

Standards of Diplomatic Assurances? A Comparative Study of the Impact of Diplomatic Assurances Against Torture on Risk Assessment in Refoulement Cases

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To all who helped.

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EXECUTIVE SUMMARY

This thesis focuses on the practice of states widely used in the context of fighting against terrorism, which, in order to remove persons identified as posing a threat to national security or wanted on the basis of terrorism charges want to remove the individuals to countries where they might face torture or other ill-treatment. In order to avoid breaching their obligations under the international human rights law known as the principle of *non-refoulement*, the states seek to safeguard that the individual's human rights will be respected upon removal by engaging in bilateral agreements known as diplomatic assurances.

The international and regional human rights judicial bodies have not ruled out the use of diplomatic assurances despite the criticism from various actors of international human rights movement. The bodies consider it as a one factor among many in the risk assessment they employ to establish whether a specific removal would violate the prohibition of *refoulement*. The thesis examines selected case law of the Committee Against Torture, the Human Rights Committee and the European Court of Human Rights in order to establish to what extent these authorities develop a certain set of standards of diplomatic assurances, and how this standardization impacts the risk assessment procedure.

The thesis concludes that certain standardization is visible at both levels. However, the degree and type of the standardization varies – the international level exhibits the tendency to reactively define the elements missing from the assurances presented for the examination, while the European Court of Human Rights has proactively developed a certain set of criteria. This impacts also the consideration of factors in the risk assessment – the international level maintains that the state of human rights in the receiving country together with the personal status of the individual is the most important factor. In contrast, if the assurances examined before the European Court of Human Rights comply with the established criteria, they might prevail over the other factors.

LIST OF ABBREVIATIONS

- CAT Committee: UN Committee Against Torture
- CoE: Council of Europe
- ECHR: European Convention on Human Rights
- ECtHR: European Court of Human Rights (the Court)
- EU: European Union
- GID: General Intelligence Directorate (here: Jordan)
- ICCPR: International Covenant on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- MoU: Memorandum of Understanding
- NGO: non-governmental organization
- OAS: Organization of American States
- OAU: Organization of African Unity
- SIAC: Special Immigration Appeals Commission
- UK: United Kingdom
- UN: United Nations
- UN CAT: United Nations Convention Against Torture
- UNHCR: United Nations High Commissioner for Refugees (The Refugee Agency)
- UN HRC: United Nations Human Rights Committee
- US: United States of America

Introduction

After the attacks of September 11, 2001, the constant threat of a possible terrorist attack looms over the world and the “War on Terror”¹ has become a part of our lives. Based on the climate of fear terrorism is creating, consideration of human rights in counterterrorism measures is often suppressed. The danger of counterterrorism policies often is hidden in their expanded power for which there is no adequate control. In some cases, this allows states to resort, in the name of counterterrorism, to methods infringing on a variety of human rights, often even those of their own citizens. States even more frequently balance human rights of persons suspected from terrorism with the perceived threat these persons pose to national security. This exercise more often than not results in infringement on individual human rights. As a result, the conflict between the national security interests of the state and its human rights obligations becomes very pronounced.

The present thesis works with this conflict. The underlying theme centers on the measures states take to safeguard national security in the context of the war on terror, in the light of the states’ international human rights obligations. Specifically, this thesis focuses on removals of persons identified as posing a threat to national security. Historically, such removals have been used as a valuable counter-terrorism measure, the usage of which has grown after September 11, 2001.² This measure allows the sending state to “get rid” of a dangerous person and send a strong message to the public. However, such transfers are governed by human rights instruments. Known as the principle of *non-refoulement*, interrelated with the prohibition of torture, states are not to expel a person to a country where there are substantial grounds to believe that she would be in a real risk of torture or other ill-

¹ New York Times, President Bush’s Speech on Terrorism, September 6, 2006, available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&r=0, accessed 7 March 2014. The thesis works with the concept “war on terror”, or fight against terrorism.

² Manfred Nowak, Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, (New York City: Oxford University Press, 2008), p.212

treatment.³ Therefore, states have searched for measures to solve the arising clash between their bilateral obligations and international human rights treaties. Among others, use of diplomatic assurances has become popular, especially after September 11, 2001. The instrument provides a way for a state to protect their national security and avoid an underlying conflict with the principle of non-refoulement. International and regional courts have accepted the practice of using diplomatic assurances against torture and consider it is one factor among several others when performing the risk analysis, which determines whether the principle of non-refoulement would be violated after return.

Literature review

The human rights movement, especially the international non-governmental organizations (NGOs/INGOs) and some of the representatives of the movement, are skeptical about the effect of diplomatic assurances on the treatment of returned persons. They warn against the reliance on guarantees, or outwardly reject them as unreliable and weakening the prohibition of *refoulement*.⁴ Academics however, vary in their position. For example, Manfred Nowak emphasized their unreliability numerous times.⁵ Lena Skoglund also warned before the development of standards in diplomatic assurances that the protection would be still unreliable.⁶ Constanze Schimmel considered that assurances could be reliable under certain circumstances. However, she remained skeptical about the political will of states to

³ The Article 33(1) of the Refugee Convention prohibits transfer of a person to a territory where she may face persecution on grounds of race, religion, nationality, membership of a particular social group, or political opinion, or where she may be onward removed to another State where there exists a risk of persecution for one of the five aforementioned reasons. Convention Relating to the Status of Refugees (1954) and Protocol Relating to the Status of Refugees (1967), Article 33 (1), available at <http://www.unhcr.org/3b66c2aa10.html>

⁴ See for example reports of Human Rights Watch, '*Still At Risk: Diplomatic Assurances No Safeguard Against Torture*', (2005) Vol. 17, No. 4, or report of Amnesty International, '*Dangerous Deals: Europe's Reliance on Diplomatic Assurances Against Torture*', (2010), EUR 01/012/2010

⁵ See Manfred Nowak, 'Challenges to the absolute nature of the prohibition of torture and other ill-treatment' (2005) 23 *Netherlands Quarterly of Human Rights*, p. 688

⁶ Lena Skoglund, 'Diplomatic Assurances Against Torture – An Effective Strategy?' (2008) 77 *Nordic Journal of International Law*, p. 362

make them legally binding.⁷ On the other hand, international or regional courts have not yet ruled against diplomatic assurances. Considering them as one factor in a risk assessment pertinent to the principle of non-refoulement, they do not dismiss their importance.

