demanded by Swedish officials.

In sum, one can safely say that the CAT Committee with its opinion in the *Agiza* case has clearly taken a more cautious and skeptical approach towards the use of diplomatic assurances, when comparing it with its earlier Views adopted in the *Attia* case. However, in doing this, the CAT Committee continued to apply the same principled approach, referring to the need to have ‘substantial grounds for believing’ that a person would be in danger of being subjected to torture. In evaluating whether such substantial grounds exist, it continued to emphasize the importance of a ‘personalized risk’ of being subjected to torture, with the general human rights situation in the country in question being considered as one of the relevant considerations to be taken into account but not necessarily a determining factor. Finally, the CAT Committee’s concluding statement in the *Agiza* case also points to the importance of the presence of an enforcement mechanism as a criterion that might be taken into account in assessing the reliability of diplomatic assurances.

A third and last relevant case was the case of *Pelit v. Azerbaijan* (2007).¹¹⁸ Elif Pelit was a Turkish national of Kurdish origin suspected of having ties with the Kurdish Worker’s Party (PKK). Although a recognized refugee in Germany, she was arrested in Azerbaijan and subsequently extradited to Turkey through means of diplomatic assurances.

Apart from the highly problematic fact that Azerbaijan proceeded with the extradition contrary to an order for interim measures from the CAT Committee, the Views adopted also

¹¹⁷ *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, paragraph 13.5.

¹¹⁸ *Pelit v. Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005, 29 May 2007.

addressed the issue of diplomatic assurances against mistreatment issued by Turkey in this case:

“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.”¹¹⁹

In light of this, the CAT Committee found that this amounted to a violation of Article 3. It is noteworthy that the Committee specifically highlighted its approach in the Agiza case as the baseline approach towards diplomatic assurances. In addition, the Committee made it clear that it expected “to conduct an independent assessment of any diplomatic assurances and post-return monitoring schemes [in order] to reach its own conclusion regarding whether such guarantees sufficiently reduced the risk of abuse on return.”¹²⁰

A review of the UN CAT case law in the field of non-refoulement after the *Pelit v. Azerbaijan* case does not reveal any new cases that addressed the issue of diplomatic assurances. In sum therefore, the approach of the CAT Committee regarding diplomatic assurances is one in which it refuses to generalize (and thus not unequivocally excludes the use of diplomatic assurances per se) but rather opts for an approach “to assess risk on return and the sufficiency of any diplomatic assurances on a case-by-case basis.”¹²¹ The presence of a ‘personal risk’ is paramount in this analysis. As it currently stands, the standard as laid down by the Committee in the Agiza case appears to indicate a skeptical and cautious

¹¹⁹ *Pelit v. Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005, 29 May 2007, paragraph 11.

¹²⁰ Amnesty International, “Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture” (April 2010), 17.

¹²¹ Amnesty International, “Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture” (April 2010), 15.

approach with regard to the use of diplomatic assurances, an approach which is unlikely to be easily abandoned.

2. The case-law of the UN Human Rights Committee

The second important international body that has pronounced itself on the use of diplomatic assurances in relation to the issue of non-refoulement is the UN Human Rights Committee (UN HRC). However, the number of relevant cases before the HRC are less numerous than before the CAT Committee.

A leading case in the Committee's jurisprudence on diplomatic assurances is the case of *Mohammed Alzery v. Sweden*, which the Committee decided in 2006.¹²² The case concerned the expulsion of an Egyptian national involved in government opposition activities (and suspected terrorism), from Sweden to Egypt. The Swedish government had obtained so-called 'aide-memoires' from the Egyptian authorities, in the form of "diplomatic assurances against torture and ill treatment, the death penalty, and unfair trial, prior to transfer."¹²³ The Committee started by analyzing whether the expulsion of Mr. Alzery from Sweden to Egypt "exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition on refoulement contained in article 7 of the Covenant."¹²⁴

In explaining its approach to whether such a 'real risk' was present or not, the HRC clearly stated that it 'must consider' all relevant factual elements, including the general human rights situation in a country, the existence and content of diplomatic assurances, and

¹²² *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, ICCPR/C/88/D/1416/2005, 10 November 2006. Paragraphs 11.3 to 11.5 of the Views adopted by the Human Rights Committee (HRC) are most relevant for our analysis here.

¹²³ Amnesty International, "Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture" (April 2010), 15.

¹²⁴ UN Human Rights Committee, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, ICCPR/C/88/D/1416/2005 (10 November 2006), paragraph 11.3.

the existence and implementation of enforcement mechanisms in relation to such assurances.¹²⁵

The HRC then addressed the case at hand by highlighting a number of problematic elements, including the fact that the only reason the State Party relied on the diplomatic assurances was because it believed that these would have the effect of reducing the risk of ill treatment to an extent sufficient to avoid breaching the non-refoulement principle. In other words, without resorting to diplomatic assurances, the removal of Mr. Alzery would always have run counter to international human rights obligations. Other problematic elements were the absence of monitoring mechanisms ensuring the enforcement of the assurances, the lack of effective implementation arrangements (which manifested itself through the fact that visits by Swedish Embassy personnel only started five weeks after the actual extradition took place), and the lack of conformity of these visits with international good practice standards in this field.¹²⁶

As a logical conclusion, the Committee stated in its Views that the removal of *Mohammed Alzery* constituted a violation of article 7 of the ICCPR, since “the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant.”¹²⁷

A last remarkable observation in relation to the Alzery case is that the Human Rights Committee had also the opportunity to pronounce itself on whether the expulsion of Alzery through means of diplomatic assurances amounted to a breach of the right to a fair trial as well, but decided not to pronounce itself on this issue. However, that this is a relevant question has already been pointed out in Chapter II, by highlighting that the protection against refoulement is nowadays considered to have been broadened to include not only the

¹²⁵ Ibid.

¹²⁶ Ibid, paragraph 11.4.

¹²⁷ Ibid, paragraph 11.5.

risk to torture but also violations of other substantial rights. In addition, the Othman (Abu Qatada) case before the European Court of Human Rights crucially turned on this element (see Chapter IV, Section 3).

A further important case involving diplomatic assurances before the Human Rights Committee is the case of *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan* (2008). All four individuals were granted refugee status and have been detained in Kyrgyzstan, awaiting extradition to Uzbekistan. Contrary to interim measures issued by the HRC, the four were eventually extradited to Uzbekistan.

In its analysis, the HRC reiterated its stance regarding the need to identify a ‘real risk’ of torture or other ill treatment, and that it must ‘consider all relevant elements’ in its determination of whether such a risk existed. These ‘relevant elements’ clearly also include diplomatic assurances:

“The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill treatment existed.”¹²⁸

The Committee furthermore reiterated the language from its General Comment No. 20 regarding the absolute nature of non-refoulement to torture and clarified that both national security considerations as well as the (criminal) conduct of an individual person do not constitute balancing factors in this regard.

Apart from this principled stance, the Committee in this case considered it as problematic that there was widespread knowledge available about ongoing torture practices in Uzbek detention facilities, especially towards political prisoners and persons forming a national security threat. On this point therefore, the Committee concluded that the individuals in

¹²⁸ UN Human Rights Committee, *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan*, Communication No. 1461, 1462, 1476 & 1477/2006, ICCPR/C/93/D/1461,1462,1476 & 1477/2006 (31 July 2008), paragraph 12.4.

question were indeed facing a ‘real risk of torture’ in case they were extradited to Uzbekistan. In addition, due to the nature of the offences involved, they also faced a great risk of the death penalty being imposed in case of conviction. On another crucial point, namely regarding the diplomatic assurances in this specific case, the HRC highlighted the following:

“The Committee reiterates that at the very minimum, the assurances procured should contain such a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation.”¹²⁹

In sum, the Committee found the assurances were lacking a concrete mechanism for their enforcement and considered therefore that they were insufficient to protect against/reduce the above-mentioned risks of torture and the death penalty. This insistence on the necessity of a monitoring mechanism seems to be a constant issue of concern in the HRC’s jurisprudence. In addition to monitoring, the HRC referred to the need for assurances ‘to be safeguarded by arrangements made outside the text of the assurances themselves’, a vague formulation which corresponds with the HRC’s formulation in the *Alzery* case regarding the need for effective implementation arrangements.¹³⁰

A review of the UN HRC’s case law in the field of non-refoulement and diplomatic assurances after the 2008 *Maksudov, Rakhimov, Tashbaev and Pirmatov v. Kyrgyzstan* case does not reveal any new cases that addressed the issue of diplomatic assurances. Therefore, in sum, the approach of the Human Rights Committee regarding diplomatic assurances is one in which it does not categorically rule out the use of diplomatic assurances. In this respect it echoes the approach adopted by the UN Committee Against Torture (CAT Committee) as outlined earlier. However, the abovementioned cases clearly illustrate that the HRC goes

¹²⁹ Ibid, paragraph 12.5.

¹³⁰ Ibid.

further in laying down benchmarks for the assessment of the legality of diplomatic assurances.

Rather than banning diplomatic assurances ‘tout court’, the HRC chooses to consider ‘all relevant elements’ in determining whether a ‘real risk’ of torture is present, and the existence and content of diplomatic assurances clearly form part of these relevant elements. Special attention is being accorded to having monitoring mechanisms in place, as well as effective implementation or enforcement arrangements for the assurances (on a practical level).

3. A consensus ‘against’ the use of diplomatic assurances within the United Nations system?

As became clear from the above analysis of relevant international case law, the (quasi-) judicial bodies at the international level have not explicitly ruled out the use of diplomatic assurances. However, these bodies are not the only bodies or institutions within the UN system that have pronounced themselves on the legality of diplomatic assurances. In addition, several prominent UN appointed officials have over the years taken a stance on the issue, many of them pointing to a variety of problems associated with the use of diplomatic assurances.

As early as 2004, the – at the time – U.N. Special Rapporteur on Torture *Theo van Boven* highlighted in his report to the UN General Assembly that the increased use of diplomatic assurances was increasingly undermining the principle of non-refoulement.¹³¹ While voicing his reticence with regard to diplomatic assurances, Van Boven did not completely rule out their use in certain situations.¹³² In his report, the Special Rapporteur also put forward a

¹³¹ UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment*, 1 September 2004, A/59/324, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement> [accessed 28 March 2013]: paragraph 30.

¹³² “The Special Rapporteur is not of the opinion that requesting and obtaining assurances as a precondition for

number of essential criteria that diplomatic assurances should respect. These relate to the inclusion of “an unequivocal guarantee that the person concerned will not be subjected to torture or any other form of ill treatment”¹³³, the inclusion of “provisions with respect to prompt access to a lawyer, recording (preferably video-recording) of all interrogation sessions and recording the identity of all persons present, prompt and independent medical examination and forbidding incommunicado detention or detention at undisclosed places”¹³⁴, and finally the putting in place of a system of effective, prompt and regular monitoring – including through means of private interviews – by independent persons or organizations reporting back to the respective authorities of both states.¹³⁵

In addition to outlining the above-mentioned criteria, Van Boven also articulated a certain ‘threshold’ beyond which diplomatic assurances should *not* be resorted to. This is the case in circumstances where there is a ‘*systematic practice of torture*’, defined by the CAT Committee as “encompassing torture both as a State policy and as a practice by public authorities over which a Government has no effective control.”¹³⁶ Such a situation of ‘systematic torture’ should be distinguished from a situation in which ‘a consistent pattern of gross, flagrant or mass violations of human rights’ exists. In the latter, diplomatic assurances could still be a relevant consideration in the risk of torture analysis, even though the existence of such a consistent pattern of human rights violations seriously affects their credibility.

In sum, while not completely ruling out the use of diplomatic assurances, it can indeed be safely said that “[t]he Special Rapporteur thus create[d] the highest of bars to reliance on diplomatic assurances [...]”¹³⁷

the transfer of persons under terrorist or other charges should be ruled out altogether.” (paragraph 30 of the Report)

¹³³ Ibid, paragraph 40.

¹³⁴ Ibid, paragraph 41.

¹³⁵ Ibid, paragraph 42.

¹³⁶ Ibid, paragraph 37.

¹³⁷ Human Rights Watch, “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” Vol. 16 No. 4 (April 2004): 8.

Theo van Boven's successor, *Manfred Nowak*, continued to highlight the issue of diplomatic assurances and the problems associated with it, and took a stronger stance against the use of diplomatic assurances. Already in the conclusions of his 2005 interim report to UN General Assembly, UN Special Rapporteur *Nowak* highlighted that [i]t is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment [...].¹³⁸ Throughout his term as UN Special Rapporteur on Torture, *Nowak* kept this principled position regarding the inadequacy of using diplomatic assurances against torture. For example, in its 2006 Interim Report to the UN General Assembly, *Manfred Nowak* repeated that "[diplomatic assurances] are not legally binding, undermine existing obligations of States to prohibit torture and are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States."¹³⁹ The same position is taken up in the Special Rapporteur's 2010 report, in which he gave an overview of his mandate, activities and main observations during his 5-year term. With regard to the principle of non-refoulement and diplomatic assurances, he summarized as follows:

*"The principle of non-refoulement has come under fire during the Special Rapporteur's tenure [...] from [...] the several attempts at undermining the principle in the context of the fight against terrorism (including through the so-called "test of reasonableness", which balances the risk of torture against the threat to national security and the increased use of diplomatic assurances) [...]. As the Special Rapporteur has stated repeatedly, diplomatic assurances related to torture are nothing but an attempt to circumvent the absolute nature of the principle of non-refoulement."*¹⁴⁰

¹³⁸ UN General Assembly, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment Manfred Nowak*, 30 August 2005, A/60/316, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/476/51/PDF/N0547651.pdf?OpenElement> [accessed 11 June 2013]: paragraph 51.

¹³⁹ UN General Assembly, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment Manfred Nowak*, 14 August 2006, A/61/259, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/468/15/PDF/N0646815.pdf?OpenElement> [accessed 11 June 2013]: paragraph 2.

¹⁴⁰ UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment Manfred Nowak*, 9 February 2010, A/HRC/13/39, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-39.pdf> [accessed 11 June 2013]: paragraph 67 (emphasis added by author).

In addition to these different UN Special Rapporteurs, other prominent UN officials have also voiced their concern about the use of diplomatic assurances and their negative impact on the principle of non-refoulement. These include the former UN High Commissioner for Human Rights *Louise Arbour*,¹⁴¹ the current UN High Commissioner for Human Rights *Navanetham Pillay*¹⁴², and the former UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Robert K. Goldman*¹⁴³. The statements made by these officials reflect either skepticism on the working premises of diplomatic assurances, or criticize the fact that they erode international legal human rights norms such as the principle of non-refoulement. The importance of such public statements is not to be underestimated: often such prominent officials have a larger visibility, which allows them to both contribute to keeping the issue alive and on the agenda, as well as do ‘naming and shaming’ of certain UN member states who actively contribute to the practice of diplomatic assurances.

However, it appears that in recent years the attention of high-ranking public officials for the issue of diplomatic assurances has diminished somewhat. For example, the newly

¹⁴¹ “The fact that some governments conclude legally nonbinding agreements with other governments on a matter that is at the core of several legally binding UN instruments threatens to empty international human rights law of its content. Diplomatic assurances create a two-class system among detainees, attempting to provide for a special bilateral protection regime for a selected few and ignoring the systematic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments.” (Louise Arbour, ‘No exceptions to the ban on torture’, *The International Herald Tribune*, 6 December 2005)

¹⁴² “Some states have made use of diplomatic assurances and other forms of diplomatic agreements to justify the return or irregular transfer of individuals suspected of terrorist activities to countries where they may face a real risk of torture or other serious human rights abuse. There is a clear need to stop this practice, shed light on it, and hold perpetrators of torture accountable.” (Navanetham Pillay, UN High Commissioner for Human Rights, quoted in Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 65.

¹⁴³ “Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent the nonrefoulement obligation.” (UN Commission on Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 7 February 2005, E/CN.4/2005/103, available at <http://www2.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf> [accessed 11 June 2013]: paragraph 61).

appointed UN Special Rapporteur on Torture *Juan E. Mendez* seems to have shifted his focus to other thematic issues, such as the death penalty and solitary confinement (as has become evident from his interim reports submitted to the UN General Assembly so far). The fact that international attention for the practice of diplomatic assurances has waned is regrettable, but to a certain extent this has been compensated by the development of an impressive body of case law at the regional level, especially within the jurisdiction of the Council of Europe before the European Court of Human Rights (ECtHR).

Concluding remarks

A number of observations can be made after the analysis conducted in this chapter. Firstly, the international case law regarding the legality of diplomatic assurances is rather limited. With three cases in the UN Committee Against Torture's jurisprudence and two cases where the ICCPR's Human Rights Committee addressed the issue of diplomatic assurances, one can hardly speak of an extensive case law. However, this is understandable in light of the broad range of topics that these bodies have to address (for example, an analysis of the Human Rights Committee's jurisprudence reveals that the Committee addressed 61 cases in 2012 and 45 cases in 2011). Given the limited time available to these bodies as well as the complex legal issues they are being faced with, it would be unrealistic to expect a huge case law on this thematic issue of diplomatic assurances.

Secondly, the case law available does not provide us with extensive criteria in terms of assessing the legality of diplomatic assurances. What is clear, however, is that neither body completely excludes the possibility of using diplomatic assurances as such. Rather, they prefer to conduct an independent analysis on a case-by-case basis, focusing on the impact of diplomatic assurances on whether or not a 'personal' or 'real' risk exists for the person in question. Both bodies also agree on the importance of post-return monitoring arrangements.

In addition, it appears that in situations where a ‘systematic practice of torture’ is present in a country, diplomatic assurances are considered as inherently unreliable and should therefore not be resorted to. However, far greater detail is provided in the case-law on diplomatic assurances of the European Court of Human Rights, which will be examined in the next chapter of this thesis.

Chapter IV: The Legality of Diplomatic Assurances against Torture before the European Court of Human Rights

“But should the prohibition on torture apply in the same way when assessing the extent of a risk that ill-treatment might take place at the hands of another state? Was it really intended by those who drafted the Convention that considerations of the safety of other citizens could not be taken into account in such circumstances when the issue is whether a foreigner should be admitted here or allowed to remain?”¹⁴⁴

Contrary to the limited case law available under relevant international bodies, the European Court of Human Rights’ jurisprudence reveals a richer and far more developed case law around the issue of diplomatic assurances. In this section, an overview will be presented of the European Court’s jurisprudence on diplomatic assurances, thereby focusing on the analysis of landmark cases. The aim of this exercise is to try to distill both the Court’s historical and current position regarding diplomatic assurances, as well as certain evolutions in this position over the years and the reasons for these changes.