Research question

The present thesis aims to examine, from a legal point of view, the position of international and regional human rights bodies towards diplomatic assurances against torture. It answers the following research questions: *R1: To what extent do international and regional human rights bodies increasingly develop standards of diplomatic assurances in the context of the war on terror?* And *R2: To what extent does the standardization affect the importance the international and regional human rights bodies award to diplomatic assurances against torture in the risk assessment?* This thesis presupposes that all bodies to a certain extent implicitly or explicitly identify a set of criteria that would pass their scrutiny and would be assessed as a satisfactory safeguard from the risk of torture or other ill-treatment in the receiving country. Moreover, this thesis suggests that where specific standards have been developed, there is a certain visible shift in the importance the bodies award diplomatic assurances in their risk assessments.

Definition of terms

The present thesis is focused only on the diplomatic assurances issued in the context of the prohibition of torture or other ill-treatment. Other uses of diplomatic assurances, which aim to safeguard other rights, such as fair trial, or prohibition of death penalty, fall out of the scope of this thesis. This thesis works with the definition of diplomatic assurances established in the UNHCR note on Diplomatic Assurances as “*an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the*

⁷ Constanze Alexia Schimmel, 'Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment?' (2007) 3 *Human Rights Law Commentary*, pp. 27, 29

sending State or, more generally, in keeping with its human rights obligations under international law.”⁸

This thesis works with four types of *regular* inter-State transfers of prisoners – *deportation, extradition, transport, and transfer*, as defined by the Opinion of the Venice Commission on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners.⁹ *Deportation* is defined as “the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial.”¹⁰ *Extradition* is defined as “a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence.”¹¹ *Transit* “is an act whereby State B provides facilities for State A to send a prisoner through its territory.”¹² Finally, *transfer of sentenced persons* means removal “for the purpose of serving their sentence in their country of origin.”¹³ To generalize the terms, the present thesis uses *removal, return* or *transfer*. Irregular inter-State transfers, such as extraordinary renditions fall outside the scope of the present thesis.

The concept of *standardization* of diplomatic assurances is defined according to the definition of standard provided by Black’s Law dictionary: “a criterion for measuring acceptability, quality, or accuracy.”¹⁴ Standardization of diplomatic assurances by international or regional human rights bodies thus refers to systematization, or a development

⁸ The United Nations Refugee Agency (UNHCR), ‘*Note on Diplomatic Assurances and International Refugee Protection*’, Geneva, August 2006, p. 2

⁹ European Commission for Democracy through Law (the Venice Commission), ‘*Opinion on the International Legal Obligations of Council of Europe Member States In Respect of Secret Detention Facilities And Inter-State Transport of Prisoners*’, Opinion no. 363 / 2005, CDL-AD(2006)009, Strasbourg, 17 March 2006, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)009-e), accessed 5. October 2014, p. 4

¹⁰ *Ibid.*, p. 4

¹¹ *Ibid.*, p. 5

¹² *Ibid.*, p.6

¹³ *Ibid.*, p.7

¹⁴ Black’s Law Dictionary (9th ed. 2009), “standard”

of a certain set of criteria, or requirements, according to which the bodies examine assurances provided by the states and rule on their acceptability.

Methodology and structure of the thesis

Methodologically, the thesis analyses primary and secondary sources. Primary sources include the international conventions and treaties concerning prohibition of torture and other ill-treatment, including the principle of *non-refoulement*. Another primary source is the case law of selected jurisdictions, namely the Committee Against Torture (CAT), the Human Rights Committee (HRC), and the European Court of Human Rights (ECtHR). Supported secondary literature includes scholarly articles focusing on the use of diplomatic assurances, commentaries, and reactions of international human rights organizations.

This thesis is structured as follows. The first chapter defines the concept of diplomatic assurances against torture, the scope of their use, and presents an overview of the main criticism. Following that is legislative background which provides an overview of international documents addressing the principle of *non-refoulement*, including international and regional agreements.

The second chapter presents selected case law of the jurisdictions. In total, the thesis examines ten cases: five at the international level and five at the regional level. All cases were submitted and decided by the bodies after September 11, 2001. Detailed factors for selecting particular cases are available in the overview of the second chapter. The third chapter contains a selective analysis of the described case law– the cases are compared within their jurisdictions. Afterwards, an international and regional approach is compared on a horizontal level. The fourth and final chapter provides extensive conclusions and answers to the research questions.

By ascertaining to what extent the international and regional human rights bodies have been developing requirements for assurances following the intensified fight against

terrorism after September 11, 2001, and how such standardization can impact the risk assessment, the present thesis adds to increasingly developing work on diplomatic assurances on torture in the context of fight against terrorism. Its main contribution lies in focusing on a legal point of view as opposed to many scholarly articles and reports of the international human rights organizations, which direct their attention more on the negative impact of the diplomatic assurances on the prohibition of *refoulement*.

1 Legislative framework

The following chapter being by defining the diplomatic assurances, including their form and situations in which they are mostly used. A specification of major concerns of the international human rights community follows. This thesis then introduces the principle of *non-refoulement* as anchored in the international and regional human rights agreements.

This thesis uses descriptive analysis of primary and secondary sources. Specifically, the section on diplomatic assurances uses mostly scholarly articles and reports of international human rights organizations. The section defining the principle of *non-refoulement* summarizes international and regional human rights agreements.

This chapter sets a legislative background for the thesis, identifying the principle of *non-refoulement*, and the relevance of diplomatic assurances, which are considered by international and human rights bodies as one factor among others in the risk analysis.

1.1 Diplomatic Assurances

1.1.1 Definition, form, content

According to the United Nations Refugee Agency (UNHCR), diplomatic assurances are “undertakings”¹⁵ between the sending and receiving state ensuring that the standards of human rights protection in the sending state will be upheld after the transfer in the receiving state, or that the obligations of the receiving state towards human rights instruments will be kept.¹⁶

The form of how such promises are drafted varies. They can be oral promises, or written documents, approved by both governments’ officials. Their content also differs, combining promises of guaranteeing prohibition of torture and other ill-treatment with securing other rights, promising adherence to international legal human rights obligations, or

¹⁵ The UNHCR, ‘*Note on Diplomatic Assurances and International Refugee Protection*’, supra note 8, p. 2

¹⁶ Ibid., supra note 8, p. 2

arrangements to monitor after return.¹⁷ Usually, assurances are sought with regard to one particular individual, on the basis that this individual is identified as a national security threat.¹⁸

1.1.2 States' practice of seeking diplomatic assurances

States have been using diplomatic assurances, also called guarantees, for a long time, especially in the extradition cases, where the transfer of an individual would otherwise violate responsibilities of the sending state under international human rights obligations.¹⁹ Historically, the practice of drawing diplomatic assurances has concerned the cases where the individual would potentially be subject to the death penalty punishment in the requesting state.²⁰ Assurances have been widely used by European states, due to the abolishment of such practice in the European countries. Subsequently, transferring a person to a country that still uses the death penalty would give rise to a violation of Article 2, and/or 3 of the ECHR. Human Rights Watch has noted the use of assurances against death penalty sentences, as it “simply acknowledges the different legal approaches of two states.”²¹ Whilst these assurances have been relatively unquestioned by the international authorities, guarantees against torture have raised controversy among scholars, international organizations, and other international authorities.