In what follows, a first sub-section will discuss the European Court’s case law in the run-up to the landmark 2008 Saadi case, before laying out in the second sub-section the framework on diplomatic assurances put forward by the ECtHR in this famous case. A third sub-section will look at another groundbreaking case in the field of diplomatic assurances, notably the *Othman (Abu Qatada)* case. In a fourth and last sub-section, the focus will shift towards the developments in the ECtHR’s case law in the aftermath of *Othman*, assessing the influence of the *Othman* judgment on subsequent cases.

¹⁴⁴ Lord Goldsmith, “Attorney General Lord Goldsmith’s speech to the Royal United Services Institute,” 10 May 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/4760031.stm [accessed 8 October 2013].

1. The ECtHR's case law in the run-up to Saadi

As demonstrated in Chapter I when tracing back the roots of diplomatic assurances, prior to their contentious use in the context of the 'war on terror', diplomatic assurances were already frequently resorted to by European states in the context of extradition, in cases where the person risked to be charged with the death penalty upon conviction in the country of return. The landmark case in this context is the ECtHR case of *Soering v. United Kingdom*¹⁴⁵, where the Court characterized the so-called 'death row phenomenon'¹⁴⁶ as treatment that would run counter to Article 3 of the ECHR. Taken together with the "general tendency in favour of abolition of the death penalty"¹⁴⁷, this resulted in a practice whereby European countries started to request on a routine basis diplomatic assurances against the death penalty when considering extradition requests.¹⁴⁸ However, as indicated earlier, the fight against terrorism in the wake of 9/11 resulted in putting diplomatic assurances in the spotlight once again.

Apart from the *Soering* case (which related to diplomatic assurances in the context of the death penalty), the first major case involving diplomatic assurances against torture to come before the ECtHR was the 1996 case of *Chahal v. United Kingdom*.¹⁴⁹ Mr. Chahal was a leading figure in the Sikh community, advocating for the autonomy of the province of Punjab in India. While permanently residing with his family in the UK, he had been detained and subjected to ill treatment (and possibly torture) by the Punjab police when visiting relatives in India. In 1990, the UK Home Secretary decided to deport him "for reasons of national

¹⁴⁵ *Case of Soering v. The United Kingdom*, ECtHR, Application no. 14038/88, Judgment of 7 July 1989.

¹⁴⁶ According to Patrick Hudson, "the death row phenomenon is to be defined as prolonged delay under the harsh conditions of death row." (Patrick Hudson, "Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law". *European Journal of International Law (EJIL)* 11 (2000): 836.)

¹⁴⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Preamble)

¹⁴⁸ Alice Izumo, "Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence," *Columbia Human Rights Law Review* 42 (2010): 237.

¹⁴⁹ *Case of Chahal v. The United Kingdom*, ECtHR, Application no. 22414/93, Judgment of 15 November 1996.

security and other reasons of a political nature, namely the international fight against terrorism.”¹⁵⁰ He was held in custody awaiting deportation.

In its judgment, the ECtHR highlighted the ‘real risk’ test applicable in such situations and reaffirmed the absoluteness of Article 3 of the Convention:

*“[...] it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country”*¹⁵¹

*“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.”*¹⁵²

Therefore, according to the Court there is clearly no room for any balancing whatsoever between national security threats and the risk of torture or ill treatment.

The core of the ECtHR analysis focused on the question whether the ‘real risk’ threshold was met or not. Both the problematic general human rights situation in Punjab, the assumption that Mr. Chahal’s high profile would increase the risk to him¹⁵³ and the fact that he had been publicly ‘branded’ as a terrorist, led the Court to the conclusion that the applicant’s deportation would violate the obligations of the United Kingdom under Article 3 of the ECHR.¹⁵⁴

¹⁵⁰ Ibid, paragraph 25.

¹⁵¹ Ibid, paragraph 74 (emphasis added by author).

¹⁵² Ibid, paragraph 79 (emphasis added by author).

¹⁵³ In the Othman (Abu Qatada) case which will be discussed at a later stage in this section, the ECtHR adopts the exact opposite reasoning with regard to the applicant’s high profile and its impact on the risk he faced. (see *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, Application no. 8139/09, Final Judgment of 9 May 2012, paragraph 196). In this respect it is noteworthy that such diverging view was already adopted in the Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits in the Chahal case, stating: “*It is, however, arguable with equal, if not greater, force that his high profile would afford him additional protection. In the light of the Indian Government's assurances and the clear prospect of a domestic and international outcry if harm were to come to him, there would be cogent grounds for expecting that, as a law-abiding citizen in India, he would be treated as none other than that.*” (paragraph 8 of the Joint Partly Dissenting Opinion in *Chahal v. The United Kingdom*).

¹⁵⁴ *Case of Chahal v. The United Kingdom*, ECtHR, paragraph 107.

While not in the centre of its analysis, the Court specified the following with regard to the diplomatic assurances in the case at hand, highlighting that in situations where torture is ‘endemic’ or a ‘recalcitrant and enduring problem’, diplomatic assurances cannot be considered a sufficient guarantee:

“Although the Court does not doubt the good faith of the Indian Government in providing the assurances [...], it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem [...]. Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.”¹⁵⁵

In the period after the landmark Chahal case, the European Court of Human Rights on various occasions continued to pronounce itself on the validity of diplomatic assurances. Noteworthy is the 2005 case of *Mamatkulov and Askarov v. Turkey*¹⁵⁶ concerning the extradition from Turkey to Uzbekistan of two Uzbek nationals suspected from involvement in terrorist-related activities. Both persons were (again) extradited contrary to interim measures issued by the Court while relying on diplomatic assurances offered by the Uzbek government.¹⁵⁷ Surprisingly enough, the Court did not find a violation of Article 3 in this case, stating that it was “not able to conclude that substantial grounds existed [...] for believing that the applicants faced a real risk of treatment proscribed by Article 3.”¹⁵⁸ This could be interpreted as a tacit acceptance of the use of diplomatic assurances, and in light of the evidence that was available at the time regarding systematic torture practices in Uzbekistan, such a conclusion can be considered as highly problematic.

¹⁵⁵ *Case of Chahal v. The United Kingdom*, ECtHR, Application no. 22414/93, Judgment of 15 November 1996, paragraph 105 (emphasis added by author).

¹⁵⁶ *Case of Mamatkulov and Askarov v. Turkey*, ECtHR, Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005.

¹⁵⁷ These assurances specified that the death penalty would not be imposed on both men, that they would not be subjected to the torture or ill treatment, and that their property would not be confiscated.

¹⁵⁸ *Case of Mamatkulov and Askarov v. Turkey*, ECtHR, Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005, paragraph 77.

However, according to at least two commentators, it was “unclear whether the existence of the diplomatic assurances was relevant for the conclusion that the individuals faced no risk.”¹⁵⁹ Indeed, the Court’s analysis of the assurances presents itself as remarkably succinct, with the major part of the judgment dedicated to the Article 34 claim (finding that Turkey had violated the applicant’s right to lodge individual applications through ignoring the court’s interim measures regarding non-extradition). The ECtHR itself was clearly also very much divided on the case, with various concurring and partly dissenting opinions accompanying the judgment.

In a subsequent judgment in the case of *Shamayev and 12 Others v. Georgia and Russia*¹⁶⁰, the ECtHR conducted a far more detailed assessment of the diplomatic assurances at hand. In its conclusion however, it again showed a willingness to accept diplomatic assurances. The Court especially considered the fact that the assurances were issued by the Acting Prosecutor-General, the highest prosecuting authority in criminal cases in Russia, as positively contributing to the credibility of the assurances in question. In addition, taking into account that the applicants had already been extradited, it also analyzed the reliability of the assurances in light of subsequent information obtained regarding their treatment. Both the information submitted as the absence of any subsequent complaints from the applicants concerning ill treatment or bad detention conditions led the Court to the conclusion that there was no real, personal risk of ill treatment, and therefore no violation of Article 3.

¹⁵⁹ Evelyne Schmid, “The End of the Road on Diplomatic Assurances: The Removal of Suspected Terrorists under International Law” *Essex Human Rights Review* 8 (2011): 225 (footnote 34); see also Lena Skoglund, “Diplomatic Assurances Against Torture – An Effective Strategy?” *Nordic Journal of International Law* 77 (2008): 346.

¹⁶⁰ *Case of Shamayev and Others v. Georgia and Russia*, ECtHR, Application no. 36378/02, Judgment of 12 April 2005.

In sum, what these post-Chahal cases seem to illustrate – as rightly observed by Skoglund – “[...] is that assurances are ‘noted’, thus considered as one factor amongst many in the risk assessment of the Court.”¹⁶¹

2. The Saadi judgment and its aftermath

While the *Mamatulov* and *Shamayev* cases appeared to indicate a certain openness of the ECtHR to actually accept diplomatic assurances, the Court’s approach in assessing the validity of diplomatic assurances was first clearly outlined in its landmark case of *Saadi v. Italy*, which dates back to 2008.¹⁶²

The case concerned the deportation of *Nassim Saadi* from Italy to Tunisia, where “a military court had sentenced him in absentia to twenty years imprisonment for membership in a terrorist organization operating abroad in time of peace and for incitement to terrorism.”¹⁶³ Subsequently, at the request of the Italian Embassy in Tunis, the Tunisian Minister of Foreign Affairs provided diplomatic assurances in the form of two written ‘note verbales’.¹⁶⁴ In its judgment, the ECtHR found that the deportation of *Saadi* to Tunisia would amount to a violation of Article 3 of the European Convention, confirming that there were substantial grounds for believing that a real risk existed that *Saadi* would suffer treatment prohibited by

¹⁶¹ Lena Skoglund, “Diplomatic Assurances Against Torture – An Effective Strategy?”, 347.

¹⁶² *Case of Saadi v. Italy*, ECtHR, Application no. 37201/06, Judgment of 28 February 2008.

Various observers have pointed out that the *Saadi* case is *the* case in which the European Court outlined its framework and major principles for assessing the validity of diplomatic assurances. (Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 69; Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence,” *Columbia Human Rights Law Review* 42 (2010): 256).

¹⁶³ *Case of Saadi v. Italy*, ECtHR, paragraph 29.

¹⁶⁴ These assurances specified that “*the Tunisian Government [was] prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes*”, that “*the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial*” and that “*Tunisia has voluntarily acceded to the relevant international treaties and conventions.*” (see *Case of Saadi v. Italy*, ECtHR, paragraph 54-55)

Article 3.¹⁶⁵ With regard to the issue of diplomatic assurances, the Court did not consider these ‘note verbales’ provided by the Tunisian government as actual ‘assurances’, and focused its criticism on their content:

“[...] the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”¹⁶⁶

In addition, the judgment specified that even when diplomatic assurances are actually provided by a state authority, the ECtHR continues to have the last say in assessing their validity on a case-by-case basis:

“[...] the Court [has] the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”¹⁶⁷

In other words, what the *Saadi* decision *substantially* established is that diplomatic assurances *by themselves* are not considered to be sufficient in order to satisfy concerns of torture or ill-treatment and as such comply with Article 3 of the European Convention. Sending governments have an obligation to examine the actions and human rights record of receiving governments, thereby assessing whether the mere words as laid down in the diplomatic assurances actually reflect the reality on the ground.¹⁶⁸ Fundamentally, the Court reaffirmed *Chahal* in the sense that the prohibition of refoulement remains absolute, even in the fight against terrorism. This implied that there can be no balancing exercise between the

¹⁶⁵ *Case of Saadi v. Italy*, ECtHR, paragraph 29; Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence, 257.

¹⁶⁶ *Case of Saadi v. Italy*, ECtHR, paragraph 147 (emphasis added by author).

¹⁶⁷ *Ibid*, paragraph 148 (emphasis added by author).

¹⁶⁸ Alice Izumo, “Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence, 258; Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 69.

risk of harm in case the person is sent back *and* the dangerousness he or she represents to the community of the sending state if not returned. With this reasoning, the Court struck down the United Kingdom's argument – which intervened as a third party in the case¹⁶⁹ – that “national-security considerations must influence the standard of proof required from the applicant.”¹⁷⁰ More specifically, in cases where a threat against national security was present, the UK proposed the application of a ‘more likely than not’ standard of proof (or proportionality standard of proof) to determine the risk of ill-treatment.¹⁷¹

Procedurally, the *Saadi* decision implied that the approach of the ECtHR in such cases remains the same, in the sense that the burden of proof lies with the applicant who has to establish substantial grounds for the existence of a real risk of torture.¹⁷² Diplomatic assurances only come into play when assessing the government rebuttal evidence, and specifically to assess whether the assurances are able to reduce the applicant's already established risk of torture.¹⁷³ However, even then these assurances will only form one part of the assessment puzzle.

In the aftermath of the *Saadi* case, the ECtHR has reaffirmed its approach in a variety of cases, finding diplomatic assurances insufficient when taking into account the poor human rights record in the receiving country.¹⁷⁴ Indeed, these subsequent cases have confirmed the

¹⁶⁹ Around the same period, the “UK government was also backing a test case at Strasbourg (*Ramzy v. Netherlands*), together with The Netherlands, Lithuania, Portugal and Slovakia, to overturn the *Chahal* ruling.” (Alexander Horne and Melanie Gower, “*Deportation of individuals who may face a risk of torture*,” 11 March 2013, House of Commons Library (SN/HA/4151), 7). The UK used the same argument in its intervention in *Ramzy*, but the case was eventually struck out given the impossibility of establishing any communication with the applicant. (*Case of Ramzy v. The Netherlands*, ECtHR, Application no. 25424/05, Judgment of 20 October 2010).

¹⁷⁰ *Case of Saadi v. Italy*, ECtHR, paragraph 122.

¹⁷¹ *Ibid*, paragraph 122 and 140.

¹⁷² *Ibid*, paragraph 129.

¹⁷³ Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 69.

¹⁷⁴ These cases include among others the case of *Ryabikin v. Russia* (Application No. 8320/04), *Ismoilov and Others v. Russia* (Application No. 2947/06), as well as a dozen cases concerning the removal of individuals from Italy to Tunisia including *Sellem v. Italy* (Application No. 12584/08), *Abdelhedi v. Italy* (Application No. 2638/07), *Soltana v. Italy* (Application No. 37336/06), *Hamraoui v. Italy* (Application No. 16201/07), *Ben*

Court's willingness to actively perform a judicial review of the assurances themselves, as well as its case-by-case approach in analyzing the reliability of these assurances. Based on her analysis of the post-Saadi case-law, Izumo argued that:

*"When assessing diplomatic assurances in a particular case, the human rights record of the receiving country should be given the most weight, with some weight given to the identity of the provider of the assurances, the national security profile of the individual subject to transfer, the possibility of post-transfer monitoring, and the content and consistency of the assurances."*¹⁷⁵

Having said this, there have been instances in the post-Saadi era where the European Court of Human Rights has actually found that the diplomatic assurances *did* offer sufficient protection against the risk of torture or ill-treatment. In an admissibility decision in the case of *Gasayev v. Spain*, the Court briefly considered the assurances offered by the Russian authorities to Spain and found them to be sufficient.¹⁷⁶ Furthermore, in a case involving diplomatic assurances provided by the United States (*Al-Moayad v. Germany*), the Court upheld the assurances through putting a great emphasis on its positive human rights record.¹⁷⁷

The latter *Al-Moayad* case involved the extradition from Germany to the United States of a Yemeni imam, facing charges due to his involvement in terrorist activities. Diplomatic assurances were provided by the US Embassy to the German government, specifying "that the applicant would not be prosecuted by a military tribunal [...] or by any other extraordinary court."¹⁷⁸ In assessing the reliability of these assurances, the European Court emphasized a number of elements. Firstly, while expressing 'grave concern' about the various international reports that referred to the use by US authorities of interrogation

Khemais v. Italy (Application No. 246/07), Bouyahia v. Italy (Application No. 46792/06), Darraji v. Italy (Application No. 11549/05), Ben Salah v. Italy (Application No. 38128/06), O. v. Italy (Application No. 37257/06), C.B.Z. v. Italy (Application No. 44006/06).

¹⁷⁵ Alice Izumo, "Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence, 276.

¹⁷⁶ "En tout état de cause, la Cour se rallie aux arguments de l'Audiencia et constate que les assurances obtenues du Gouvernement de la Fédération de Russie sont suffisantes." (Case of *Gasayev v. Spain*, ECtHR, Application No. 48514/06, Admissibility decision of 17 February 2009)

¹⁷⁷ Case of *Al-Moayad v. Germany*, ECtHR, Application No. 35865/02, Admissibility decision of 20 February 2007).

¹⁷⁸ Case of *Al-Moayad v. Germany*, ECtHR, paragraph 13.

methods that go counter to Article 3 standards, the Court noted that “these reports concern prisoners detained by the US authorities outside the national territory, notably in Guantanamo Bay (Cuba), Bagram (Afghanistan) and some other third countries”¹⁷⁹ and therefore are not applicable to the Al-Moayad case. Secondly, the ECtHR seemed to defer to a great extent to the German courts and authorities, especially in terms of their interpretation of the assurances. More specifically, the German courts interpreted the assurances as forming a guarantee that Al-Moayad would not be detained in any of the above-mentioned facilities. This outspoken interpretation and the fact that this assumption was subsequently confirmed by the reality has been highlighted by the ECtHR as a positive element in assessing the effectiveness of the assurances.

In addition, the ECtHR also referred to the long-established extradition history between both countries, with well-respected diplomatic assurances over the years. In doing so, the European Court finally declared the case inadmissible and concluded with a strong statement, both regarding the legal nature of such assurances as well as their reliability:

*“In these circumstances, the Court accepts that the German authorities have obtained an assurance, which is binding under public international law, that the applicant will not be transferred to one of the detention facilities outside the United States of America in respect of which interrogation methods at variance with the standards of Article 3 have been reported.”*¹⁸⁰

While being only admissibility decisions and not fully-fledged judgments, these cases do seem to confirm Izumo’s above-mentioned conclusion that the human rights record of the receiving country is the most important element to be taken into account when assessing diplomatic assurances. Certainly with regard to the United States, the Court appears to appeal to a presumption of good faith with regards to a State that has such a long and well-established democratic system. In light of the recently documented human rights violations in

¹⁷⁹ Ibid, paragraph 66.