Diplomatic assurances against torture are, on the other hand, sought in order to avoid violations of international agreements, which prohibit treatment that is secret and not easily detected.²² Moreover, the fear from harsh retribution prevents the victims of torture from

¹⁷ Human Rights Watch, “*Diplomatic Assurances*” against Torture: Questions and Answers’, 2006, p. 1

¹⁸ UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, supra note 8, p. 3

¹⁹ Ibid., p. 2

²⁰ As Alice Izumo explains, European countries have sought diplomatic assurances against the death penalty from receiving countries due to the effective abolishment of the practice in Europe. Alice Izumo, ‘Diplomatic Assurances against torture and ill treatment: European Court of Human Rights jurisprudence’ (2010), 42 *Columbia Human Rights Law Review*, p.236

²¹ HRW, “*Diplomatic Assurance*” Against Torture, supra note 17, p.2

²² Ibid., p.3

disclosing that they had been subjected to torture.²³ Contrary to acknowledged practice of assurances against the death penalty, Human Rights Watch considers assurances against torture as “worthless”²⁴.

Scholars and international organizations have noted a rise in the usage of diplomatic assurances against torture within the context of the fight against terrorism.²⁵ However, the exact number of cases in which states resorted to diplomatic assurances since 9/11 is difficult to ascertain, as the states are not compelled to disclose the process or outcomes of negotiations about diplomatic assurances and it is often kept secret.²⁶ It has been noted that many western governments are keen users of diplomatic assurances, including the United States, Sweden, Germany, Italy, Spain, the Netherlands, Russia, and the United Kingdom.²⁷ Because the exact number of cases in which the assurances were used is not known, Kate Jones, a proponent of the practice, denied that the usage of guarantees is increasing. In the case of the UK, she argues that they are used as a tool of last resort in “cases in which prosecution is not an option and the individual cannot otherwise be deported.”²⁸ The exact number of cases in which diplomatic assurances have been used is not known. However, it is irrelevant for the research in the present thesis.

Generally, diplomatic assurances are in many cases negotiated and developed on a case-by-case basis, encompassing the treatment of an individual or a number of individuals in one

²³ HRW, “*Diplomatic Assurance*” *Against Torture*, supra note 17, p.1

²⁴ Ibid., p.1

²⁵ See for example, C. Schimmel, supra note 7, p.10. Lena Skoglund mentions increased identifications of persons suspected of terrorism and consequently, increased reasons to remove these persons to countries despite the risk of torture. L. Skoglund, supra note 6, p.320, 332. See also Human Rights Watch, „Diplomatic Assurances“ *Against Torture*, supra note 17, p.1

²⁶ Skoglund, supra note 6, p.332. The CAT has requested more detailed information about the cases in which diplomatic assurances were used from the states, such as the exact number and nature of the cases. See Committee Against Torture, ‘*Conclusions and Recommendations: Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland*’, CAT/C/CR/33/3, 10 December 2004, available at <http://www.refworld.org/publisher/CAT,,GBR,42cd6d8d4,0.html>, accessed 20. September 2014

²⁷ M. Giuffré, ‘An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom’, (2012), *International Human Rights Law Review* (2013), p. 279. See also Human Rights Watch, ‘*“Diplomatic Assurances” against Torture*’, supra note 17, p. 10

²⁸ Kate Jones, ‘Deportations with Assurances: Addressing Key Criticism’, (2008) 57 *The International and Comparative Law Quarterly* 1, p. 184

particular transfer.²⁹ With the increased usage of assurances against torture, the United Kingdom has negotiated more permanent bilateral agreements with several states, which contain general provisions and allow states to engage in additional, individualized promises regarding specific cases.³⁰ Apart from standardizing diplomatic assurances on the national level, the government of the United Kingdom has together with other states advocated for a regional standardization of the usage of diplomatic assurances against torture on a regional level. The Steering Committee of the Council of Europe with expertise in the fight against terrorism, has, however, decided against development of an instrument which would standardize the use of diplomatic assurances.³¹ According to the opinion of the Committee, such guidelines could be perceived as weakening the absolute prohibition of torture and a legitimization of the use of the assurances.³² Moreover, the Committee had also stressed the duty of states to assess the reliance on diplomatic assurances individually.³³ A clash of stances towards standardization is visible - whilst states are engaging in more permanent types of diplomatic assurances, a regional body has expressed reluctance to officially endorse the practice by establishing any certain set of standards.

1.1.3 Main criticism against the use of diplomatic assurances

Apart from the CoE Steering Committee on Human Rights, many prominent scholars, members of the international human rights community, and international organizations have either straightforwardly called for rejection of the practice, or have voiced their skepticism

²⁹ Vassilis Pergantis, 'Soft Law: Diplomatic Assurances and the Instrumentalisation of Normativity: Wither a Liberal Promise?' (2009) *Netherlands International Law Review*, p. 150

³⁰ First such agreement, the Memorandum of Understanding (MoU) was conducted between the UK and Jordan in 2005, followed by similar memoranda with Ethiopia, Algeria, Morocco, or Libya. See Foreign and Commonwealth Office, '*Memoranda of Understanding on Deportations with Assurances*', available at <https://www.gov.uk/government/collections/memoranda-of-understanding-on-deportations-with-assurances>, accessed 15. September 2014

³¹ Council of Europe Steering Committee for Human Rights (CCDH), Group of Specialists on Human Rights and the Fight Against Terrorism: '*Meeting Report*', 2nd Meeting, 29-31 March 2006, available at http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf, p.15

³² *Ibid.*, p.15

³³ *Ibid.*, p.13

toward diplomatic assurances against torture. The criticism, which follows in a short overview, presents a set of issues that have been commonly voiced by the majority of international human rights society and includes one controversial issue on the legal nature of assurances.

Manfred Nowak, the former UN Special Rapporteur on Torture, has strongly criticized the practice of using diplomatic assurances. He concluded that they “are nothing but attempts to circumvent the absolute prohibition of torture and refoulement.”³⁴ He argued that the countries which seek diplomatic assurances against torture, implicitly acknowledge that the requesting state does not obey its international obligations.³⁵ On the contrary, Kate Jones, in her defense of reliance on diplomatic assurances sought by the UK, argued that non-compliance with bilateral agreements could seriously hurt the relationship between the states.³⁶ Therefore, the state from which the assurances are sought is more willing to comply with the assurances and maintain good relations, rather than comply with the multilateral international human rights agreements where breach would not have such serious effects.³⁷

Noll considered the importance of bilateral relationships between states crucial for the fact that neither of the parties would admit that the assurances were breached. He explained this phenomenon with the example of the position of a diplomat tasked with monitoring the compliance with assurances.³⁸ On one hand, the diplomat monitors the situation of the detainee, looking for signs of torture and acting as “an emissary of human rights protection.”³⁹ On the other hand, he is tasked with obtaining any evidence against the applicant which was extracted by torture. As a diplomat, he is also tied to the receiving

³⁴ Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (Mr. Manfred Nowak), 23 December 2005, UN Doc. E/CN.4/2006/6, p. 10

³⁵ M.Nowak, ‘Challenges to the Absolute Nature of the Prohibition of Torture’, supra note 5, p. 687

³⁶ Kate Jones, supra note 28, p. 188

³⁷ Ibid., p.188

³⁸ Gregor Noll, ‘Diplomatic Assurances and the Silence of Human Rights Law’, (2006), *Melbourne Journal of International Law* 7, p.122

³⁹ Ibid., p.122

country by the virtue of his function. Therefore, his choices are limited to either admit the failure of compliance with the assurances, or to keep it to himself and breach his own obligation to monitor the compliance with assurances.⁴⁰ An effective monitoring mechanism has also been in the center of discourse regarding diplomatic assurances.

Lena Skoglund analyzed the possibility of establishing an effective monitoring mechanism of diplomatic assurances.⁴¹ She acknowledged that the monitoring should be performed by an independent, preferably large international organization, which has both expertise and a capacity to perform the monitoring. However, well-established international organizations are not willing to perform such task.⁴² On the other hand, smaller and not well-known organizations, while willing, raise subsequent questions of lack of expertise or possible compromised independency, both from the receiving state and financial provider.⁴³ Moreover, as pointed out in the report by Human Rights Watch, monitoring of a person who has been a subject to diplomatic assurances lacks confidentiality.⁴⁴ The victim can be easily identified by the perpetrators of torture and may become subject to harsh retributions. Shared with many critics, assurances thus create double standards in the treatment of detainees, dividing them into those under the protection of assurances and the other ones, who are not protected from such treatment.⁴⁵ The above-enumerated concerns have been commonly shared among international scholars and organizations. The legal status of assurances is, however, widely disputed.

The debate is mainly focused on the impact of assurances on the overall mechanisms of the protection of human rights. Pergantis suggested that if assurances merely reiterated a

⁴⁰ Ibid., p.122

⁴¹ Skoglund, *supra* note 6, p.357-359

⁴² Ibid., p. 358

⁴³ Ibid., p.358

⁴⁴ HRW, “*Diplomatic Assurances*” *against Torture*, *supra* note 17, p.1

⁴⁵ See, among others, Manfred Nowak, ‘Challenges to the Absolute Nature of the Prohibition of Torture’, *supra* note 5, p.687

state's international obligations, it would be quite "bizarre"⁴⁶ to consider them as non-binding, as opposed to binding obligations, which the assurances simply repeat.⁴⁷ On the other side, if the assurances went beyond repetition of the state's obligations, their binding legal status might endanger current human rights protection mechanisms by creating a "parallel"⁴⁸ system.⁴⁹ Gregor Noll strongly advocated in line with the second position, arguing that assurances are binding in cases where they exceed international agreements, such as in introducing a monitoring mechanism. Otherwise, they would be "quite meaningless."⁵⁰ Therefore, he presumes that "states generally intend to create *binding* obligations when giving and receiving [such] diplomatic assurances."⁵¹ Lena Skoglund was less explicit in her position. Referring to documents governing the international law, she concluded that diplomatic assurances "*may* qualify as a binding treaty, provided that was the intention of the states."⁵² Others have argued that diplomatic assurances are non-binding, and cannot be enforced.⁵³ Although Kate Jones also claimed that assurances are not binding, she rejected that they were also unreliable.⁵⁴ As explained above, she argued that breaching of assurances could have severe outcomes on the strength of mutual relations between the countries.⁵⁵ As will be shown later, international human rights judicial bodies have not yet attempted to answer this question, nor have they considered it as relevant when assessing the importance of diplomatic assurances.

⁴⁶ Pergantis, *supra* note 29, p. 151

⁴⁷ *Ibid.*, p. 151

⁴⁸ *Ibid.*, p. 151

⁴⁹ *Ibid.*, p. 151

⁵⁰ Noll, *supra* note 38, p.113-114

⁵¹ *Ibid.*, p.114, emphasis added

⁵² Skoglund, *supra* note 6, p.335, emphasis added

⁵³ See, for example reports of the Human Rights Watch, '*Diplomatic Assurances*' *against Torture*, *supra* note 17, p.4, Amnesty International, 'Dangerous Deals', *supra* note 4, p.5, or Manfred Nowak, 'Challenges to the Absolute nature of Torture', *supra* note 5, p. 687

⁵⁴ Kate Jones, *supra* note 28, p.188

⁵⁵ *Ibid.*, p.188

1.1.4 *The position of international human rights organizations and representatives of human rights movement*

International organizations, namely Amnesty International and Human Rights Watch lead the opposition by international human rights organizations against assurances. Both have issued numerous reports, reiterating similar criticism voiced by scholars, such as their unreliability. Additionally, they provide numerous examples of cases in which promises were not kept. Of particular interest is the report of Human Rights Watch from 2004 serving as a comprehensive guide on diplomatic assurances.⁵⁶ Both international organizations have repeatedly voiced that reliance on the diplomatic assurances against torture undermines the absolute prohibition of *refoulement*.⁵⁷ The main representatives of the human rights movement, such as the UN Commissioners for Human Rights, or Special Rapporteurs on Torture or Counter-terrorism, have expressed their opinion on the practice of using diplomatic assurances.