¹⁸⁰ Ibid, paragraph 69 (emphasis added by the author).

the Guantanamo Bay and Bagram prisons, it remains of course debatable to which extent the US can be considered a ‘good’ human rights performer.

Furthermore, an additional important assertion was made in the Al-Moayad case, notably that the ‘practice’ in terms of the past use of diplomatic assurances should inform the assessment of the reliability of future assurances. Together with criteria such as the importance of assessing diplomatic assurances on a case-by-case basis, the human rights record of the receiving country, and the fact that assurances are only one element in the assessment of the risk, the Court seemed to indicate with this that also the existing practice and experiences – in terms of whether or not diplomatic assurances have been respected by the receiving country in question – could be considered as another criterion to inform the reliability assessment of assurances.

In other words, the reality is that assurances from one state do not possess the same value and cannot be considered as reliable as assurances from another state. This is nicely illustrated by the following quote from an interview with *Edward Fitzgerald QC*:

“[...] it’s one thing to accept assurances from a very stable country like the United States, where there is some constancy in governance and people can therefore see the long term damage done by not sticking to assurances. But you get some regime that has just been newly elected and wants to take a popular stand on something, and there is some frightful terrorist or some frightful alleged kind of murderer facing charges, and they decide that it would look good and discourage others if we have a very impressive show trial and person is convicted.”¹⁸¹

A next important step in the jurisprudence of the European Court of Human Rights’ regarding diplomatic assurances was taken with the Othman (Abu Qatada) judgment, which will be analyzed in detail below.

¹⁸¹ Edward Fitzgerald QC, Personal Interview (25th February 2013): 140 (interview on file with the author in Annex I).

3. The importance of the Othman (Abu Qatada) case¹⁸²

The *Othman (Abu Qatada) v. United Kingdom* case can be considered as another turning point in the European Court of Human Rights' jurisprudence regarding diplomatic assurances, and this for a variety of reasons. Qatada¹⁸³ arrived in the UK in 1993, where he was subsequently granted refugee status and allowed to remain in the country temporarily. In 1999 and 2000 a Jordanian military court charged and convicted him 'in absentia' for participation in several terrorist offences. However, part of the evidence against him consisted in incriminating statements by co-defendants, allegedly obtained through means of torture.¹⁸⁴ After the events of 9/11, *Abu Qatada* was excluded from the Refugee Convention's protection and he was served by the Home Secretary with a notice of intention to deport on the grounds of national security.¹⁸⁵ In October 2002 he was arrested and detained indefinitely without charge or trial under the now-repealed Part 4 of the 2001 Anti-terrorism, Crime and Security Act. However, shortly after the House of Lords issued a declaration of incompatibility regarding the indefinite detention of foreign nationals, Qatada was released and made subject to a Non-Derogating Control Order as introduced by the 2005 Prevention of Terrorism Act.¹⁸⁶

On the 10th of August 2005, the UK and Jordan signed a Memorandum of Understanding (MoU), specifying that if returned to Jordan, Qatada would not be subjected to torture or inhuman treatment.¹⁸⁷ A new notification of intention to deport was served to Qatada, and he

¹⁸² *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012.

¹⁸³ Abu Qatada already had a certain reputation: having been known as a radical muslim cleric, he was described by a Spanish judge as 'Osama bin Laden's right-hand man in Europe' and by the British authorities as a 'truly dangerous individual'. (Alexander Horne and Melanie Gower, "Deportation of individuals who may face a risk of torture," 11 March 2013: 17).

¹⁸⁴ Matthew Garrod, "Deportation of Suspected Terrorists with 'Real Risk' of Torture: The House of Lords Decision in *Abu Qatada*," *Modern Law Review* 73 (2010): 632.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Christopher Michaelson, "The Renaissance of Non-Refoulement? The *Othman (Abu Qatada)* decision of the European Court of Human Rights," *International and Comparative Law Quarterly* 61 (2012): 751.

was again detained, awaiting deportation. The deportation order was challenged before English courts (notably the Special Immigration Appeals Commission (SIAC) and the Court of Appeal), but ultimately upheld by the House of Lords.¹⁸⁸ Qatada then appealed to the European Court of Human Rights, alleging, in particular, that he would be at real risk of ill-treatment contrary to Article 3 of the Convention, and a flagrant denial of justice, contrary to Article 6 of the Convention, if he were deported to Jordan.¹⁸⁹

One of the striking features of the ECtHR's *Othman* judgment is the amount of detail it provides – notably the inclusion of specific sections dedicated to the arrangements concluded between the UK and Jordan, the human rights situation in Jordan, the case-law regarding the use of evidence obtained by torture, the case-law regarding the use of diplomatic assurances, as well as a section on the international law on review of detention and the right to a fair trial.

Moreover, the case provided the Court with the first opportunity to pronounce itself on the recently introduced UK practice of concluding Memoranda of Understanding (MoUs) with a number of Middle Eastern and North African governments in order to allow the deportation of terrorism suspects based on assurances from the receiving state that they would be treated humanely.¹⁹⁰ Lastly, the *Othman* judgment complements the reviewed case-law since it extends to non-refoulement in the context of fair trial concerns (Article 6 of the ECHR).¹⁹¹

On the surface and in a nutshell, the ECtHR in this case ruled unanimously that the UK could not lawfully deport Qatada to Jordan. However, beyond the surface, it is crucial to

¹⁸⁸ Ibid; See also *RB (Algeria) (FC) v. Secretary of State for the Home Department, OO (Jordan) v. Secretary of State for the Home Department*, United Kingdom: House of Lords Appellate Committee, [2009] UKHL 10, 18 February 2009.

¹⁸⁹ *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 3.

¹⁹⁰ Christopher Michaelsen, "The Renaissance of Non-Refoulement? The *Othman* (Abu Qatada) decision of the European Court of Human Rights," 751.

¹⁹¹ Ibid, 764.

note that it came to this conclusion on the basis of finding a violation of Article 6 and not – as many observers and commentators expected – on the basis of a violation of Article 3 of the ECHR. Nonetheless, the Court’s analysis of the Article 3 claim is highly instructive in terms of its approach with regard to diplomatic assurances against torture.

3.1. A new approach to diplomatic assurances?

In setting out its approach, the Strasbourg Court started off with the acknowledgment that there is “widespread concern within the international community as to the practice of seeking assurances.”¹⁹² At the same time however, the Court appeared to want to avoid making a general statement about the propriety of diplomatic assurances as such, but rather emphasized a ‘hands off approach’ while focusing on an analysis of the assurances on a case-by-case basis:

*“[...] it is not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.”*¹⁹³

In what followed, the Court started to lay out – in a very detailed and comprehensive way – its approach in relation to diplomatic assurances in Article 3 expulsion cases, mostly reiterating and building on the framework laid down in *Chahal* and *Saadi*. In applying the ‘real risk test’, it was reiterated that “the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant.”¹⁹⁴ Furthermore, diplomatic assurances are – if provided – another relevant factor in the Court’s assessment but they “are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.”¹⁹⁵ In addition, the ECtHR continued to emphasize its obligation to examine

¹⁹² *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 186.

¹⁹³ *Ibid* (emphasis added by author).

¹⁹⁴ *Ibid*, paragraph 187.

¹⁹⁵ *Ibid*.

whether the assurances in question are capable of providing a real, practical protection against ill-treatment (see also Saadi), with the weight to be accorded to them varying from case to case.¹⁹⁶

However, the innovative part of the Othman judgment is arguably its structure in terms of detailing how the Court assesses the practical value of diplomatic assurances and which elements determine the weight accorded to them:

“[In doing this] the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances [...].”¹⁹⁷

Since it is only in exceptional cases that the general human rights situation in a country is of such poor quality that diplomatic assurances have no value whatsoever, the general rule will be that the ECtHR will initially assess the quality of the assurances as such, and in a second phase analyze whether they can be relied on in the specific context of the receiving State. Consolidating its own case-law, the ECtHR subsequently listed a large number of criteria that it takes into account when assessing the quality of the assurances given:

- (i) whether the terms of the assurances have been disclosed to the Court [...];*
- (ii) whether the assurances are specific or are general and vague [...];*
- (iii) who has given the assurances and whether that person can bind the receiving State [...];*
- (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them [...];*
- (v) whether the assurances concerns treatment which is legal or illegal in the receiving State [...];*
- (vi) whether they have been given by a Contracting State [...];*
- (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State’s record in abiding by similar assurances [...];*
- (viii) whether compliance with the assurances can be objective verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers [...];*
- (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring*

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, paragraph 188 (emphasis added by author).

mechanisms (including international human rights NGOs) and whether it is willing to investigate allegations of torture and to punish those responsible [...]; (x) whether the applicant has previously been ill-treated in the receiving State [...]; and (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State [...].”¹⁹⁸

The significance of this consolidation exercise by the Strasbourg Court should not be underestimated. In essence, it can be perceived as providing countries willing to use diplomatic assurances to extradite terrorist suspects with a check-list to foolproof their assurances or other mechanisms (such as Memoranda of Understanding) and reduce the risk that they might be overruled by the ECtHR in a later stage. While on the one hand such consolidation and harmonization of the Court’s case law should of course be welcomed, there is evidently a risk that this lowers the threshold for countries to make use of assurances, thereby leading to an increase of the phenomenon.

Whether this is a positive or negative evolution depends a lot on the principled point of view one has regarding diplomatic assurances as a concept. In its core, this discussion boils down to the trade-off that governments have to make on a regular basis between regulating a social practice or simply outlawing it (the dilemma of regulation versus prohibition). If one is fundamentally opposed to the concept of diplomatic assurances and strives towards eradicating the practice, the ECtHR list of criteria clearly works counter-productive and is not helpful in this regard.

However, if one takes the more pragmatic point of view that diplomatic assurances are a phenomenon that is here to stay – which clearly seems to be the European Court of Human Rights’ position, since it has not declared itself fundamentally opposed to the use of diplomatic assurances – but that needs to be under judicial scrutiny to avoid any abuses, the Strasbourg Court’s harmonization exercise might help in becoming a useful point of

¹⁹⁸ Ibid, paragraph 189.

reference for both Council of Europe Member States and the Court itself in assessing the validity of assurances.

3.2. *A violation of Article 3 or not?*

In applying these principles to the Othman (Abu Qatada) case, the Strasbourg Court surprisingly enough did not find a violation of Article 3 of the ECHR. On the basis of reports from UN bodies as well as NGO's, it characterized the human rights situation in Jordan as 'disturbing'. With torture remaining 'widespread and routine', as well as being perpetrated with impunity by the General Intelligence Directorate (GID) against detainees, the ECtHR agreed with the Parties that without assurances from the Jordanian Government, there would be a *real risk of ill-treatment* if Abu Qatada were returned to Jordan.¹⁹⁹

In a next step, the Court then analyzed whether the assurances as contained in the UK – Jordan MoU reduced and/or removed any of this risk. Firstly, it rebutted the applicant's claim that a State that does not comply with multilateral obligations cannot be relied on to comply with bilateral assurances; rather, the level of non-compliance with multilateral obligations is considered as an element in the evaluation of the assurances as such. Secondly, the Court also emphasized that "there is no prohibition on seeking assurances when there is a systematic problem of torture and ill-treatment in the receiving State."²⁰⁰ This fundamentally controversial statement seems to go against certain tendencies in the Court's own case-law, as well as the opinion of various prominent officials on the matter (see Chapter III, Section 3 earlier). Already in *Chahal* the ECtHR emphasized that in situations where human rights violations are a *recalcitrant and enduring problem*, one cannot rely on diplomatic assurances. This was reconfirmed in the 2008 *case of Ismoilov and Others v. Russia*. UN Special Rapporteur Theo van Boven highlighted the same in his 2004 report, stating that diplomatic

¹⁹⁹ Ibid, paragraph 192.

²⁰⁰ Ibid, paragraph 193.

assurances should *not* be resorted to in situations where one can speak of a ‘*systematic practice of torture*.’ In an interview with Edward Fitzgerald QC, he confirmed that he and his team of lawyers were identifying these elements as evidence of a developing trend *against* accepting assurances where torture was systematic.²⁰¹

The fact that the Court did not confirm in Othman this developing trend and did not make a strong statement against the reliance on diplomatic assurances where torture is systematic – as was clearly the case in Jordan – can certainly be considered as a missed opportunity. However, this was not the only element of the Court’s analysis which raised eyebrows. Finding that the general human rights situation in Jordan did not exclude accepting any assurances whatsoever from the Jordanian government, the Strasbourg Court actually paid the UK and Jordanian governments compliments on the quality of the diplomatic assurances against ill-treatment in this case.

“[...] the Court considers the United Kingdom and Jordanian Governments have made genuine efforts to obtain and provide transparent and detailed assurances [...]. The product of those efforts, the MOU, is superior in both its detail and its formality to any assurances which the Court has previously examined [...]. The MOU would also appear to be superior to any assurances examined by the United Nations Committee Against Torture and the United Nations Human Rights Committee [...].”²⁰²

The ECtHR highlighted in particular the fact that the MoU was specific and comprehensive, that it addressed directly the protection of Othman’s Convention rights in Jordan, and last but not least that it had withstood the examination of an independent tribunal (SIAC).²⁰³ In addition, the Court also referred to the historically very strong bilateral relations between both governments, and the fact that they were approved at the highest levels of the Jordanian Government (with the express approval and support of the King

²⁰¹ Edward Fitzgerald QC, Personal Interview (25th February 2013): 134 (interview on file with the author in Annex I).

²⁰² *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 194 (emphasis added by author).

²⁰³ In the proceedings before SIAC, SIAC found that there was no real risk of ill-treatment of the applicant by the GID.

himself) as well as approved and supported by senior officials of the GID. All of these factors made the ECtHR conclude that the assurances could be considered as given in good faith and that strict compliance with both the letter and spirit of the MoU would be more likely.²⁰⁴

While it is difficult to challenge the Court on this part of its analysis – given that it only applied its above-mentioned list of criteria to the case in question – its reasoning with regard to the high profile of the applicant again appears to go counter to its past jurisprudence. Already back in the Chahal case, the Strasbourg Court held that Mr. Chahal’s high profile would increase the risk to him. In Othman however, the Court adopted the exact opposite reasoning, taking into account the wider political context in which the MOU has been negotiated, and de facto stated that the profile of Mr. Othman would ensure he was properly treated:

“It [the Court] considers it more likely that the applicant’s high profile will make the Jordanian authorities careful to ensure he is properly treated; the Jordanian Government is no doubt aware that not only would ill-treatment have serious consequences for its bilateral relationship with the United Kingdom, it would also cause international outrage.”²⁰⁵

Unfortunately, such a holding does not address some of the key concerns associated with diplomatic assurances against torture or ill-treatment, notably the fact that – even in such high profile cases – it remains difficult to detect torture. In addition, numerous reports about Jordan have confirmed that torture is perpetrated systematically by the General Intelligence Directorate (GID) – particularly against Islamist detainees – and that the Jordanian criminal justice system lacks many of the standard, internationally recognised safeguards to prevent torture and punish its perpetrators, resulting in a culture of impunity.²⁰⁶

²⁰⁴ *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 195.

²⁰⁵ *Ibid*, paragraph 196 (emphasis added by author).

²⁰⁶ *Ibid*, paragraph 191.

A last important element with regard to the Article 3 analysis of the European Court of Human Rights in the Othman case concerned the monitoring mechanism envisaged by the MoU between the UK and Jordan. Any person returned under the MoU should have contact as well as prompt and regular visits from a representative of an independent body nominated jointly by the United Kingdom and Jordanian Governments. For Abu Qatada, a monitoring agreement was signed with the Adaleh Centre for Human Rights Studies.²⁰⁷ In its analysis of the assurances, the Strasbourg Court acknowledged several weaknesses in the monitoring arrangements, notably that:

*“[...] the Adaleh Centre does not have the same expertise or resources as leading international NGOs such as Amnesty International, Human Rights Watch or the International Committee of the Red Cross. Nor does it have the same reputation or status in Jordan as, for example, the Jordanian NCHR.”*²⁰⁸

However, the Court agreed with SIAC’s conclusion, recognizing the Centre’s relative inexperience and scale, but affirming that “it was the very fact of monitoring visits which was important.”²⁰⁹ Even so, the Court highlighted that the capacity of the Adaleh Centre significantly improved after signing the monitoring agreement, mostly due to generous funding by the United Kingdom.

Again however, there is some ground for concern here. Firstly, one should definitely praise the decision of the UK Government to rely on a locally embedded human rights NGO to perform this important task. Nevertheless, some doubts persisted regarding its capacities, including due to the fact that this organization was during its entire existence mainly focused on advocacy and training rather than on actual human rights monitoring.²¹⁰ Given the

²⁰⁷ Ibid, paragraph 24.

²⁰⁸ Ibid, paragraph 203.

²⁰⁹ Ibid.

²¹⁰ Application No. 8138/09 ‘Omar Othman v. United Kingdom, “Intervention submitted by Amnesty International, Human Rights Watch and Justice,” paragraph 11; Human Rights Watch (Julia Hall), “Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture”, Essay in HRW World Report 2008, 8.

immense difficulties in making torture ‘visible’, it appears highly doubtful whether the Adaleh Centre possessed the necessary expertise. Secondly, there is a clear conflict of interest in terms of the independent operation of the Adaleh Centre. The fact that its funding is now mainly coming from UK Government sources does not render it *more* independent – as the Court seemed to argue – but rather the opposite.