The UN High Commissioners for Human Rights, Louise Arbour and Navanethem Pillay have voiced their firm opposition, arguing against the eroding impact of assurances on the prohibition of *non-refoulement*. Louise Arbour labeled diplomatic assurances in transfers as “having an acutely corrosive effect of the global ban on torture ...”⁵⁸ In a similar tone, her successor, Navanethem Pillay, urged states not to seek diplomatic assurances, stressing the need to obtain more information on this practice.⁵⁹

Theo Van Boven, a Special Rapporteur on Torture had, in the immediate aftermath of September 11, 2011, recognized the practice, yielding to a possibility to extradite a terrorist

⁵⁶ Human Rights Watch, ‘“Empty Promises:” Diplomatic Assurances No Safeguard against Torture’, (2004), Vol 6, No 4

⁵⁷ See HRW, ‘“Empty Promises”’, supra note 56, p. 37, HRW, ‘“Diplomatic assurances” against Torture’, supra note 17, p.7, Amnesty International, ‘“Dangerous Deals”’, supra note 4, p.6

⁵⁸ Statement by the United Nations High Commissioner for Human Rights Louise Arbour, Human Rights Day, New York, 7 December 2005, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E> , accessed 15. September 2014

⁵⁹ Navanethem Pillay, ‘United Nations High Commissioner for Human Rights to the Counter-terrorism Committee of the Security Council’, UN Address by New York, 29 October 2009, pp. 8, 9, available at http://www.un.org/en/sc/ctc/docs/rights/2009_10_09_hchr_brief.pdf, accessed 15. September 2014

suspect in case there was an “unequivocal guarantee”⁶⁰ that her or she would not be tortured or subjected to other ill-treatment and an effective monitoring mechanism is in place.⁶¹ However, he also strongly emphasized the obligation of states to adhere to the principle of *non-refoulement*. Later, he amended his position and strongly reaffirmed that national security interests cannot prevail over the prohibition of torture and other ill-treatment, which is absolute.⁶² As already mentioned, Manfred Nowak was among the strongest critics of the practice. Nowak's successor, Juan Méndez, followed his position, emphasizing the duty of states to respect the principle of *non-refoulement*.⁶³ In line with Nowak's position, he strongly argued that assurances were unreliable, and useless in the prevention of torture.⁶⁴

The UN Special Rapporteur on Counter-Terrorism and Human Rights, Martin Scheinin, joined the Special Rapporteurs on Torture and reiterated that assurances do not alleviate the responsibility of state to individually evaluate the potential risk of violation of prohibition of torture and other ill-treatment upon return.⁶⁵ In the most recent case of sending a former Guantanamo detainee to Algeria, both current rapporteur on Counter-Terrorism Ben Emerson and Special Rapporteur on Torture Juan Méndez expressed deep concern over reliance on diplomatic assurances. They jointly reaffirmed a strong position against usage of diplomatic assurances in such cases, emphasizing that “diplomatic assurances are unreliable and ineffective in protecting against torture and ill-treatment and States should never resort to

⁶⁰ Theo van Boven, ‘Question of torture and other cruel, inhuman or degrading treatment or punishment - Report of the Special Rapporteur’, 2 July 2007, UN Doc: A/57/173, para. 35

⁶¹ Ibid. para. 35

⁶² HRW, “‘Empty Promises’: Diplomatic Assurances No Safeguard against Torture,” supra note 56, p. 7

⁶³ Statement by Mr. Juan E Méndez, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council 16th session, 7 March 2010, available at http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf, accessed 4 March 2014, p. 5

⁶⁴ Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Human Rights Council 16th session, 3 February 2011, UN Doc A/HRC/16/52, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.52.pdf>, accessed 4 March 2014, paras. 60 - 63

⁶⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 2007, UN Doc.A/62/263, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/461/15/PDF/N0746115.pdf?OpenElement>, accessed 4. March 2014, p. 17

them.”⁶⁶

The Commissioner for Human Rights of the Council of Europe Thomas Hammarberg emphasized that states should not seek diplomatic assurances from countries which are known to resort to torture.⁶⁷ In line with the UN Special Rapporteurs, Hammarberg saw the weakness in the need for seeking such promises, proving that the countries indeed engage in practicing torture. Furthermore, he also stressed their unreliability referring to the findings of the European Court of Human Rights.⁶⁸

In sum, states have turned to diplomatic assurances when considering their international obligations in transfer cases. Scholars, international organizations, and members of the human rights movement have mostly disputed the effects of the practice of using diplomatic assurances. International and regional human rights bodies have not yet ruled against the practice of diplomatic assurances. They consider them relevant to the risk assessment performed when deciding whether a particular transfer would be in violation of the principle of *non-refoulement*, which is explained into more detail further in the thesis.

⁶⁶ The United Nations Office at Geneva, United Nations Rights Experts On Torture And Counter-Terrorism Concerned About The Fate Of Guantánamo Detainees published 10. December 2013, available at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/6B2FCC26050BCA13C1257C3D0058406E?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/6B2FCC26050BCA13C1257C3D0058406E?OpenDocument) accessed 4. March 2014

⁶⁷ Memorandum by Thomas Hammarberg, Commissioner for Human Rights for the Council of Europe, paras 91-94, available at <https://wcd.coe.int/ViewDoc.jsp?id=1339037>, accessed 5. March 2014

⁶⁸ Ibid., paras 91-94

1.2 The principle of non-refoulement

The principle of *non-refoulement* has been reflected in international instruments in two ways - explicitly stated or emerging implicitly from the prohibition of torture. As a stand-alone principle, it has been firstly articulated by the UN Refugee Convention. Article 33 (1) states that “[N]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶⁹ The principle, while being the first of its kind, is subject to certain limitations. Firstly, it is limited in subject of application, as the provision concerns only refugees defined as such by the Convention. Furthermore, the prohibition is not absolute, as it allows for balancing individual rights with the protection of national security. Article 33 (2) limits prohibition of *refoulement* of a person being under a threat to his freedom or life to instances in which the individual poses a threat to national security, or had been convicted by committing a particularly serious crime as to constitute a threat to the public.⁷⁰ The states have invoked this provision particularly with cases concerning suspected terrorists identified as a threat to national security.⁷¹