In conclusion, the ECtHR did not find that Abu Qatada would be the subject of a real risk of ill-treatment if returned back to Jordan.²¹¹ In doing so, it de facto declared that the diplomatic assurances procured in this case were sufficient to protect Abu Qatada. The Court’s analysis rested on a very detailed set of criteria, which in essence were a consolidation of its previous case-law. Nevertheless, the application of these criteria on the case at hand certainly raises some questions marks, with various grounds for concern as demonstrated above. However, these weaknesses were not considered substantial enough to find a violation of the non-refoulement principle. Having said this, the broader question which the Othman (Abu Qatada) case raises is whether this decision implies an implicit approval by the Court of diplomatic assurances and MoUs as an acceptable way to allay risk of torture. As stated by Michaelsen, the Qatada decision can certainly be considered as weakening the non-refoulement protection through the relatively low threshold for diplomatic assurances which it established.²¹²

3.3. *A violation of Article 6 or not?*

Apart from the claim under Article 3 of the Convention, Othman also – among others – complained about an alleged violation of Article 6 of the Convention. The issue here was whether Othman would be at *real risk of a flagrant denial of justice* if retried in Jordan for

²¹¹ Ibid, paragraph 205.

²¹² Christopher Michaelsen, “The Renaissance of Non-Refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights,” 764.

either of the offences for which he had been convicted in absentia. The Court emphasized that the ‘flagrant denial of justice test’ should be considered as a ‘stringent test of unfairness’. Only *in exceptional circumstances* might an expulsion or extradition decision therefore raise an issue under Article 6.²¹³ The Strasbourg Court was also fairly specific about what it understood under a ‘flagrant denial of justice’, namely:

*“[...] the term “flagrant denial of justice” has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein [...]”*²¹⁴

*“A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.”*²¹⁵

The Court clearly aimed to put the bar high with the flagrant denial of justice test, making it difficult to get actual violations of Article 6 in the expulsion or extradition context. The rationale for this can be twofold: on the one hand, violations of the right to a fair trial come in different colors and shapes, forming the bulk of the cases before the European Court of Human Rights. One incentive for the Court is certainly to avoid adding more to this workload – by opening a Pandora’s box – but another element might also be the fact that allowing minor fair trial rights violations to completely nullify an extradition or deportation decision would be an unrealistic standpoint of the Court. The particular significance which the Court has traditionally attached to Article 3 of the ECHR is another element to be taken into consideration.

²¹³ *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 258.

²¹⁴ The Court also outlined a number of examples of certain forms of unfairness that could be categorized as a flagrant denial of justice include the following: “conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge”; “a trial which is summary in nature and conducted with a total disregard for the rights of the defence”; “detention without any access to an independent and impartial tribunal to have the legality the detention reviewed”; “deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.” (ibid, paragraph 259).

²¹⁵ Ibid, paragraph 260 (emphasis added by author).

The standard and burden of proof in the ‘flagrant denial of justice test’ are identical as in Article 3 expulsion cases. This implies that “it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.”²¹⁶

In its application of these principles to the Othman case, the Strasbourg Court’s analysis presents itself as remarkably succinct. The Court’s examination focused on the question whether there is a real risk that evidence obtained by torture of third persons will be admitted at the applicant’s retrial.²¹⁷ Firstly, it firmly established that the admission of any torture evidence should be considered as being ‘manifestly contrary’ to the most basic international fair trial standards, rendering such a trial immoral, illegal and unreliable. In other words, it can be said that the use of torture evidence at a trial would constitute a flagrant denial of justice.²¹⁸

Secondly, the torture evidence in the Othman (Abu Qatada) case related to incriminating statements provided by Abu Hawsher and Al-Hamasher, who both claimed to have been tortured. The ECtHR decided that – due to the unwillingness of the Jordanian State Security System to conduct a proper and effective examination of these torture allegations made by Abu Hawsher and Al-Hamasher – the applicant had demonstrated that a ‘real risk’ existed that both individuals were subjected to torture in order to provide incriminating statements against him.²¹⁹ As such, the Strasbourg Court rejected the application of a ‘balance of probabilities’ test, emphasizing the difficulties in proving torture allegations as well as the

²¹⁶ Ibid, paragraph 261.

²¹⁷ Ibid, paragraph 263.

²¹⁸ Ibid, paragraph 267.

²¹⁹ Ibid, paragraph 280.

complicit nature of the Jordanian criminal justice system.²²⁰ As a concluding note, it therefore decided that:

“[...] there is a real risk that the applicant’s retrial would amount to a flagrant denial of justice.”²²¹

In sum, while one can be highly critical of the Qatada decision in terms of weakening the protection offered by the principle of non-refoulement in classical Article 3 (torture) cases, the analysis of the ECtHR on Qatada’s Article 6 claim can be welcomed – at least from a human rights point of view. Indeed, with its decision that the possible admission of torture evidence forms a ‘flagrant denial of justice’, the Strasbourg Court de facto extended the scope of protection offered by the non-refoulement principle to Article 6 of the ECHR. In this sense, the Qatada decision provides an additional barrier for governments in expulsion and extradition cases.²²²

4. Developments since Othman

Even though the Othman (Abu Qatada) case is a fairly recent one, the European Court of Human Rights already had various occasions to confirm or adapt its rationale from Othman.

In a series of cases against Russia, the Strasbourg Court did refer to the Othman decision at various points, confirming it as valid and standing case-law of the ECtHR in the field of diplomatic assurances. In the *case of Abdulkhakov v. Russia*, the Strasbourg Court found a violation of Article 3 both for the applicant’s transfer to Tajikistan as well as in case he would be extradited by Russia to Uzbekistan. On the issue of the diplomatic assurances provided by the Uzbek authorities, the ECtHR criticized the predominant weight accorded to the assurances by the domestic courts. Referring to the Chahal, Saadi and Othman decisions,

²²⁰ Ibid, paragraph 274 and 276.

²²¹ Ibid, paragraph 282.

²²² Christopher Michaelson, “The Renaissance of Non-Refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights,” 764.

the Court also reiterated its skepticism about relying on diplomatic assurances in situations where torture is endemic or persistent, as well as its obligation to examine whether the assurances in question provide the necessary protection in practice.²²³ Taking the list of criteria from *Othman* as a point of reference, the ECtHR was fairly straightforward and clear in its assessment about the Uzbek assurances:

*“The Court notes that the assurances provided by the Uzbek authorities were couched in general stereotyped terms and did not provide for any monitoring mechanism. It finds unconvincing the authorities’ reliance on such assurances, without their detailed assessment against the standards elaborated by the Court (see Othman (Abu Qatada), [...]).”*²²⁴

Finding an Article 3 violation if the applicant would be extradited to Kyrgyzstan, the ECtHR – de facto going through the entire list of criteria as put forward in *Othman* – also performed a rather detailed analysis of the diplomatic assurances in the *case of Makhmudzhan Ergashev v. Russia*. Once more it criticized the lack of scrutiny on behalf of the Russian authorities in accepting the assurances from the Kyrgyz Republic.²²⁵ In its assessment of the assurances in question, the Strasbourg Court positively highlighted their specificity, as well as the fact that they were issued by the Prosecutor General of the Kyrgyz Republic and related to treatment made illegal in Kyrgyzstan. Taking into account the poor human rights record in the south of the country, the Court however adopted a more critical attitude with regard to the fact whether local authorities could be expected to abide by the assurances in practice, even though they would be formally binding on them. In addition, while the Kyrgyz authorities made an effort through requesting assistance to the Foreign Affairs Ministry of the Russian Federation in terms of monitoring the assurances, very few

²²³ *Case of Abdulkhakov v. Russia*, ECtHR, Application No. 14743/11, Judgment of 2 October 2012, paragraph 149.

²²⁴ *Ibid*, paragraph 150.

²²⁵ *Case of Makhmudzhan Ergashev v. Russia*, ECtHR, Application No. 49747/11, Judgment of 16 October 2012, paragraph 74.

information was available about the follow-up of this request. The ECtHR therefore concluded on the issue of the diplomatic assurances as follows:

*“Although the Court does not doubt the good faith of the Kyrgyz authorities in providing the assurances mentioned above, it is not, in these circumstances, persuaded that they would provide the applicant with an adequate guarantee of safety.”*²²⁶

In the case of *Zokhidov v. Russia*, the ECtHR found an Article 3 violation due to the applicant’s transfer to Uzbekistan, where he ran a ‘real risk’ of being subjected to ill-treatment. His deportation took place despite interim measures ordered by the Court. With regard to the assurances provided by the Uzbek authorities, the Court used elements from *Othman* in noting that the assurances “were couched in general terms and no evidence has been put forward to demonstrate that they were supported by any enforcement or monitoring mechanism (see, by contrast, *Othman (Abu Qatada) v. The United Kingdom* [...]).”²²⁷

In the case of *Azimov v. Russia*, the Court found a violation of Article 3 if the applicant would be forced to return to Tajikistan. In its decision, the ECtHR emphasized that “domestic courts should have a somewhat critical approach to diplomatic assurances”, certainly in a context “where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”²²⁸ In addition, the Court highlighted the absence of any monitoring mechanism as well as the fact that prior diplomatic assurances provided by the Tajikistani authorities have been breached on various occasions.²²⁹ It concluded its assessment in the following way:

*“In sum, the Court finds unconvincing the Russian authorities unconditional reliance on assurances by the Tajikistani authorities, with no detailed assessment against the standards elaborated by the Court (see Othman (Abu Qatada) [...])”*²³⁰

²²⁶ Ibid, paragraph 75.

²²⁷ *Case of Zokhidov v. Russia*, ECtHR, Application No. 67286/10, Judgment of 5 February 2013.

²²⁸ *Case of Azimov v. Russia*, ECtHR, Application No. 67474/11, Judgment of 18 April 2013.

²²⁹ Ibid, paragraph 134.

²³⁰ Ibid, paragraph 135.

In a similar *case of Savriddin Dzhurayev v. Russia* involving the extradition of a Tajikistani national from Russia to Tajikistan, the ECtHR also referred to Othman in finding an Article 3 violation. The Strasbourg Court considered and criticized the Russian City Court's "unexplained and unconditional reliance on the assurances provided by the prosecutor's office of Tajikistan", as running counter to its obligation to examine whether assurances in their practical application provide the necessary guarantees.²³¹ In addition, the Strasbourg Court characterized the assurances as 'vague and containing no guarantee that they would be applied in practice', therefore not changing the risk of ill-treatment for the applicant.²³² Given that Dzhurayev was forcibly transferred back to Tajikistan – circumventing all legal procedures as well as the interim measures issued by the ECtHR, another fundamental consideration for the Court in declaring the assurances unreliable was the actual treatment which Dzhurayev received from the Tajikistani authorities following his return. The subsequent reality confirmed the existence of a 'real risk' of ill-treatment as well as the unreliability of the diplomatic assurances in mitigating this risk.

In addition to these Article 3 cases which have been treated by the European Court of Human Rights in the aftermath of the Othman (Abu Qatada) case, the Court also referred to Othman in a number of other cases in the context of the 'flagrant denial of justice' test. While these cases did not involve an assessment of diplomatic assurances, it is instructive to see that the Strasbourg Court continued to use the Othman case as a reference point in this regard.²³³

²³¹ *Case of Savriddin Dzhurayev v. Russia*, ECtHR, Application No. 71386/10, Judgment of 25 April 2013, paragraph 163.

²³² *Ibid*, paragraph 174.

²³³ See *Case of El Haski v. Belgium*, ECtHR, Application No. 649/08, Judgment of 25 September 2012, and *Case of Willcox and Hurford v. The United Kingdom*, ECtHR, Applications nos. 43759/10 and 43771/12, Admissibility Decision of 8 January 2013.

Concluding remarks

This overview of the European Court of Human Rights' jurisprudence in the field of diplomatic assurances against torture clearly allows for a number of concluding observations. It is clear that the Strasbourg Court disposes of a very rich human rights jurisprudence in this field, with the amount of cases increasing over the years in the aftermath of 9/11. In addition, such case-law has allowed for the gradual refinement of the Court's approach.

As seen above, the ECtHR's approach to diplomatic assurances against torture is certainly not one in which it principally positioned itself *against* the use of such assurances. Rather than doing this, the Court has consistently emphasized that diplomatic assurances can be a relevant factor in assessing whether a real risk of torture or ill-treatment is present. In that respect, there have been cases in which the Court has actually upheld the validity of diplomatic assurances. The Court has however cautioned against the reliance on diplomatic assurances in situations where a persistent or endemic problem of torture – and human rights violations in general – is present. While the international human rights bodies and UN officials have taken the position that diplomatic assurances should not be relied on in situations where a systematic practice of torture exists, the European Court of Human Rights did not seem to want to go that far. Initially, the Court did appear to be taking a firmer stance in considering that diplomatic assurances did not prove a sufficient guarantee in such situations of endemic or recalcitrant torture practices (see Chahal). However, in later jurisprudence the Court seemed to back away from this stance, going as far as stating that “there is no prohibition on seeking assurances when there is a systematic problem of torture”.²³⁴

Furthermore, the case law has highlighted the general human rights situation in the receiving country as the most important factor in the Court's assessment puzzle. While other

²³⁴ *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 193.

factors also played a role, it was only with the ECtHR's Othman decision that some consolidation and clarity was brought in the Court's approach to diplomatic assurances. In addition to listing a set of elements which it takes into account when assessing diplomatic assurances, the Court in Othman also broadened the scope of the protection offered by the non-refoulement principle to include fair trial concerns under Article 6 of the ECHR. Unlike the 'real risk' test under Article 3 claims, the 'flagrant denial of justice' test is however a rather stringent test. Subsequent cases in the aftermath of Othman have confirmed both the Othman decision as a standard reference point (be it in parallel with the Saadi decision) for assessing diplomatic assurances, as well as the broader scope of protection offered by Article 6 claims in an expulsion or extradition context.

One can definitely wonder whether the Court did not open Pandora's box by listing a set of criteria for diplomatic assurances, as it did in Othman, which might result in Contracting States increasingly experimenting and fine-tuning their assurances. But in the end one has to recall that the Strasbourg Court's assessment will never be an exact science. Therefore, while the Othman decision might result in helping States to improve the quality of their diplomatic assurances, the Court will continue to have the last say in assessing their validity, as it has emphasized throughout its jurisprudence.

To conclude, there is an underlying philosophical dilemma present in this debate. The ECtHR had the fundamental choice between outlawing diplomatic assurances as such, or accepting them as a reality and developing an approach to assessing their legality. It chose the latter option, by considering such assurances as a 'relevant factor' in assessing the risk of torture or ill-treatment. When taking this implicit acceptance of assurances as a real phenomenon as a starting point, it suddenly becomes more difficult to criticize the Court's underlying rationale in the Othman decision in trying to consolidate and clarify its case law on the matter.

Chapter V: A country example: the role of the United Kingdom as ‘promoter’ of the use of diplomatic assurances

“[...] it was identified first by Tony Blair as a major issue that we could not deport or extradite people who face torture. Therefore, he introduced this policy of extradition and deportation with assurances, so it was very much a policy that had the full support of the then Prime Minister. [...] it was coming straight from the top, Blair saying: you must be able to get rid of these people! I think that’s why it became such a big thing, it was a whole programme of diplomats going around to try and obtain these assurances of the Middle East and a lot of political capital was spent on it.”²³⁵

There are various reasons to dedicate a chapter to the role of the United Kingdom in the debate around diplomatic assurances. Firstly, having analyzed both the international and European (in the sense of the Council of Europe) jurisprudence, the reality is that every case originates at the national level. It is therefore important to go and look at this level in order to understand the complete picture. Secondly, the UK is a good case study in this regard, because its case law is both abundant and easily accessible (in English). In addition to these practical elements however, the UK has played an intriguing role in the debate about diplomatic assurances over the years since 9/11.

The present chapter will look in-depth to the origins of the UK’s policy of Deportation With Assurances (DWA), as well as its underlying rationale. Furthermore, an analysis will be made of the content of the various Memoranda of Understanding (MoU’s) concluded by the

²³⁵ Edward Fitzgerald QC, Personal Interview (25th February 2013): 139 (interview on file with the author in Annex I).

British government, followed by a set of criticisms that can be formulated on the basis hereof. Finally, a third large sub-section will present an overview of the approach, jurisprudence and criticisms on the Special Immigration Appeals Commission (SIAC), the key UK judicial organ in this regard.

1. The origins of the British Policy of ‘Deportation With Assurances’

Various international human rights organizations and NGO’s have characterized the UK as being ‘the most influential and aggressive promoter in Europe of the use of diplomatic assurances’.²³⁶ The inevitable question one poses when reading such a characterization is what the United Kingdom has done to deserve such a title?

The British government started to look into the use of diplomatic assurances in the beginning of 1990s.²³⁷ However, both the European Court of Human Rights as well as national UK courts initially showed great skepticism with regard to the UK’s approach. As demonstrated in the previous chapter about the ECtHR’s jurisprudence, the Strasbourg Court already discredited the UK’s reliance on diplomatic assurances as early as *Chahal v. UK* (1996)²³⁸. In response to the Strasbourg Court’s criticisms in *Chahal*, the Special Immigration Appeals Commission (SIAC) was set up by means of the 1997 Special Immigration Appeals Commission Act.²³⁹ According to its website, SIAC deals “with appeals against decisions made by the Home Office to deport, or exclude someone from the UK on national security

²³⁶ Amnesty International, “Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ against Torture,” (April 2010): 28; Human Rights Watch (Julia Hall), “Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture”, Essay in HRW World Report 2008, 2; Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 73.

²³⁷ Ibid, 28; Human Rights Watch, “Not the Way Forward: The UK’s Dangerous Reliance on Diplomatic Assurances,” (October 2008): 7.

²³⁸ *Case of Chahal v. The United Kingdom*, ECtHR, Application no. 22414/93, Judgment of 15 November 1996.

²³⁹ Special Immigration Appeals Commission Act 1997 Chapter 68 (17 December 1997), available at <http://www.legislation.gov.uk/ukpga/1997/68/introduction/enacted> [accessed 9 October 2013].

grounds, or for other public interest reasons. It also hears appeals against decisions to deprive persons of citizenship status.”²⁴⁰

In addition, in a 1999 case of *Youssef v. Home Office*, UK courts characterized the assurances provided for the transfer of four terrorism suspects to Egypt as insufficient, despite heavy pressure and involvement of the then British Prime Minister Tony Blair who showed a remarkable willingness to obtain and accept assurances from the Egyptian government.²⁴¹ Despite straightforward information about the presence of a situation of systematic torture in Egypt as well as several negative legal advices from both the UK Home Office (Interior Ministry) and the Foreign and Commonwealth Office, Tony Blair personally intervened several times in the process of obtaining assurances. This is most strikingly illustrated by an excerpt from a letter exchange from the Prime Minister’s Private Secretary, as reflected in the *Youssef* decision:

*“He [the Prime Minister] 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. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention. The Prime Minister’s view is that we should now revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking.”*²⁴²

In the end, the four men in the *Youssef* case were not deported due to the unwillingness of the Egyptian government to provide assurances. The case already showed however that the UK government – with his Prime Minister in a leading role – was prepared to go far in order to deport ‘unwanted’ security threats.

²⁴⁰ “Special Immigration Appeals Commission Tribunal Guidance,” last modified June 20, 2012, available at <http://www.justice.gov.uk/tribunals/special-immigration-appeals-commission> [accessed 23 August 2013].

²⁴¹ *Hani El Sayed Sabaei Youssef v. Home Office*, United Kingdom: England and Wales High Court (EWHC), EWHC 1884, 30 July 2004.

²⁴² *Ibid*, paragraph 38.

Over the years, the UK policy on diplomatic assurances gradually developed and started to occupy an increasingly central place in the government's counterterrorism strategy.²⁴³ In the aftermath of the 9/11 attacks, the UK government used the momentum to introduce a variety of new counterterrorism measures by means of the 2001 Anti-Terrorism Crime and Security Act²⁴⁴. It was in this context that the Foreign and Commonwealth Office (FCO) already affirmed that "specific and credible assurances could be useful".²⁴⁵ The ruling by the UK House of Lords in December 2004 that the indefinite detention of terrorism suspects without charge was incompatible with the European Convention on Human Rights, as well as the 2005 attacks on the London metro, subsequently provided a renewed impetus for the UK's 'Deportation With Assurances' (DWA) policy. The appointment of a specific United Kingdom Special Representative on Deportation with Assurances (as part of the Foreign and Commonwealth Office) is an indication of how serious this policy of 'deportation with assurances' was regarded by the UK government.

According to Amnesty International, the promotion of this policy of 'deportation with assurances' has occurred at various levels: at the national – domestic level – in cases involving the deportation or extradition of persons considered to be a national security threat; at the level of the European Court of Human Rights in Strasbourg, either as respondent state in specific cases (see Chahal and Othman) or as a third party intervener (see Saadi); as well as at EU level in the context of the Justice and Home Affairs (JHA) Council meetings and the G-6. In addition, the UK authorities have also been active in a variety of other intergovernmental fora, including the G-8 and the Council of Europe's Committee of Experts on Terrorism.²⁴⁶ More specifically, in 2005 and 2006 the UK was advocating in the context

²⁴³ Human Rights Watch, "Not the Way Forward," 7.

²⁴⁴ Anti-Terrorism, Crime and Security Act 2001 Chapter 24 (14 December 2001), available at <http://www.legislation.gov.uk/ukpga/2001/24/contents> [accessed 9 October 2013].

²⁴⁵ Columbia Law School Human Rights Institute, "Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers" (December 2010): 75.

²⁴⁶ Amnesty International, "Dangerous Deals," 28; Human Rights Watch, "Not the Way Forward," 21 – 27.

of the Council of Europe for the development of guidelines in the form of minimum standards regarding the content and use of diplomatic assurances against the risk of torture and other forms of ill-treatment.²⁴⁷ At the same time, the UK was also the leading actor within the G-6 to advocate for broader EU endorsement of diplomatic assurances. In that sense, the October 2007 Joint Declaration by the Ministers of Interior of the G6 States was highly indicative in elaborating that “[t]he G6 Governments will initiate and support continued exploration of the expulsion of terrorists and terrorist suspects, seeking assurances through diplomatic understandings.”²⁴⁸

On the domestic level, as part of its DWA policy, the UK government announced in 2005 that it was “taking a new approach to returning people to countries where there was risk of torture or ill-treatment.”²⁴⁹ From 2005 onwards, it started to negotiate and sign so-called ‘memoranda of understanding’ with a series of North African and Middle Eastern governments. It concluded such MoUs with Jordan, Libya and Lebanon in 2005, with Algeria in 2006, with Ethiopia in 2008 and with Morocco in 2011.²⁵⁰ These MoUs provide a general framework within which specific ‘unwanted’ persons can be deported back to their country of

The G6 (Group of Six) in the European Union consists of the respective Ministers of Interior Affairs of the six EU Member States with the largest populations, being France, Germany, France, Spain, Italy, the United Kingdom, and Poland. It is not a formal decision-making body, but has a rather ambiguous statute with informal ad hoc meetings taking place, usually at least twice a year. (see among others House of Lords, European Union Committee Fortieth Report (11 July 2006),

<http://www.publications.parliament.uk/pa/ld200506/ldselect/lddeucom/221/22102.htm>).

“The Group of Eight (G8) refers to the group of eight highly industrialized nations--France, Germany, Italy, the United Kingdom, Japan, the United States, Canada, and Russia--that hold an annual meeting to foster consensus on global issues like economic growth and crisis management, global security, energy, and terrorism.” (Council on Foreign relations, ‘Backgrounder: The Group of Eight (G-8) Industrialized Nations,’ last modified June 13, 2012, <http://www.cfr.org/global-governance/group-eight-g8-industrialized-nations/p10647> [accessed 23 August 2013]).

²⁴⁷ Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 73; Amnesty International, Human Rights Watch and International Commission of Jurists, “Reject rather than regulate – Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment” (2 December 2005): 19.

²⁴⁸ Joint Declaration by the Ministers of Interior of G6 States, Sopot, Poland (18 October 2007).

²⁴⁹ Alexander Horne and Melanie Gower, “*Deportation of individuals who may face a risk of torture*,” 11 March 2013, House of Commons Library (SN/HA/4151), 14.

²⁵⁰ “UK Government, Series Memoranda of Understanding on Deportations with Assurances,” last modified August 7, 2013, available at <https://www.gov.uk/government/organisations/foreign-commonwealth-office/series/memoranda-of-understanding-on-deportations-with-assurances>

origin. This general framework can – where necessary – be complemented by a number of specific assurances in the circumstances of an individual case.²⁵¹ The first MoU concluded with Jordan served as a template for all subsequent MoUs negotiated, with the exception of the arrangements negotiated with Algeria.²⁵² The Algerian situation is a bit different in the sense that its government was particularly sensitive with regard to the post-return monitoring arrangements envisaged by the MoU, considering this as an intrusion on their sovereignty. For these reasons, the arrangements with Algeria took the form of an Exchange of Letters and Note Verbales between the Algerian President Bouteflika and (former) Prime Minister Tony Blair. Again this Exchange of Letters sets out the general framework, which can be complemented where needed with specific assurances in individual cases.²⁵³

The idea is that these assurances are only to be used in a very small minority of cases in which prosecution is not an option and the individual cannot otherwise be deported.²⁵⁴ Nonetheless, it seems that there are attempts ongoing to “extend to process of ‘deportation with assurances’ to other countries as useful and in the public interest.”²⁵⁵ What exactly the content is of these assurances will be explored in the next section.

2. The UK’s Memoranda of Understanding

2.1. *The United Kingdom’s position*

There are a number of arguments that United Kingdom officials raise on a regular basis in defense of their use of diplomatic assurances. Firstly, one of the key arguments made by the UK relates to a particular perception of the respect for bilateral versus multilateral obligations

²⁵¹ Kate Jones, “Deportations with Assurances: Addressing Key Criticisms,” *International and Comparative Law Quarterly* 57 (2008): 184.

²⁵² Eric Metcalfe, “The false promise of assurances against torture,” *Justice Journal* 6 (2009): 75.

²⁵³ Kate Jones, “Deportations with Assurances,” 184; Human Rights Watch, “Not the Way Forward,” 7 – 8.

²⁵⁴ Kate Jones, “Deportations with Assurances,” 184.

²⁵⁵ Columbia Law School Human Rights Institute, “Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers” (December 2010): 76.

by States with whom diplomatic assurances are concluded. It is being put forward that these States – which generally are performing badly in terms of respect for their multilateral obligations, hence the need for assurances – attach more importance to ‘reasons and incentives’ rather than the exact legal status of a commitment.²⁵⁶ In other words, it is being put forward that yes, such assurances are inherently political bilateral commitments, but the effect of a breach of these bilateral arrangements would be graver than in the case of a multilateral norm. In the Abu Qatada case, SIAC affirmed the UK’s view on this matter, by highlighting that:

*“[t]he political realities in a country matter rather more than the precise terminology of the assurances, and with the bilateral relationship, are the key to whether or not the assurances would be effective in that respect.”*²⁵⁷

The argument is thus that it is easier to put mutual incentives and reasons for compliance in a bilateral relationship than in a multilateral process, and that it is exactly here that diplomatic assurances provide an added value. In its essence therefore, the British government argues that these assurances provide for an additional level of protection on top of existing multilateral obligations, thereby de facto reinforcing the multilateral human rights system. The fact that these various provisions in the assurances are largely based on existing international legal obligations – notably in the area of human rights – should serve as a confirmation of this presumption.²⁵⁸

Secondly and fundamentally, the UK purports that it advocates for a particular model of diplomatic assurances, namely so-called ‘enhanced assurances’. This specific UK model of assurances is specifically characterized by its insistence on a form of post-return monitoring

²⁵⁶ Kate Jones, “Deportations with Assurances,” 188.

²⁵⁷ *Abu Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department (SSHD)*, United Kingdom: Special Immigration Appeals Commission (SIAC), SC/15/2005, 26 February 2007: paragraph 495.

²⁵⁸ Kate Jones, “Deportations with Assurances,” 189.

of the deported person (as well as monitoring of the assurances in question), usually conducted by local organizations.²⁵⁹

A first set of arguments often invoked by the Foreign and Commonwealth Office (FCO) to insist that the UK's model of diplomatic assurances is distinct, relates to the *process* along which these assurances come into their existence. On the one hand, the British authorities affirm that discussions and negotiations are taking place at the 'highest level', between Heads of State or Government to ensure sufficient 'buy-in' throughout the system. In addition, the assurances are being put at the 'heart' of the bilateral relationship, implying serious diplomatic consequences in case they would be breached. On the other hand, the United Kingdom claims that there are more frequent and detailed discussions about '*why*' the assurances are being sought and what exactly their meaning would be in practice. In this sense, a more detailed screening is taking place of what exactly would happen with a returned person, as well as attempts are being made to remedy certain 'blind spots' – where things might go wrong in such scenarios.²⁶⁰

Another set of arguments emphasizing the distinctiveness of the UK's model of 'enhanced assurances' is the reasoning by United Kingdom officials "that assurances used in deportation cases are reliable due to extensive public and judicial scrutiny."²⁶¹ Indeed, one has to admit that the UK is remarkably open and transparent about its practice of obtaining 'enhanced assurances', compared to other countries (such as the United States or Russia). According to the UK, this transparency critically ensures public scrutiny and accountability, thereby forming an additional 'check' in order to avoid misuse. An additional benefit is of course that it helps legitimize the practice, since it is only through making these arrangements

²⁵⁹ See among others Human Rights Watch, "Not the Way Forward," 8; Amnesty International, "Dangerous Deals," 29.

²⁶⁰ See points raised by Kate Jones, Assistant Legal Advisor at the Foreign and Commonwealth Office (Kate Jones, "Deportations with Assurances," 187).

²⁶¹ Columbia Law School Human Rights Institute, "Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers" (December 2010): 73; Kate Jones, Assistant Legal Advisor at the Foreign and Commonwealth Office (Kate Jones, "Deportations with Assurances," 193).

visible that broader public support can be gathered. In addition to this element of public scrutiny and accountability, the British courts are performing an extensive judicial scrutiny of the assurances. The logic behind this is “that [such] scrutiny creates the incentive to use assurances conservatively, as ‘[i]t is clearly not in [the government’s] interest to lose cases.’”²⁶²

A third set of arguments that are being put forward to emphasize the distinctiveness of the UK’s model of diplomatic assurances focuses on the United Kingdom’s engagement on the ground. Through the involvement of *local* monitoring bodies, the UK is indeed “engaging with NGO’s on the ground in the countries concerned, providing valuable capacity building and training on detection and reporting of torture.”²⁶³ For example, the European Court of Human Rights in *Othman (Abu Qatada)* acknowledged that in the case of the Adeleh centre (the Jordanian monitoring body) considerable grants and funding had been provided by the UK government.²⁶⁴ This line of argument contends that through providing such core funding and practical engagement with human rights organisations and monitoring bodies on the ground, the UK does not only improve the quality and reliability of its diplomatic assurances but also contributes to an increased ‘in-country’ human rights capacity to detect, raise awareness about and ultimately prevent torture and ill-treatment. In other words, the British government helps in this way to address “the long term issues that underlie the need for the process of seeking assurances.”²⁶⁵

2.2. *The content of the MoU’s*

Having clarified the British government’s rationale in seeking to conclude these Memoranda of Understanding, the next question is what exactly is being specified in these

²⁶² Kate Jones, “Deportations with Assurances,” 193.

²⁶³ *Ibid.*, 190.

²⁶⁴ See *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 87 and 203.

²⁶⁵ Kate Jones, “Deportations with Assurances,” 190.

MoUs. While opinions on the (legal) value of the assurances differ greatly, the content of these MoUs is something that can be assessed rather objectively, allowing for a number of conclusions. Firstly, the MoU's usually set out the general political commitment that any deported individuals will be treated in accordance with international human rights standards (or subjected to humane treatment), as specified in the MoU in question.²⁶⁶ For example, the MoU with Lebanon specified the following:

*"The Governments of the United Kingdom and of the Lebanese Republic will comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum."*²⁶⁷

Secondly, the MoUs generally reiterate the relevant human rights standards in the form of specific assurances. Analyzing the first MoU which the UK government concluded with Jordan, Eric Metcalfe highlighted that "six of the eight 'specific' assurances [contained in the MoU] do no more than restate Jordan's existing obligations under the Torture Convention and the International Covenant on Civil and Political Rights, namely the right of those returned to due process, a fair trial, and religious freedom."²⁶⁸ In sum, while precise formulations might somewhat vary and be drawn from different international legal instruments, a large part of the actual content of the assurances is based on existing legal obligations to which both the sending and receiving country have already subscribed and are already expected to respect in the first place.

Building on Metcalfe analysis, what is therefore novel in the UK's template MoU with Jordan, is "an assurance of regular visits while in detention from an 'independent body nominated jointly by the UK and Jordanian authorities' and to allow access to the UK

²⁶⁶ Kate Jones, "Deportations with Assurances," 184; Columbia Law School Human Rights Institute, "Promises to Keep," 77.

²⁶⁷ Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic concerning the Provision of Assurances in respect of Persons subject Deportation, available at <https://www.gov.uk/government/publications/memoranda-of-understanding-on-deportations-with-assurances-dwa-lebanon> [accessed 5 September 2013], p. 1.

²⁶⁸ Eric Metcalfe, "The false promise of assurances against torture," *Justice Journal* 6 (2009): 75.

consulate while not detained”.²⁶⁹ In addition, a withdrawal provision has been included, allowing each side to annul the arrangements made taking into consideration a six months notice. Nonetheless, such a withdrawal would only affect future transfers, since the assurances would continue to apply to past returnees.

Expecting a certain ‘learning-by-doing’ process, one might have expected changes in the subsequent MoUs concluded with Libya and Lebanon. However, this does only appear to be the case to a limited extent. While there have been some adjustments, these took the form of the inclusion of a provision on medical examination as well as a certain broadening of the tasks and responsibilities of the monitoring body, thereby making the monitoring body responsible for supervising the entire set of assurances.²⁷⁰ This becomes clear from the following comparison between the monitoring arrangements in the initial MoU with Jordan and the subsequent one with Lebanon:

*“If the returned person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities.”*²⁷¹

*“An independent body will be nominated by both Governments to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state (“the monitoring body”). The responsibilities of the monitoring body will include, but are not limited to, monitoring the return of, and any detention, trial or imprisonment of, the person.”*²⁷²

Having said all of this, the monitoring provisions in the various MoUs differ significantly in terms of the frequency of visits and modalities of access to the returned persons. The

²⁶⁹ Ibid, 76.

²⁷⁰ Ibid, 77.

²⁷¹ Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan regulating the Provision of Undertakings in respect of Specified Persons prior to Deportation, available at <https://www.gov.uk/government/publications/memoranda-of-understanding-on-deportations-with-assurances-dwa-jordan> [accessed 5 September 2013], p. 4.

²⁷² Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic concerning the Provision of Assurances in respect of Persons subject Deportation, p. 2.

following overview table compiled by the Columbia Law School Human Rights Institute is illustrative of this:

FIGURE I. VARYING ACCESS AND VISITATION BY MOU MONITORING BODIES

RECEIVING STATE	INITIAL CONTACT AND VISIT	FREQUENCY OF VISITS	PRIVATE ACCESS	MEDICAL EXAM
Libya	Returnee is entitled to “contact [the body] promptly” and “meet a representative of the monitoring body within one week” of initial arrest or detention.	Generally, unspecified “regular visits”; during any period before trial, they are permitted at least once every three weeks	Visits “will include the opportunity for private interviews”	“If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so”
Jordan	No time specified; if arrested or detained within three years of return, returnee is “entitled to contact, and then have prompt and regular visits” from the body representative	Visits are permitted “at least once a fortnight”	Visits “will include the opportunity for private interviews”	Not specified
Lebanon	If arrested within three years of return, returnee is entitled to contact the body “promptly, and in any event within 48 hours”	Generally, unspecified “regular visits”; during any period before trial they are “permitted at least once a week”	Visits “will include the opportunity for private previews with the person”	“If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so”
Ethiopia	If arrested, detained or imprisoned within 3 years of the date of his return, returnee is entitled to contact the body “promptly, and in any event within 48 hours, a representative of the monitoring body”	Unspecified “regular visits”	Not specified but “in the even an allegation of ill-treatment, the monitoring body will have access to the person without delay”	Not specified

Figure 1: Overview of monitoring provisions in some of the UK MoU's²⁷³

In sum, it appears that the MoUs are to a large extent a reiteration of relevant existing multilateral obligations in the form of a bilateral arrangement. In addition to basic ‘guarantees of humane treatment’, the innovative element in the UK’s MoUs appears to be limited to the inclusion of on the one hand a medical examination provision (with the exception of the Jordanian and Algerian MoU’s) and on the other hand the inclusion of a set of ‘monitoring guarantees’. This seems to confirm the United Kingdom’s insistence on the ‘enhanced’ character of its assurances. Having said this, a number of criticisms have been

²⁷³ Columbia Law School Human Rights Institute, “Promises to Keep,” 78.

voiced with regard to both the UK's rationale and the content of its MoUs, which will be discussed further below.