1.2.1 *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR)⁷² does not explicitly address the prohibition of *refoulement*. It is derived from the absolute prohibition of torture defined in Article 7⁷³. The prohibition of torture allows for no derogations as specified by Article 4 (2). The Human Rights Committee extended the impact of Covenant on transfers through application of Article 7 on prohibition of torture. General Comment No. 20

⁶⁹ Convention Relating to the Status of Refugees (1954) and Protocol Relating to the Status of Refugees (1967), Article 33 (1)

⁷⁰ Ibid., articles 32, 33

⁷¹ *Case of Chahal v. The United Kingdom*, 22414/93 (15/11/1996), ECtHR, par. 76

⁷² The United Nations International Covenant on Civil and Political Rights (1966)

⁷³ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” The United Nations International Covenant on Civil and Political Rights (1966)

sets forth the ban on transferring persons to countries where they would face a risk of being subjected to torture and other ill-treatment.⁷⁴

1.2.2 *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Also on the international level and entirely dedicated to the prohibition of torture, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷⁵ defines the principle of *non-refoulement* as a self-standing provision in Article 3. It prohibits states to “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.”⁷⁶

1.2.3 *The European Convention of Human Rights*

On the regional level, further extension of the principle came through the European Convention of Human Rights (ECHR) in 1950 and subsequent case law from the European Court of Human Rights (ECtHR). The Court addressed transfers of individuals through the Article 3 prohibition of torture, and other cruel, inhuman, degrading treatment or punishment, which applies to every person without exception.⁷⁷ According to Article 15 (2), this provision is subject to no derogations or limitations, safeguarding that national security concerns will not trump the prohibition of torture.⁷⁸ The ECtHR’s landmark case of *Soering v. the United Kingdom*⁷⁹, concerning extradition of the applicant to the United States who faced the risk of being subject to capital punishment further endorsed the absolute nature of the prohibition of

⁷⁴ Human Rights Committee (CCPR) General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992

⁷⁵ The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984)

⁷⁶ *Ibid.*, Article 3.

⁷⁷ “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Convention on Human Rights (1950)

⁷⁸ “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.” The European Convention on Human Rights (1950)

⁷⁹ *Case of Soering v. the United Kingdom*, 14038/88 (07/07/1989), ECtHR

torture.⁸⁰ The Court also established that in such instances, the sending state, as a party to the Convention, would be held responsible for the violation.⁸¹

Contrary to the Refugee's Convention limitation of the principle of *non-refoulement* in case of national security, the ECtHR explicitly defended the ban on removal to countries where the risk of torture was substantial even in national security cases. For example, in the case of *Chahal v. the United Kingdom*, the government argued for using an exception to *non-refoulement* established by the Refugee Convention. The ECtHR held that the principle of *non-refoulement* applies despite the character of a person's activities, which could be considered as a threat to national security.⁸² According to the ECtHR, there is no causal link between the danger that the individual poses to the sending country to the risk that he faces in the receiving country.⁸³ In sum, individuals suspected of terrorism or activities who pose a threat to national security are awarded the same level of protection under the European Convention of Human Rights with regards to the principle of *non-refoulement*.

1.2.4 Other regional instruments

Apart from the ECHR, other regional instruments of human rights protection also award protection from *refoulement*. The American Convention on Human Rights established the principle of *non-refoulement* in Article 22 (8).⁸⁴ In comparison to other instruments, it is only limited to the risk of a person's life or personal liberty and does not apply to nationals of state parties. The African Charter on Human and People's Rights does not provide for explicit prohibition of *refoulement* based on the grounds of a risk of death penalty or ill-treatment. However, it extends the application of prohibition of expulsion to groups of people based on

⁸⁰ According to the case law of the ECtHR, the applicant could have been subjected to the „death row phenomenon“ which falls under the Article 3. See *Case of Soering v. the United Kingdom*, supra note 79, para 105

⁸¹ Ibid., supra note 79, par. 88

⁸² *Case of Chahal v. The United Kingdom*, supra note 71, par. 80

⁸³ Ibid., para 81

⁸⁴ “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.” Article 22 (8) Organization for American States: American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32) (1969)

the non-discrimination principle.⁸⁵ Finally, after the Charter of the Fundamental Rights of the European Union came into force in 2009, and in accordance to the EU's objectives, the principle of *non-refoulement* is explicitly laid out in Article 19, extending also to mass expulsions.⁸⁶ However, the scale of the application of the Charter is limited only to the scope of the EU law.⁸⁷ In practice, the principle of *non-refoulement* is applicable to the European Asylum System, however, due to the limiting character of harmonization of this policy, the standard of protection is questionable.

1.3 Risk assessment in cases involving the prohibition of refoulement

To determine whether the removal of an individual would violate the principle of *non-refoulement*, the international and regional bodies have employed a risk analysis. The standard of scrutiny slightly varies to a certain degree across all bodies; however, the differences do not have a crucial impact on the outcome of the present thesis. The UN CAT requires the complainant to prove that “there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”⁸⁸ Alternatively, according to the Human Rights Committee, “State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment...”⁸⁹ Finally, the ECtHR, similarly to the CAT, decides whether “there are substantial grounds for believing that the person in question, if expelled, would face real risk of being subjected to torture or to inhuman and degrading treatment or punishment in the receiving country.”⁹⁰ The bodies have identified a set of factors important to the analysis including the general state of human rights in the

⁸⁵ African Charter on Human and People's Rights (“Banjul Charter”) (1986), Article 12 (3)

⁸⁶ Charter of the Fundamental Rights of the EU, Official Journal of the European Communities 2000/C 364/01, Article 19

⁸⁷ Ibid., Article 51 (1)

⁸⁸ UN Convention Against Torture, Article 3, *supra* note 76,

⁸⁹ CCPR General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para 9, *supra* note 74

⁹⁰ See *Case of Soering v the United Kingdom*, *supra* note 79, para 88; *Case of Chahal v the UK*, *supra* note 71, para 74

country, personal circumstances of the individual, or diplomatic assurances. In case the factors show that the risk is not substantial, or is mitigated by provided assurances under the threshold, the transfer will not violate the principle of *non-refoulement*.