2.3. Criticisms

Leaving aside the general criticisms on the practice of diplomatic assurances that have been discussed at an earlier stage, a number of doubts and weak spots can be identified in the United Kingdom's MoU approach. A *first* point of criticism lies in the core rationale put forward by the UK that it is easier and more effective to put *mutual incentives* in these bilateral assurances than to rely exclusively on multilateral legal obligations. As demonstrated above, one of the key arguments advanced by the British government is that the MoU's do *not* erode the international human rights system (including the principle of non-refoulement) but rather contribute to reinforcing it. There is however an inherent contradiction in this argument, since if these MoU's or assurances are indeed an opportunity to go beyond existing multilateral obligations and reinforce the international human rights system, then what exactly is the added value of merely reiterating international legal norms in a bilateral agreement? As demonstrated in the previous subsection, the core of the assurances provided in the British MoU's consists of a repetition of relevant human rights norms and declaring them applicable to the returned person in question. Does the incorporation of these norms in a bilateral arrangement actually reinforce them?

Certainly such incorporation can be seen as a recognition and acknowledgement of the importance of these multilateral obligations, but it is doubtful whether a mere reiteration actually helps to reinforce the multilateral human rights system in this respect. A striking illustration of this is the Special Immigration Appeals Commission's summary of the Algerian stance on why negotiating a Memorandum of Understanding was unnecessary (see the 2006 case of *Y v. Secretary of State for the Home Department*):

“The Algerian stance on ill-treatment had always been that they objected to repeating, in generic form, commitments which they had entered into in the Convention against Torture and in the International Convention on Civil and Political Rights. But they had no difficulty in committing themselves to treating those returned fully in accord with those obligations. A general reiteration was seen as casting doubt on whether they would abide by commitments which they had already entered into, whereas an individual assurance was seen as applying to an individual the general obligation already undertaken. Their history, that is their colonial past, made them very sensitive about that.”²⁷⁴

In addition to this, the objective attributed to these Memoranda of Understanding is for them to be practical and operational, in providing a concrete safeguard against torture and ill-treatment on the ground. Clearly the simple reiteration of such international legal norms and principles – which are the inevitable result of a compromise reached after long negotiations between the governments of this world – does not particularly contribute to the clarity of the assurances. A good illustration of this is provided by the critical view of Goodwin-Gill on the impact of diplomatic assurances on States’ international legal obligations: “in short, diplomatic assurances effectively add nothing to the receiving States’ obligations while in no way diminishing those of the sending State.”²⁷⁵ While it might be useful to refer to such international legal norms and standards in a generic way, one would expect that the added value of such assurances would lie in their concretization and operationalization of these norms through detailed and clearly formulated benchmarks. In that sense, the lack of specificity in the United Kingdom’s assurances can be viewed as a ‘missed opportunity’ to reinforce and operationalize these legal principles.

Furthermore, another problematic argument often invoked by the British authorities in defense of their rationale of ‘enhanced assurances’ relates to their ability to include greater incentives and mutual obligations in these assurances than in the multilateral human rights

²⁷⁴ *Y v. Secretary of State for the Home Department (SSHD)*, United Kingdom: Special Immigration Appeals Commission (SIAC), SC/36/2005, 24 August 2006: paragraph 256.

²⁷⁵ Guy Goodwin-Gill, “Diplomatic Assurances and Deportation,” paper presented at JUSTICE/Sweet & Maxwell Conference on Counter-terrorism and Human Rights (28 June 2005), 2.

regime. Along this line of reasoning, it is being put forward that the effect of a breach of such bilateral assurances “may be more acute than [a] breach of [a] multilateral obligation owed to many states generally, but none specifically.”²⁷⁶ In other words, the ability to take measures towards the other State in case of non-compliance with assurances is greater in such a bilateral arrangement than it is in a multilateral context. To a certain extent, this might certainly be the case, in the sense that a sending State can unilaterally take certain diplomatic, economic and/or political measures towards the receiving State, without having to consult or find a complex compromise with other States in the international arena. However, the experience of the Agiza case has shown that there are limits to the ability to insert conditionalities in bilateral relations.²⁷⁷

Moreover, it is clear that all of the abovementioned diplomatic, economic or political measures can in principle also be taken by the international community as a whole. There are clear benefits associated with the international community as a whole taking a strong stance in condemning certain torture practices. While this would require overcoming the additional hurdle of obtaining an international consensus, it would at the same time result in a far more powerful signal towards the torturing state in question. Not only does such public condemnation across the board isolate the regime in its (implicit) acceptance of torture practices, but it also sends a message to the wider international community that respect for the multilateral human rights system is a fundamental requirement in being fully accepted as an entity in the international arena. In addition, as Metcalfe rightly noted, the UK could have used its diplomatic weight in order to condemn and prevent torture in these countries already on a unilateral basis a long time ago:

²⁷⁶ Kate Jones, “Deportations with Assurances,” 188.

²⁷⁷ See Human Rights Watch, “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” Vol. 17 No. 4 (April 2005): 26.

*“The UK does not appear hitherto to have threatened either Algeria or Jordan with negative consequences for their many breaches of the Torture Convention, so why is it credible to think that it will do so in the context of bilateral memoranda?”*²⁷⁸

A *second* major line of criticism has to do with the ‘*selective transparency*’ used by the British government in the context of its policy of ‘enhanced diplomatic assurances’. One of the arguments put forward earlier emphasized that the UK derived a greater legitimacy for its MoU policy through its transparent behavior and extensive judicial scrutiny of the assurances, thereby creating additional checks and safeguards. However, it appears that this transparency is somewhat selective, since neither the terms of reference of the appointed monitoring bodies, neither their actual monitoring reports have been made publicly available.²⁷⁹ It is one thing to be transparent about the intentions, the process of concluding and the content of these diplomatic assurances, but transparency about both the exact tasks attributed to the monitoring bodies as well as their reports issued is paramount in order to be able to fully evaluate their functioning in practice. Not disclosing this information not only raises suspicion, but also works counterproductive when taking into account the British government’s ambition to legitimize the practice of diplomatic assurances.

A *third* major line of criticism focuses on the *content* of the monitoring provisions contained in the various MoU’s. With the appointment of monitoring bodies being considered as the ‘core’ of the UK’s insistence on the enhanced nature of their assurances, it is unfortunate that these monitoring arrangements – as described above – remain fairly superficial. Again one can speak of a missed opportunity, since “[n]one of the agreements specifically refer to international human rights guidelines on interrogation practices or safeguards such as videotaping interrogations.”²⁸⁰ The United Kingdom argued that its

²⁷⁸ Eric Metcalfe, “The false promise of assurances against torture,” *Justice Journal* 6 (2009): 87.

²⁷⁹ Columbia Law School Human Rights Institute, “Promises to Keep,” 79.

²⁸⁰ *Ibid*, 77.

monitoring provisions “draw on Part IV of the Optional Protocol to the UN Convention Against Torture [...] and the recommendations in the September 2004 Report of Theo van Boven [...]”²⁸¹ Certainly the monitoring provisions on private access are a reflection of this, but if the UK really wanted to set a convincing example it should have made a stronger case in more comprehensively reflecting former UN Special Rapporteur Theo van Boven’s recommendations.

Having said this, the UN Special Rapporteur is not the only source to have issued recommendations on how such post-return monitoring schemes should look like. In a critical report on the practice of diplomatic assurances, Human Rights Watch emphasized a number of critical, essential safeguards for pre-agreed monitoring schemes, including the following:

*“[...] video and audio recording of all interrogations in the presence of a lawyer; expert monitors, trained in detecting signs of both physical and psychological torture and ill-treatment; meetings with a detainee in total privacy; routine forensic medical examinations by an independent physician not associated with the detention facility; confidentiality when transmitting allegations of torture so that the detainee and his or her family do not suffer further retribution for having spoken out; and the ability of the monitors to visit and have unhindered access to a detainee at any time, without having to provide advance notice.”*²⁸²

In other words, there are a variety of guidelines and recommendations available on how to organize effective prison monitoring, on which the British government could easily have build to strengthen its diplomatic assurances. However, as recognized by Human Rights Watch itself, the official authorities in most of the countries where torture is a persistent problem would never accept such detailed monitoring arrangements, characterizing it as an unacceptable intrusion on their sovereignty.²⁸³ This realistic position appears to be confirmed by the reality of the UK’s enhanced assurances. As with all diplomatic undertakings, the

²⁸¹ Kate Jones, “Deportations with Assurances,” 187; see also UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment*, 1 September 2004, A/59/324

²⁸² Human Rights Watch, “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” Vol. 17 No. 4 (April 2005): 25 – 26.

²⁸³ Ibid, 26.

monitoring arrangements in the United Kingdom's Memoranda of Understanding are the result of inevitable trade-offs on both sides, with the aim of reaching a compromise agreement. In this respect, it is crucial to note that "[t]he tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection. The fundamental right to be free from torture, however, is not negotiable or permitting of compromise."²⁸⁴

A *fourth* major line of criticism relates to the *absence* in the Memoranda of Understanding of any *adjudication, enforcement or sanctioning provisions* in case of a breach of the assurances.²⁸⁵ It is not clear what exactly the consequences are of a breach of any kind in the diplomatic assurances. An illustration of this is that while the MoU's include a provision allowing either State to withdraw from the assurances with a six-month notice, there is no enforcement or sanctioning provision in case the State in question does *not* respect its obligation to continue to apply the assurances to already returned persons.²⁸⁶

This observation casts even more doubt about the ability to include real, enforceable bilateral incentives and reasons to comply in these arrangements. If it is not clearly spelled out for both Parties what exactly the consequences will be of non-compliance, then how can one call this a 'real' incentive? One could certainly assume that it is in both the sending and receiving States' interests to be as clear as possible about the predetermined consequences of breaches in the assurances. Such clarity about possible sanctions will not only contribute to a higher degree of respect for the assurances – and thus serve as an incentive to avoid breaches, but might also help in terms of accountability towards human rights organizations and other observers. The most recent MoU concluded with Morocco shows some improvement by including a provision stating that "[a]ny dispute regarding the interpretation and application

²⁸⁴ Ibid, 19.

²⁸⁵ Eric Metcalfe, "The false promise of assurances against torture," *Justice Journal* 6 (2009): 76.

²⁸⁶ Ibid, 76.

of this Memorandum of Understanding will be resolved through diplomatic means.”²⁸⁷ Even so, the vagueness of this formulation still leaves a lot of room for improvement.

Lastly, the UK’s policy of deportation with assurances was also domestically criticized in a May 2006 report by the Parliamentary Joint Committee on Human Rights. At the time, taking into account only the MoU’s concluded with Jordan, Libya and Lebanon, the Committee expressed its concern and emphasized that the British policy had the potential to undermine both its non-refoulement obligations as well as its obligations to prevent torture and ill-treatment in the context of the UN Convention Against Torture as the ECHR.²⁸⁸

3. SIAC’s case law on diplomatic assurances

Before concluding this chapter on the United Kingdom’s role in the context of the debate of diplomatic assurances, it is worth having a look at the case-law of the most relevant UK courts in order to see whether any trends can be identified. The process of decision making around diplomatic assurances within the UK can be characterized as highly complex, involving on the one hand the Foreign and Commonwealth Office (for the negotiation of assurance agreements, the coordination of post-return monitoring and capacity-building of monitoring organizations) and on the other hand the Home Office (for making deportation or ‘removal’ decisions).²⁸⁹

²⁸⁷ Memorandum of Understanding on Cooperation between the Government of the Kingdom of Morocco and the Government of the United Kingdom of Great Britain and Northern Ireland concerning persons subject to deportation for reasons of involvement in terrorism, available at <https://www.gov.uk/government/publications/memoranda-of-understanding-on-deportations-with-assurances-dwa-morocco> [accessed 6 September 2013], p. 6.

²⁸⁸ See Joint Committee on Human Rights – Nineteenth Report (18 May 2006), <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf> [accessed 3 September 2013], paragraphs 129 and 131.

²⁸⁹ Columbia Law School Human Rights Institute, “Promises to Keep,” 79.

As mentioned previously, the British government is proud of the fact that an extensive judicial scrutiny is taking place of deportation decisions involving diplomatic assurances. The most important judicial organ in this regard is the Special Immigration Appeals Commission (SIAC), which is in essence a trial-level court tasked with considering deportations based on national security grounds or on classified evidence.²⁹⁰ Decisions made by SIAC can – only on legal grounds – be appealed to the Court of Appeals and at a further stage to the Supreme Court.

3.1. *The approach taken by SIAC*

With regard to the approach taken by SIAC – and the British judiciary in general, it is in essence a reflection of the core question asked by the ECtHR, namely whether ‘there are substantial grounds for believing that the person in question would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR’. In accordance with ECtHR jurisprudence, SIAC assesses the presence of such a ‘real risk’ on a case-by-case basis. In interpreting the term ‘substantial grounds’, the UK courts – referring to the ECtHR’s Saadi decision – clarified that this requirement “means no more than that there must be a proper evidential basis for concluding that there was such a real risk.”²⁹¹

It is needless to say that SIAC has over the years acquired quite some experience in reviewing deportation decisions against the UK’s non-refoulement and torture obligations. Specifically with regard to diplomatic assurances, SIAC has set out its general approach in its December 2006 *case of RB. v. Secretary of State for the Home Department*, identifying four conditions that have to be satisfied in order to be able to consider the assurances as ‘credible’ guarantees of safety on return:

²⁹⁰ See “Nationality, Immigration and Asylum Act 2002” referred to in Columbia Law School Human Rights Institute, “Promises to Keep,” 80.

²⁹¹ *AS & DD v. Secretary of State for the Home Department*, United Kingdom: England and Wales Court of Appeal (Civil Division), [2008] EWCA Civ. 289, 9 April 2008, paragraph 24.

- “i) the terms of the assurances had to be such that, if they were fulfilled, the person returned would not be subjected to treatment contrary to Article 3;
- ii) the assurances had to be given in good faith;
- iii) there had to be a sound objective basis for believing that the assurances would be fulfilled;
- iv) fulfillment of the assurances had to be capable of being verified.”²⁹²

How exactly SIAC interprets these four conditions became clear in subsequent decisions, including the 2009 *House of Lords Appeal Judgment in RB (Algeria) (FC) and another v. Secretary of State for the Home Department*.²⁹³ According to SIAC and confirmed by the House of Lords, the first two conditions should be considered as ‘axiomatic’ or self-evident, meaning that SIAC “engages only in a cursory analysis of the text of the assurances”.²⁹⁴ The third condition covers a number of possible situations. In the SIAC decision of *BB v. Secretary of State for the Home Department*, the Commission differentiated between States where the rule of law is firmly established (such as the United States) and States where this is less the case.²⁹⁵

With regard to the former category, there is an implicit general assumption that assurances agreed with the other State will be respected. With regard to the latter category however, it is considered essential to identify other grounds in order to believe that the assurances will be respected. The presence of a ‘*settled political will to fulfill the assurances*’ in combination with ‘*an objective national interest*’ in respecting the assurances are key requirements in this regard. An additional requirement is that the government of the receiving

²⁹² *BB (RB) v. Secretary of State for the Home Department*, United Kingdom: Special Immigration Appeals Commission, SC/39/2005, 5 December 2006, paragraph 5.

²⁹³ *RB (Algeria) (FC) v. Secretary of State for the Home Department*, United Kingdom: House of Lords Appellate Committee, [2009] UKHL 10, 18 February 2009, paragraph 23.

²⁹⁴ See *BB (RB) v. Secretary of State for the Home Department*, paragraph 6; *RB (Algeria) (FC) v. Secretary of State for the Home Department*, paragraph 23; and Columbia Law School Human Rights Institute, “Promises to Keep,” 80.

²⁹⁵ *BB (RB) v. Secretary of State for the Home Department*, paragraph 6.

state must be able “to exercise an adequate degree of control over its agencies, including its security forces”, in order to be able to ensure respect for the assurances.²⁹⁶

With regard to the fourth condition of verification, SIAC affirmed that this could be realized through a number of means (either formal and informal) and a variety of agencies (either governmental and non-governmental). Monitoring has been identified as one mechanism of verification, but alternatives are as likely to achieve this goal. The crucial point however is to strive towards a situation of ‘effective verification’, since assurances which are incapable of being verified are of little value.²⁹⁷

3.2. *An analysis of SIAC’s jurisprudence*

Having set out the approach used by the UK judiciary to assess diplomatic assurances, it is instructive to analyze its practice in the form of the available jurisprudence regarding cases involving deportation with diplomatic assurances. As a recent review of SIAC’s case-law by the European Court of Human Rights in the *Othman (Abu Qatada)* case has demonstrated, SIAC has considered assurances reliable in cases involving Algeria (see *cases of G* (8 February 2007); *Z and W* (14 May 2007) *Y, BB and U* (2 November 2007); *PP* (23 November 2007); *B* (30 July 2008); *T* (22 March 2010); *Sihali (no. 2)* (26 March 2010)). In addition, it has also ruled favourably in the *case of XX* (10 September 2010), involving assurances from the Ethiopian government. With regard to Libya however, SIAC considered the assurances to be insufficient taking into account the volatile nature of the Gaddafi regime and the lack of independent monitoring (*case of DD and AS*, 27 April 2007).²⁹⁸ With regard to Jordan, SIAC has found the assurances compatible with Article 3 of the ECHR both in the cases of *Othman* (26th February 2007) and *VV* (2nd November 2007). In the case of *Othman* however, the UK Court of Appeal judged that he could not be deported since there was a risk that torture

²⁹⁶ *RB (Algeria) (FC) v. Secretary of State for the Home Department*, paragraph 23.

²⁹⁷ *Id.*

²⁹⁸ *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, paragraph 74.

evidence might be used at a retrial in Jordan. In February 2009, the UK House of Lords overturned the Court of Appeal's decision and decided that Othman could be removed, after which the case went to the ECtHR (see Chapter IV).²⁹⁹

In one of the more recent cases before SIAC, the *case of 'U', 'G', 'Y', 'W', 'Z', 'BB', and 'PP' v. Secretary of State for the Home Department*, the Commission was tasked to reconsider the appellants' appeals on the issue of safety on return in light of the decision of the Supreme Court in *W (Algeria) v. SSHD [2012] 2 AC 115*.³⁰⁰ In its concluding remarks, SIAC reaffirmed that "the four conditions identified in §5 of BB are and will be satisfied in the case of these appellants."³⁰¹ While doing this, SIAC also reflected on the European Court of Human Rights Othman (Abu Qatada) judgment:

*"We in turn must now address the factors to which the Strasbourg Court will have regard when considering the reliability of assurances. The obligation on us is to examine whether the assurances provide, in their practical application, a sufficient guarantee that an appellant will be protected against the risk of ill-treatment. We must consider the circumstances and the general human rights situation in the receiving state – in the case of Algeria, disastrous in the 1990s, still imperfect but on an improving trend. In deciding whether or not against that background the assurances can be relied upon, we, like the Strasbourg Court will have regard to the 11 factors set out in §189 of its judgment. This is not a box-ticking exercise, in which each box must be ticked affirmatively. In the end, it is a question of judgment."*³⁰²

SIAC then provided a summary analysis of its interpretation of all these factors in the case at hand, and 'respectfully added' to the ECtHR's list two factors which figure prominently in its own case-law, namely "whether or not the assurances are given in good faith"; and "whether or not it is in the objective national interest of the receiving state to fulfill its assurances."³⁰³

²⁹⁹ Matthew Garrod, "Deportation of Suspected Terrorists with 'Real Risk' of Torture: The House of Lords Decision in Abu Qatada," *Modern Law Review* 73 (2010): 633; Alexander Horne and Melanie Gower, "Deportation of individuals who may face a risk of torture," 11 March 2013, House of Commons Library (SN/HA/4151), 18 – 19.

³⁰⁰ *'U', 'G', 'Y', 'W', 'Z', 'BB', and 'PP' v. Secretary of State for the Home Department*, United Kingdom: Special Immigration Appeals Commission, Open Judgment, 25 January 2013, paragraph 2.

³⁰¹ *Ibid*, paragraph 43.

³⁰² *Id.* (emphasis added by the author).

³⁰³ *Ibid*, paragraph 44.

Its conclusion with regard to the Algerian assurances however remained the same, considering them as reliable in the case at hand.

3.3. Criticisms

A number of criticisms against SIAC's approach have been formulated throughout the literature. One of the core criticisms relates to SIAC's failure to show any substantial awareness of the difficulties relating to the concealment and denial of torture and ill-treatment, as well as the realistic possibility of the use of non-physical and non-visible torture techniques.³⁰⁴ In addition to this, while SIAC has rigorously scrutinized the monitoring arrangements in the various MoU's concluded by the British government – finding them insufficient at various instances – it appears to be reluctant to attach great weight to these findings. The above-mentioned Ethiopian *case of XX v. Secretary of State for the Home Department* is a first example, in which SIAC regarded the appointed monitoring body (being the Ethiopian Human Rights Commission) as not sufficiently politically independent. Combined with the fact that the Ethiopian government excluded other NGO's (including the International Committee of the Red Cross) from visiting Ethiopian detention facilities, this at least pointed towards some problematic features in the design of the MoU's monitoring mechanism. A second example involved the various cases where SIAC has scrutinized and upheld deportation with assurances to Algeria, with the de facto absence of any monitoring mechanism whatsoever in the ad hoc arrangements between the UK and Algeria.³⁰⁵ Here, SIAC reasoned that international NGO's such as Amnesty International have been (and will continue to have) access to such detention facilities and will therefore be able to verify these assurances.³⁰⁶

³⁰⁴ Columbia Law School Human Rights Institute, "Promises to Keep," 81; Eric Metcalfe, "The false promise of assurances against torture," *Justice Journal* 6 (2009): 84 – 85.

³⁰⁵ Columbia Law School Human Rights Institute, "Promises to Keep," 81 – 82.

³⁰⁶ Eric Metcalfe, "The false promise of assurances against torture," *Justice Journal* 6 (2009): 86.

Taking into account the difficulties of detecting torture – even where a monitoring mechanism is in place, it is surprising how little importance SIAC attaches to the flaws in the monitoring design of certain MoUs. Instead, SIAC has opted to defer to the importance of bilateral relations (with the United Kingdom) and the susceptibility of countries to international pressure.³⁰⁷ In light of the European Court of Human Rights insistence on the importance of adequate monitoring arrangements, SIAC's own emphasis on the importance of being able to verify the fulfillment of the assurances in question, as well as the British authorities priding themselves on the 'enhanced character' of their assurances, it appears somewhat contradictory that SIAC does not fully and critically reflect the importance of such adequate monitoring mechanisms in its decisions.

Another point of criticism relates to a crucial issue which has already been discussed at an earlier stage in this chapter, namely the lack of any critical views from the part of SIAC on the absence of any enforcement procedures in the MoUs. As mentioned earlier, the Memoranda of Understanding concluded by the British government are characterized by a fundamental lack of enforcement, compliance or remedy provisions, making it unclear what the consequences are of a possible breach in the assurances. Even though SIAC appears to – somewhat inconsistently (see previous paragraph) – attach a lot of importance to the ability to verify the actual fulfillment of assurances, it has not taken up the same attitude with regard to enforcement of the diplomatic arrangements. Making the comparison with a contract under ordinary law on the one hand and criminal law provisions on the other hand, Metcalfe explained it most strikingly:

“One would think that this lack of any provision for enforcement went directly to the question of the reliability of assurances. We would not say, for instance, that a contract under ordinary law which did not contain any sanction for breach or remedies would be

³⁰⁷ Columbia Law School Human Rights Institute, “Promises to Keep,” 81 – 82.

one that could safely be relied upon in any serious matter. Still less would we take seriously a criminal law that did not provide any punishment for its breach. And yet the absence of any formal provision for enforcement of the assurances drew no adverse comment or note of concern from SIAC."³⁰⁸

The fact that the UK courts have not taken up a more critical position with regard to the lack of enforcement and remedy mechanisms in the MoU's concluded by the British government can certainly be considered as surprising and is in a way, regrettable.

Concluding remarks

The UK's policy of DWA (or deportation with assurances) has been presented by the British authorities as a form of so-called 'enhanced assurances', and this for a variety of reasons. The main reason is that the UK government prides itself on the presence of strong monitoring arrangements in the assurances. The UK's assurances have taken the form of Memoranda of Understanding, broader framework agreements which provide the context for the deportation of individual persons forming a security threat. In doing so, the UK has taken up a leadership role within the EU and the broader Council of Europe region, in a continuous attempt to legitimize the practice.

Not only has the UK taken up a leadership role in the process of promoting and legitimizing the practice of diplomatic assurances, started under former Prime Minister Tony Blair and continuing up until today, but the UK judiciary – especially SIAC – have upheld the UK MoU's in a significant number of cases. In doing this, they have often deferred to the government's arguments relating to the crucial value of bilateral relations and the effectiveness of diplomatic pressure, with rather limited importance being attached to the often occurring flaws in the monitoring schemes. In its jurisprudence, SIAC has developed a test consisting of four conditions, namely whether the assurances have been given in good

³⁰⁸ Eric Metcalfe, "The false promise of assurances against torture," *Justice Journal* 6 (2009): 86.

faith, whether the terms of the assurances are as such that – if fulfilled – the returned person in question would not be subjected to treatment contrary to Article 3, whether there exists a sound objective basis for believing that the assurances will actually be fulfilled, and whether verification of such fulfillment of the assurances is possible. However, the examination of these conditions has been criticized for its cursory manner. In addition, the lack of attention from SIAC for the absence of any enforcement or compliance provisions in the MoUs is striking.

To conclude, the analysis of the United Kingdom's approach to diplomatic assurances certainly reveals the existence of a certain feedback loop of influence between the ECtHR and national-level judiciaries. While it is fairly logical to expect that national tendencies influence the case law of the ECtHR (see for example the numerous references to the existence of an 'European consensus' in ECtHR judgments), it appears that the jurisprudence and guidance developed by the Strasbourg Court also feeds back to national judiciaries in their decisions. In this respect, it is noteworthy that SIAC in one of its more recent cases has turned its attention to the list of evaluation criteria formulated in the ECtHR *Othman* judgment.³⁰⁹

³⁰⁹ *'U', 'G', 'Y', 'W', 'Z', 'BB', and 'PP' v. Secretary of State for the Home Department*, United Kingdom: Special Immigration Appeals Commission, Open Judgment, 25 January 2013.

Conclusion

“There is a real risk that the current reliance on DA’s has gone too far and is endangering the protections under Article 3.”³¹⁰

The focus of the present thesis has been on a legal analysis of the practice of diplomatic assurances against torture and its implications for the principle of non-refoulement. More specifically, the aforementioned analysis has attempted to answer the core question of ‘whether and to which extent instances of state practice regarding diplomatic assurances have had an eroding effect on the fundamental principle of non-refoulement’. On the basis of the extensive research conducted, the following pages will outline some concluding observations.

Firstly, in analyzing where the use of diplomatic assurances originated, it has been demonstrated that while such assurances were already present in the period before 9/11, their application has widened in the post-9/11 era. From the initial, non-controversial use in extradition cases of diplomatic assurances against the death penalty, a new thematic field has emerged over the years, with assurances now also being sought to protect unwanted individuals against torture or ill-treatment when sent back to their country of origin. The often raised claim of an increased use of diplomatic assurances proved however more difficult to verify, given the limited empirical evidence available and the inherent secrecy and fundamental lack of transparency associated with these undertakings. What has become clear however is that there are a number of fundamental challenges associated with the practice of using diplomatic assurances against torture – revolving around a variety of legal, moral and practical elements, which have been raised regularly by various human rights NGO’s and

³¹⁰ Edward Fitzgerald QC, Personal Interview (25th February 2013): 141 (interview on file with the author in Annex I).

other prominent observers. The legal unenforceability of assurances, the inadequacy of using diplomacy as a tool for human rights protection, and problems associated with post-return monitoring mechanisms are only a few examples of these. One can therefore safely say that the use of diplomatic assurances against torture and ill-treatment is a controversial practice in the current-day international law arena.

Secondly, switching to another core concept in our analysis, the principle of non-refoulement has presented itself as a well-established norm in both the area of refugee law as well as general human rights law. Having its origins in Article 33 of the 1951 Refugee Convention, the principle nonetheless allows for certain exceptions – in the form of so-called criminality and national security exceptions, – while on the other hand the 1951 Convention has also specified certain exclusion grounds, which may result in a person falling completely outside the scope of protection provided by this Convention. Certainly these exemptions have been applied in many cases for persons suspected of involvement in terrorist activities.³¹¹ On the basis of the Refugee Convention, it is therefore difficult to label the non-refoulement principle as an absolute norm, since it provides states with a fairly large margin of manoeuvre.

Having said this however, the protection provided by the Refugee Convention has been ‘complemented’ through general human rights conventions, primarily through provisions on the prohibition of torture. A review of the human rights provisions that speak towards non-refoulement through their torture provisions has revealed that these are generally formulated in absolute and non-derogable terms. The protection against refoulement thus clearly goes beyond the simple area of refugee law, and can now be considered as much wider in its application. In short, this situation can be summarized as follows: “[...] the Refugee

³¹¹ Lena Skoglund, “Diplomatic Assurances Against Torture – An Effective Strategy?,” *Nordic Journal of International Law* 77 (2008): 324.

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.”³¹²

While there is still some debate on whether the principle of non-refoulement could be considered a norm of customary international law (and even more on whether it could be considered as ‘jus cogens’), the practical relevance of this debate appears limited in light of the extensive protection regime already present with regard to non-refoulement. Furthermore, such a debate might even entail far greater risks in terms of diluting customary international law.

The largest part of this thesis has been dedicated to an examination of the case law of a variety of human rights bodies, starting with the relevant international human rights bodies (the UN Committee Against Torture and the ICCPR’s Human Rights Committee). Despite the limited jurisprudence available, it has become clear that neither body completely excludes the use of diplomatic assurances as such. While the case law as it stands does not reveal any extensive criteria, both judicial organs have emphasized a case-by-case approach and focused their analysis on whether the diplomatic assurances in question have had an impact on the existence of a ‘personal’ or ‘real’ risk for the person to which they should apply. Furthermore, the importance of post-return monitoring arrangements has been regularly emphasized, while diplomatic assurances have also been characterized as ‘unreliable’ in situations of ‘systematic practice of torture’.

Far greater detail can be found in the European Court of Human Rights’ jurisprudence, which appears to take the same approach as the international human rights bodies in not principally excluding the use of diplomatic assurances as such. The Strasbourg Court highlights the same case-by-case approach, and considers assurances as a ‘relevant factor’ in

³¹² Id.

the assessment of whether a ‘real’ risk of torture or ill-treatment is present. The ECtHR’s approach on the use of diplomatic assurances in situations of a persistent or endemic presence of torture and human rights violations is less clear. While the Court has at some instances cautioned against the use of diplomatic assurances in such situations, it has never gone as far as outlawing the use of diplomatic assurances in situations where there is such a systematic problem of torture.

The richness of the European Court of Human Rights’ case-law has been illustrated by its controversial decision in the *case of Othman (Abu Qatada) v. United Kingdom*, where the court significantly consolidated its case law and clearly spelled out a list of elements which it takes into account when assessing the validity of diplomatic assurances. In addition, the Strasbourg Court also broadened the scope of the protection offered by the principle of non-refoulement to include fair trial concerns (under Article 6 of the ECHR), thereby providing additional barrier for governments in expulsion and extradition cases.

Lastly, since all the cases at the ECtHR originate at national level, it has been instructive to observe the United Kingdom’s leadership role in promoting and attempting to legitimize this practice of diplomatic assurances. Within the framework of so-called ‘Memoranda of Understanding’, diplomatic assurances have been relied upon by the UK in a variety of individual cases. The United Kingdom’s judiciary – especially through the Special Immigration Appeals Commission (SIAC) – has sustained this policy of ‘enhanced’ assurances, and has developed a test of four conditions to assess their validity. Notwithstanding, both the MoU’s as such as well as SIAC’s approach have met with considerable criticisms. It appears therefore that the UK has not been able to defuse several of the fundamental challenges that diplomatic assurances against torture face (as highlighted in the first chapter of this thesis).

In sum, in the absence of an international consensus around the use and legality of diplomatic assurances, it is clearly up to the courts to defend and maintain the integrity of the principle of non-refoulement. While the case-law of relevant international human rights bodies did not really reveal such a trend, the impressive jurisprudence at both the level of European Court of Human Rights and before the UK courts points towards the fact that diplomatic assurances against torture have become a ‘hot issue’ in current day human rights debates. Crucially, none of the jurisdictions that have been analysed in the present research have principally outlawed or labeled the use of these assurances as illegal. While prominent human rights officials have taken such a strong position over the years, the judicial branches did not seem to be willing to go this far. Rather, diplomatic assurances have been considered as a ‘relevant factor’ in the torture / ill-treatment risk assessment exercise that is so fundamental in extradition or deportation proceedings. In other words, these judicial bodies have opted to try to ‘regulate’ and ‘manage’ diplomatic assurances, rather than downright ‘outlaw’ them. Such an approach – whereby diplomatic assurances have indeed been accepted as a ‘relevant factor’ in the risk assessment exercise – already points in the direction of a certain erosion of the non-refoulement principle.

It is also noteworthy that there are clear links between the various levels of jurisprudence, with the UK (as a Council of Europe member state) and the European Court of Human Rights clearly influencing each other in terms of their approaches. The recent ECtHR decision in the *Othman case* indicated that the Strasbourg Court was crucially aware of the need to clarify its jurisprudence on the matter of diplomatic assurances, whether or not due to the relentless pressure from certain member states (such as the United Kingdom). Not only does the ‘regulatory approach’ mentioned above already imply an implicit acceptance of the practice of diplomatic assurances against torture, it also runs the risk to backfire and inspire various other Council of Europe member states to try their luck and deport unwanted persons or

terrorist suspects by means of diplomatic assurances. Whether this will be the case, remains of course to be seen.

Even though the various judicial bodies analysed seem to maintain a strong position with regard to the absolute nature of the prohibition of torture, one could classify their approach regarding the issue of diplomatic assurances as a very ‘realistic’ one. Clearly these judicial mechanisms accept that diplomatic assurances have become a reality and are here to stay. However, in doing so, courts have not acknowledged nor addressed to the fullest extent the challenges associated with the use of diplomatic assurances against torture. More specifically, one would have expected the judiciary to be particularly worrisome about issues such as the legal non-enforceability of these assurances, the difficulties to detect torture as well as the inherent limits in the practical functioning of post-return monitoring mechanisms. Hence, as long as such fundamental issues, which go to the core of the practice of diplomatic assurances against torture, are not adequately addressed – if that can ever be the case – it is very difficult to claim that such a practice can or should be considered compatible with the principle of non-refoulement.

In addition, judicial decisions such as the ones of the European Court of Human Rights in *Othman (Abu Qatada)* – while clearly not such a fundamental ‘turning point’ in the Strasbourg Court’s jurisprudence as often presented – do in the longer run help states to fine-tune their diplomatic assurances’ policies. While judicial clarity is of course to be encouraged and applauded, courts are walking on a thin line here in trying to balance these competing interests of ensuring the continued validity of a fundamental human rights principle such as the one on non-refoulement, with their desire to provide judicial clarity and regulate diplomatic assurances to the greatest extent possible.

To conclude, having reviewed the various jurisdictions mentioned above, the widened use of diplomatic assurances against torture and ill-treatment, the implicit tolerance of these

assurances by the human rights bodies analysed, and their attempts to ‘regulate’ rather than outlaw these diplomatic undertakings, do appear to a certain extent to have an eroding effect on the absolute and non-derogable character of the principle of non-refoulement. However, it remains to be seen whether this controversial issue will continue to be addressed by the judiciary along the same lines in the future, or whether a strong affirmative stance of the obligation not to refoule will become visible in subsequent judicial decisions of these mechanisms.