In sum, the principle of *non-refoulement* is enshrined in major international and regional human rights bodies. Even though the Refugee Convention as a first document encompassing *non-refoulement* contains limitations of the principle, it provided an important extension of safeguarding the individual human rights. International and regional instruments of human rights protection have since covered the gap of the Refugee Convention. The prohibition of torture and other ill-treatment in the ICCPR extends to cover *non-refoulement*. The UN CAT enshrines the principle in a separate provision. Finally, the ECHR extends the absolute prohibition of torture and other ill-treatment in Article 3 to encompass also *non-refoulement*, establishing the responsibility of the sending state in case of violation, and awarding protection to any person regardless of their activities, or their risk to national security. Other regional instruments and non-binding agreements cover *non-refoulement* to some extent, however they fall out of the scope of the present thesis.

To decide on the violation of the principle of *non-refoulement*, international and regional human rights bodies employ a risk analysis, which can be summarized as determining whether there exist substantial grounds to believe that the person would be in the real risk of torture or other ill-treatment upon return. The bodies inspect a variety of factors in the risk analysis, taking into consideration the general state of human rights in the country, the personal circumstances of the applicant, and diplomatic assurances, if provided.

The first chapter defined the theoretical and legislative background of the present thesis. It provided a definition of diplomatic assurances, their general form, content, usage, and main shared issues. It then proceeded with defining the prohibition of *refoulement*, as anchored in the main international and regional human rights instruments and described how

international and human rights bodies decide whether the principle of *non-refoulement* has been violated or not, concluding that diplomatic assurances are taken into consideration as one factor among others in the risk assessment.

2 Description of selected cases

Following chapter describes ten selected cases, which will be analyzed in depth in third chapter. Firstly, five submissions before the Committee Against Torture and the Human Rights Committee are presented. Afterwards, five cases before the European Court of Human Rights follow. The cases were selected according to four criteria. Firstly, all cases were submitted and decided after September 11, 2001. Secondly, complainants and applicants in all cases submit, that their extradition, deportation, removal or expulsion to the other country, in most cases, country of their origin would violate the articles in respective international documents prohibiting torture, or specifically, *non-refoulement*. Thirdly, all complainants and applicants have been identified as a threat to national security in the sending country, or accused of, charged or convicted with serious crimes related to terrorism in the receiving country. Finally, in all cases, requesting/receiving states provided diplomatic assurances containing provisions that the individuals would not be tortured upon return.

Using descriptive method, the chapter proceeds by introducing relevant facts of each case, followed by the identification of the issue, the decision of the body and relevant reasoning.

This chapter presents selected cases relevant to the research questions. It sets the ground for following analytical and concluding chapters, introducing the most crucial and relevant parts of the cases which will be later analyzed into more depth in order to form answers to the research questions.

2.1 International jurisprudence: The Committee Against Torture and the Human Rights Committee

The international human rights bodies have reviewed states' practice of seeking diplomatic assurances against torture in transfer cases on a few occasions, producing a rather limited case law. Lena Skoklund argued that the unwillingness of the United States to ratify

mechanisms of individual complaints under the CAT, the ICCPR, or the ACHR was the main reason for the small number of cases reviewed by either of the Committees.⁹¹ Following section describes five communications before the international human rights bodies reviewed after the September 11, 2001.

2.1.1 *Ms. Hanan Attia v. Sweden*

The first described case before the Committee Against torture concerns Ms. Attia, an Egyptian national, and the wife of Mr. Agiza, who was sentenced in absentia by Egyptian military court for membership in a terrorist organization.⁹² Both the complainant and Mr. Agiza sought asylum in Sweden. The complainant argued that if returned to Egypt, she would be detained on the basis of her family ties to Mr. Agiza, and possibly tortured for information about her husband.⁹³ Her asylum application was denied by Swedish authorities based on the threat that her husband posed to the national security of the country.⁹⁴ Consequently, both the complainant and her husband were denied asylum statuses in Sweden, and she was ordered to be deported as soon as possible.⁹⁵ Before taking the decision, Swedish foreign minister met with an Egyptian representative of government to discuss the deportation possibility of the complainant and his husband without violating the principle of *non-refoulement*.⁹⁶ Procurement of diplomatic assurances against torture was discussed as a condition for removal of both the complainant and her husband and were shortly provided by the same Egyptian officer.⁹⁷ The detailed description of assurances was not available in the decision, but according to the State party, they included guarantees of a fair trial, prohibition of torture,

⁹¹ Lena Skoglund, *supra* note 6, p.341-342

⁹² Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden, No. 199/2002, U.N. Doc. CAT/C/31/D/199/2002 (2003) (Attia v. Sweden), para 1.1- 2.3

⁹³ *Ibid.*, para 1.1 – 3.1, 4.5

⁹⁴ Sweden referred to complainant's husband as posing „serious security threat“ to the country., *Ibid.*, para 4.5,

⁹⁵ The complainant's husband was deported immediately, but the complainant evaded deportation and remained at unknown location at the time of the hearing. *Ibid.*, para 2.5,

⁹⁶ *Ibid.*, para 4.6

⁹⁷ *Ibid.*, para 4.6

or other ill-treatment and prohibition of execution of the complainant.⁹⁸ The parties also agreed upon an establishment of a monitoring mechanism, which was to be conducted in the form of diplomatic visits of the detention facility by Swedish ambassador to Egypt and a secured Swedish presence at the trial with complainant's husband. According to the State party, the assurances provided for the complainant's husband extended by the same level also to the complainant.⁹⁹

The issue in question was whether the transfer of the complainant to Egypt would violate the prohibition of *refoulement* stated in Article 3 CAT. Specifically, the Committee was tasked to answer whether "there were substantial grounds for believing that [the complainant] would be in danger of being subjected by the Egyptian authorities to torture."