Annexes

Annex I: Transcript of a Personal Interview with Edward Fitzgerald QC (Monday 25th

February 2013, 3 PM)

1) With regards to the Abu Qatada (Othman) case:

- *Q 1.1: What was the strategy behind litigating in front of the ECtHR on different Articles of the European Convention (Article 3, 5, 6 and Article 13 taken in conjunction with Article 3)?*

“Well, I think the feeling was that they were all good points. We felt that there was a good point under Article 3, and there was a good point under Article 6, Article 5 obviously was slightly more tendential because it involved consideration of pre-trial custody. But certainly on the two main points, Article 3 and Article 6 we thought that there was a very strong case: there was a real risk of torture and there was a real risk of a flagrant denial of justice. I mean, to some extent, Article 3 was a more personal risk obviously, because it was a risk of him actually being tortured. Sometimes you can sort out the problems of Article 6 by saying we give a pardon or we’ll drop the case... you can’t really get rid of the risk of torture. If they wanted to say we’ll give him an advanced pardon or we’ll simply drop the case against him, then we wouldn’t have had an Article 6 argument. So the Article 3 argument was more circumstantial...”

- *Q 1.2: Were you surprised that the ECtHR decided the case on grounds of Article 6 rather than Article 3 of the ECHR? In other words, were you surprised that they*

considered the diplomatic assurances concluded between Jordan and the UK as sufficient to overcome to risk of torture?

“I think you’ll have to remember that we succeeded in the Court of Appeal on Article 6, so it seemed that it was the one point where the court had accepted our arguments before, so naturally we felt that that was in some ways the more obvious point on which we could win, because of the fact that the evidence was obtained by torture almost certainly, and that it was difficult to see how they could put him on trial without using that evidence, so of course we were going much saying that the Court of Appeal got it right. And you got to remember that SIAC made a number of findings which were in our favour, saying that ‘he might well be tortured or subject to inhuman treatment in any way and it might well be that that evidence be admitted in trial’. So we started with quite strong findings in our favour on those points.

So I think when you’re saying ‘was it a surprise that the European Court held in our favour on Article 6’, the answer is ‘no’. Obviously many organisations that intervened were more concerned about the Article 3 point and the assurances. But I think we were always aware that the European Court’s jurisprudence did not rule out assurances. I mean there have been a number of cases where they said that assurances are at least a relevant factor. Although, as you know our argument was that if it’s systematic torture in a particular country, then you should not rely on assurances at all, certainly you should not unless there was very careful monitoring and a whole battery of other safeguards. I mean, you might have a country where it is not systematic but where it happens from time to time, and the question is, is there a risk for the particular individual that can be removed by assurances. Where it is systematic as in Jordan, as you know, many organisations have taken the view that it is simply inappropriate to rely on assurances and indeed the European Court seemed in the case of Ismoilov to be moving in that direction. Our expectation was that that developing jurisprudence would be

relied on, that were there is systematic torture, verified by real monitoring, that you should not rely on assurances at all.”

- *Q 1.3: In your view, what would be the rationale behind such a decision? In the past, the Court’s case law on these issues was fairly straightforward (see *Chahal v UK*, *Saadi v Italy*) in rejecting the use of diplomatic assurances.*

“Yes, I think that it is right. But I think the position is... what we came to the conclusion was that it was always a relevant factor... They certainly never said ‘we won’t rely on it at all’. I think what they were saying was ‘you couldn’t rely on assurances where the killing was as it where out of control in *Chahal*. In other words, beyond and out of control over the rogue elements of the police... That wasn’t really the situation in *Jordan*. Suggestion there was that things were quite under control of the government. *Saadi* just... *Ismoilov* is your best bet if you’re trying to find a developing trend of not accepting... There is a passage in *Izmaelov* which is really quite important and helpful...”

- *Q 1.4: In your research before conducting that trial, did you encounter other instances where the ECtHR reacted approvingly of the use of diplomatic assurances? In other words, was this judgment really groundbreaking or are its seeds somewhere in the past?*

“Well, I think they often cited assurances as a relevant factor. I mean, for example it is now accepted that if for example the US gives an assurance on the death penalty, that you can send people back. I think it depends on how specific it is, how easy it is to monitor it... A lot of the post- *Guantanamo* cases they simply accepted the assurances, for example the

Austrian/German case (Mozaev - the leading case: that was a case where they held that it wasn't reliable, it wasn't possible to rely on diplomatic assurances). There is one where they said that the fact that there was an assurance to dissuade the risk... They have relied on assurances, in the death penalty context they have... Let's have a look here: yeah, so they set up here Ismoilov (paragraphs 69-100), they set up all the reports saying that you can't rely on assurances, they set up the Alzery case, they set up Suresh, Mahjoub... and then they say... "the applicant submitted that, as a matter of law, proper regard had to be given to the international's community criticisms of assurances. We relied on... "the Court's case law, particularly Shamayev and Ismoilov, cited above, demonstrated that, once a particular risk was shown to apply to an individual, assurances would not be sufficient, especially when torture was also shown to be systemic." This is paragraph 168, I think this is probably the key of our argument. "He submitted, therefore, assurances would only suffice where (i) a previous systemic problem of torture had been brought under control; this has not been met in this case."

And then they say on the question: "the Court accepts that ... there is widespread concern as to the practice of seeking assurances. However, it is not for this court to rule on the propriety of seeking assurances, or to assess the long term consequences of doing so." They then say: "In any examination of whether an applicant faces a real risk of ill-treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider." Yes, well Maklov is one... where they relied on assurances. **So we couldn't say that the European Court jurisprudence was one where they simply outlawed reliance on assurances. Indeed, they have relied on assurances in**

numerous cases in the past.³¹³ “More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State’s practices they can be relied upon. And then they look at all the factors... that’s paragraph 189 of the judgment, which I’m sure you are familiar with. So if you look at those factors.... *Al-Moayad v. Germany*, yes that is one where they accepted assurances there from the US to the United States. They accepted them in *Maklov*, which was highly controversial. **So my view is: we didn’t start with the European Court does not accept assurances. We started with’ the European Court has frequently accepted that assurances are relevant factors in determining whether a particular individual is at risk.**³¹⁴ There was however some evidence of a developing jurisprudence of saying ‘you shouldn’t accept assurances where the regime engages in systemic torture and where there is no proper monitoring mechanism’. But they basically said: there were no absolute principles, which was what SIAC said: it is always just a question of fact. ‘Does this assurance in this case, against the background of the practice in that state etc., does it play a part in removing the risk?’

Yes, so they say: “However, consistent with the general approach the Court has set out at paragraphs 187–189 above, the Court must also consider... So I don’t think we were unable to start from the proposition that you can never accept assurances. We were able to say: you shouldn’t accept them where the evidence is of systematic torture and of no real monitoring mechanism. Of course, it’s important also what the assurance relates to: if it relates to the death penalty, you can monitor that quite easily while if it relates to torture, it’s much more difficult to monitor. I mean, for example in *Ahmad and Azouad*, the English courts accepted the assurances that they wouldn’t invoke the Guantanamo regime against them... and the European Court effectively endorsed that that was right.

³¹³ Emphasis added by the author.

³¹⁴ Emphasis added by the author.

So the answer to this question is ‘yes’, Al Moayad was one, in Ahmad they did... there have been a number of cases where they accepted assurances. In Maklov, they accepted that assurances were a relevant factor in reducing the risk to an acceptable level.”

- *Q 1.5: In the ECtHR’s judgment (paragraph 168), you invoke that “assurances would only suffice where (i) a previous systemic problem of torture had been brought under control; (ii) although isolated, non-systemic acts continued, there was independent monitoring by a body with a track-record of effectiveness, and criminal sanctions against transgressors.” Could you give any indication of countries/instances in which these criteria would have been fulfilled? What kind of information would need to be provided in order to ascertain that these criteria are fulfilled?*

“Paragraph 168 of the judgment...I don’t think anything was invented. Yes, I mean... Suresh was the Canadian case where they said that there are difficulties in accepting it when it’s systematic. Ismoilov certainly seemed to help us in that regard. ‘Oncea risk for private individual, assurances not be sufficient, especially when torture is shown to be systemic’ There is a bit in Ismoilov where they actually say that, which we were identifying as evidence of an developing trend against accepting assurances where it was systematic. Well, there is this case where they sort of say ‘you have to show there has been a complete change where there has been a history of systemic abuse’ and although isolated non-systemic acts continued, there was independent monitoring.... Yeah, I mean I think that was just us drawing some conclusions from the jurisprudence and the past cases...”

“We were saying, if it’s systemic, it is always suspect whether you can rely on assurances at all. And you have got to proof that it’s not systemic, and then you probably gotta prove in

addition that you have got a proper monitoring mechanism... and we of course said that there was no proper monitoring system...it was rubbish”

“I don’t know whether there are any countries... for example, there is an argument that in Algeria they have brought it in control... that it was systemic and that it is now under control.”

“It’s not that theoretical because there is a whole body of immigration law in England about the circumstances in which you can say ‘countries changed’. I mean, where there has been a change in the approach to reliance on or the use of torture. What they say in that case law is: ‘if there is evidence of a positive change, then that is relevant.’ Well you know, typically it is when a new regime takes over and says the practices of the past regime are enough and we are not going to use them any longer. If you look in the asylum field, it is full of cases in which they say: ‘ten years ago, we would not have sent someone to Russia or Libya under Gaddafi, and now we will... Also South Africa might well have been one, where you would have said we would not send someone back to the authorities during the Apartheid regime, but you would now. The Guantanamo thing is quite interesting. You would not need assurances in America now that they systematically restricted the use of Guantanamo as prison number 1, they have not gotten rid of it but they did change. So you might say there since our government is come to par... with Obama as a head saying that Guantanamo is really bad, they have changed... you don’t need assurances at all.”

- *Q 1.6: What is your assessment of the criteria that the Court specified in paragraph 189 of the Othman judgment? Do you see any particular problems with specific criteria? Which ones are more problematic?*

“Well, once you accept that it is a **question of fact in every case**³¹⁵, which now does seem to be the approach in both the English and European Courts, that there is no some principle such as the one we were trying ‘if it’s systematic, you should not send someone back’. We were really trying to develop a principle to avoid being sent back by saying if as in this case it’s systemic, and you haven’t even got a proper monitoring mechanism, you shouldn’t send someone back. We were trying to universalize the principle. The criteria are all ok, they are all fairly relevant ones.”

2) *More generally:*

- *Q 2.1: Do you see a trend in this type of cases being increasingly decided on the basis of Article 6 rather than Article 3? Does this weaken the protection for individuals?*
- *Q 2.2: Are you aware of any other cases, either at national level within the UK, or broader in the context of the European Convention of Human Rights, where an attempt at using diplomatic assurances/ diplomatic assurances have been used by governments?*

“Well, you have to understand that in the extradition field it is completely standard. We will not apply the death penalty, we will not detain him in X and Y prison. Look at the Trinidad case of Goodwin Gones... we promised not to put him in Port of Spain prison. The US in Al Mamasar... we will not invoke military order no. 1, we will not lock these people up in Guantanamo. So assurances are part of the daily currency of extradition and deportation cases, particularly extradition. They are very, very frequent. The US are always giving assurances about this stuff. I just have a case coming about extradition to India, where there is some question whether the Indian government abides by the principle of specialty, so they

³¹⁵ Emphasis added by the author.

have send a special assurance... 'we promise that in this case...' It is very, very common. Whenever the Court is tethering, thinking this country looks as if it is not abiding by torture issues or terrible prison record, it often swings the Court in the direction of the requesting country that there is a specific assurance: we will not do X, Y and Z. You know the arguments: where it is a clandestine thing like torture, where once you're there, you cannot get a person back, it is difficult to verify, it's going on such that everybody is covering up, including the requesting state and the destination state, then it is very difficult to monitor these assurances."

"I think one of the factors is: is there a track record of bilateral extradition with assurances and is there a track record of those assurances proving effective. If you have not got years of successful diplomatic relations, and obedience to the principle of specialty or non-torture as it were, well then you start to say: 'hang on, this is not a regime we know very well, or have a great deal of faith in. That is why the assurances in the Gaddafi case, the Libya case didn't work."

- *Q 2.3: In the newspapers, the Othman (Abu Qatada) and Abu Hamza decisions of the ECtHR are often discussed under the same heading. To which extent do you think these cases are comparable?*

"I would say they are pretty different. One, Abu Qatada is a deportation case. The first major difference is that one of them is going to Jordan, which is an established torture regime. The other one is going to America, which despite Guantanamo is not what one would call an established torture regime. It had a period of aberration where it allowed people to be sent to Guantanamo, but no one would call America a systemic torture regime, particularly when

someone is being extradited there. There may be all sorts of rogue things they do to people who are under the radar. But if someone is extradited into the federal court system, the chances of him being tortured, assuming he doesn't go to Guantanamo and goes into the federal court system, are not very high. He is more visible, there are more checks and balances...

So I think the first thing is the destination state. The second thing is obviously Hamza was a full-on extradition for an alleged crime for which the Americans said they had a strong prima facie case. Abu Qatada was being deported because of its undesirability for the English, rather than because they found that any of the charges against him were well-founded. He is not being extradited, he is being deported. But of course there are some parallels: in the sense that a significant section of the British public hates both of them and often tends to treat them in the same category."

- *Q 2.4: Related to the previous point, some commentators spoke of a 'turn around' in the ECtHR's approach to the question of extradition. Would you agree with them on this?*

"I think they always have been pretty in favour of extradition to fellow friendly states. Soering obviously is a very important decision, but it was a fairly one off case, in that he was young, could have been tried in Germany and all that."

- *Q 2.5: Is there any reason why the UK is so active, amongst others before the European Court, in insisting on the use of diplomatic assurances, and is there any specific reason for it? Because most of the cases come from the UK and they also intervene in most of the other cases.*

“I think the position is that it was identified first by Tony Blair as a major issue that we could not deport or extradite people who face torture. Therefore, he introduced this policy of extradition and deportation with assurances, so it was very much a policy that had the full support of the then Prime Minister. For that reason, it was driven on a lot: this kind of let’s look at ways in which we can persuade these torture states to play fair at least when they take people from us. And they probably did invest a great deal of time and money in it, because it was coming straight from the top, Blair saying: you must be able to get rid of these people! I think that’s why it became such a big thing, it was a whole programme of diplomats going around to try and obtain these assurances of the Middle East and a lot of political capital was spent on it.”

- *Q 2.6: More generally, would you rather support the ECHR’s classical approach related to the use of diplomatic assurances, with a strong emphasis on the prohibition of torture? Or would you deem a certain evolution in the Court’s approach appropriate? If yes, in which direction?*
- *Q 2.7: Do you observe any increase in the use of diplomatic assurances by states in general, and/or by the UK in particular?*

“When you say increase, I think it is really interesting. I think there always have been assurances, but perhaps it is true that because there was deportation with assurances as a policy, that we started to under Blair aggressively pursue a policy of assurances, so it became a cornerstone of our foreign policy, it became a really important point. Become friendly with the Gaddafi’s of these worlds and get assurances from them. Hence the deals with Gaddafi, Algerians, Egyptians, Syrians, Jordanians...”

- Q 2.8: *If I would ask you the questions whether you think diplomatic assurances erode the principle of non-refoulement, what would you say?*

“Are they bad for human rights protection? All these people wouldn’t necessarily be people protected by having asylum status, but they certainly are people whose human rights would be at risk if they were deported or extradited. Yes, too great reliance on diplomatic assurances... What we have to have is not some blind assertion that this is a friendly power and we should accept their word, but a rigorous investigation in every case: do the assurances actually meet the risks? Are they reliable? Is the state one where in the end if it is just not in their interest to continue to respect assurances, they will be quite happy to kill, torture or unfairly trial and just take the flat from England.”

“I have to say, judges are no better than anybody else in predicting these things. It is quite instructive to see what happened with the Gaddafi thing, although in the end they did send them back, but the foreign office representative was coming to court, very convincingly and honestly saying ‘I think Gaddafi has changed and he will not torture all these people, he will not mistreat them and he will give them a fair trial, because he really respects his relationship with the English.’ Well, a couple of years later we were at war with him... if we had sent lots of opposition people back and they would have been sitting around in the prisons, the moment the uprising started, he would have killed them. And the fact that we had or we thought we had a very good relationship with Gaddafi two years before or 10 years before, would have been no guarantee for them under that situation, they probably would have been the first to be lined up and shot, and I think some of them were actually, of the Gaddafi opposition. Some of these countries are very volatile. That maybe another thing you build in: it’s one thing to accept assurances from a very stable country like the United States, where

there is some constancy in governance and people can therefore see the long term damage done by not sticking to assurances. But you get some regime that has just been newly elected and wants to take a popular stand on something, and there is some frightful terrorist or some frightful alleged kind of murderer facing charges, and they decide that it would look good and discourage others if we have a very impressive show trial and person is convicted.”

“There is a real risk that the current reliance on DA’s has gone too far and is endangering the protections under Article 3.”

- *Q 2.9: As a concluding note, and more philosophically, States seem to have difficulties in the post 9/11 era in finding the right balance between security and human rights when it comes to dealing with terrorism suspects. What type of approach would you recommend?*

“I think I would approach it as follows: ‘do not sacrifice human rights for the perceived increase in security, because it is often a very self-defeating approach. The kind of breaches of human rights alienate more of the targeted population that you are concerned about, it gives us a moral weakness when we are condemning people: people just sort of say: everybody tortures, everybody does this and does that, even the British are not too tender about the law. I think it is a disaster for Europe in the wake of 9/11 that countries were deporting and extraditing without regard for due process and without regard to these kind of protections. No doubt about it that France, Italy were definitely deporting some very suspect cases.”

“Just looking at the kind of current populist attack... There is this kind of very strong populist line: we have got to get tough on these terrorists, and these human rights are holding us back. I do think that one, there are plenty of things one can do without deporting to terror regimes. You can have your own form of control order. We obviously need to have some form of restricted control order now, which is not excessively intrusive. If a person really has committed a transnational crime or poses a terrorist threat, usually some crimes are also justiciable here and can be dealt with. I think the idea that ‘unless we can send people back to torture regimes, there is nothing we can do about it’, is usually rubbish. There is plenty you can do about it with people that really pose a threat, but that falls short of sending them back to torture regimes.”

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