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The Committee decided that the transfer of complainant would not violate the principle of *non-refoulement*. It decided taking "into account all relevant considerations"¹⁰¹, including "the existence of a consistent pattern of gross, flagrant or mass violations of human rights"¹⁰², and the personal situation of the complainant, which was "insufficient to ground a claim under article 3."¹⁰³ The Committee noted that provided assurances were satisfactory, taking into consideration the situation of complainant's husband in detention in Egypt, observing that monitoring was taking place regularly, and the condition of the complainant's husband were "adequate."¹⁰⁴

⁹⁸ Ibid., para 4.13

⁹⁹ Ibid., paras 4.13, 4.15

¹⁰⁰ Ibid., para 12.1

¹⁰¹ Ibid., para 12.2

¹⁰² Ibid., para 12.2

¹⁰³ Ibid., para 12.3

¹⁰⁴ Monitoring, taking form of diplomatic visits by the Swedish ambassador was described into details by the State party. See para paras 4.8-4.10, 6.1-6.4, 7.3, 9.3, 12.3

2.1.2 *Mr. Ahmed Agiza v. Sweden*

Second case examined by the Commission is the case of Ms. Attia's husband, Mr. Agiza. The facts are consistent with the previous case; however, the complainant was at the time of submission detained in Egypt for two years.¹⁰⁵ Summarizing the facts of the case, while in Sweden, the complainant applied for asylum, claiming that his removal to Egypt would place him in the risk of being executed as he was sentenced to life imprisonment on terrorism charges *in absentia* by an Egyptian military court.¹⁰⁶ During the process of deciding the asylum application, Swedish government investigated possibilities of removing the complainant to Egypt without violating the principle of *non-refoulement*. After a series of meetings between Swedish State Secretary of Ministry of Foreign affairs and an Egyptian representative of government.¹⁰⁷ Diplomatic assurances were considered as an adequate tool, and a sole condition for removal.¹⁰⁸ After Egypt provided assurances, the complainant's asylum claim was denied on national security grounds¹⁰⁹ and he was immediately deported to Egypt.¹¹⁰

The issue the Committee was tasked with was whether the complainant's removal to Egypt violated the principle of *non-refoulement* of Article 3 CAT, thus whether there were substantial grounds to believe, at the time of deportation, that the complainant would suffer torture after removal.¹¹¹

The Committee, contrary to its view in Attia's case, held that the removal of complainant was in violation of Article 3 CAT. In the reasoning, the Committee firstly reiterated that the risk assessment was conducted according to circumstances available at the

¹⁰⁵ Mr. Ahmed Hussein Mustafa Kamil Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) (Agiza v. Sweden), para 1.1, 2.5

¹⁰⁶ Ibid., para 2.4

¹⁰⁷ Ibid., para 4.12

¹⁰⁸ Ibid., para 4.12

¹⁰⁹ Ibid., para 4.11

¹¹⁰ During the Committee hearing, circumstances of deportation of complainant involving torture or ill-treatment of him and another individual by members of third party (CIA) were revealed, together with the torture the complainant had suffered in detention in Egypt. Ibid., paras 2.5, 3.2, 12.27-12.30

¹¹¹ Ibid., para 13.2

time of removal. However, subsequent events were also “relevant”¹¹² when assessing what the State party had, or should have known at the time of removal.¹¹³ Secondly, the Committee reiterated the importance of the state of human rights in the receiving country, and personal circumstances of the individual for the risk assessment.¹¹⁴ Applying the principles to present case, the Committee acknowledged “consistent and widespread use of torture against detainees...held for political and security reasons”¹¹⁵, and that personal circumstances of the complainant placed him in the “real risk of torture.”¹¹⁶ The Committee held that procured diplomatic assurances were not sufficient to mitigate the risk, referring to lack of any monitoring mechanism.¹¹⁷

2.1.3 *Mr. Toirjon Abdussamatov and Others v. Kazakhstan*

The most recent case involves a complaint submitted by Uzbek and Tajik nationals. Despite the interim measures issued by the CAT, they were extradited from Kazakhstan to Uzbekistan on the charges of being involved in “illegal organizations” and attempting “to overthrow the constitutional order”.¹¹⁸

Kazakh authorities claimed that they had received guarantees about the treatment of complainants after deportation and were regularly monitoring complainants’ situation in detention.¹¹⁹ Allegedly, the guarantees assured that the complainants would not be subjected to torture or other ill-treatment and that their freedoms and rights would be respected when

¹¹² Ibid., para 13.2

¹¹³ Ibid., para 13.2

¹¹⁴ Ibid., para 13.3

¹¹⁵ Ibid., para 13.4

¹¹⁶ The Committee referred to facts that the complainant was identified as a threat to national security in Sweden, was wanted by a third party which facilitated the departure, and was sentenced in Egypt on terrorism charges. See *ibid.*, para 13.4

¹¹⁷ The Committee also distinguished this case from the case of the complainant’s wife, reasoning that it based its decision on the facts that were known at the time of consideration of her application, and that the issues raised by the risk assessment in her case were different from the issues of this case, because she was not deported. See *ibid.*, paras 13.4, 13.5

¹¹⁸ *Mr. Toirjon Abdussamatov and Others v. Kazakhstan*, Communication No. 444/2010, U.N Doc. CAT/C/48/D/444/2010 (2012) (*Abdussamatov and Others v. Kazakhstan*), para 2.3

¹¹⁹ *Ibid.*, paras 4.3, 9.7

extradited.¹²⁰ A monitoring mechanism was also allegedly established, as well as a safeguard of compliance with the assurances taking the form of a review of mutual cooperation between state parties in the case of a detected breach.¹²¹

The issue before the Committee was whether the removal of the complainants violated the Article 3 of CAT, specifically, whether there were substantial grounds to believe that the complainants would face torture afterwards.¹²² The risk analysis was considered at the time of removal.¹²³

The Committee decided that in this case, the State party violated Article 3 of CAT.¹²⁴ In an extensive reasoning the Committee found the existence of “pattern of gross, flagrant or mass violations of human rights and the significant risk of torture or other cruel, inhuman or degrading treatment in Uzbekistan”¹²⁵ particularly for individuals in a similar situation as the complainants.¹²⁶ The Committee rejected diplomatic assurances provided by Uzbekistan on the ground of lacking monitoring mechanism, which would be “objective, impartial and sufficiently trustworthy.”¹²⁷

2.1.4 *Mohammed Alzery v. Sweden*

The first communication where the Human Rights Committee examined the use of diplomatic assurances against torture in the context of the war against terror concerned another individual deported from Sweden to Egypt under similar circumstances as Mr. Agiza whose case is described above. Mr. Alzery, Egyptian national, was denied an asylum status which he requested based on his previous treatment in Egypt, and possible arrest, followed by

¹²⁰ Ibid., para 4.3

¹²¹ Ibid., para 9.5

¹²² Ibid., para 13.2

¹²³ Ibid., para 13.2

¹²⁴ Ibid., para 14

¹²⁵ Ibid., para 13.8

¹²⁶ Referring to individuals who practice other than state approved religion. Ibid., para 13.8

¹²⁷ Ibid., para 13.10

a trial before military court, detention and torture in Egypt if removed. Sweden denied the asylum application on national security grounds.¹²⁸

Before his removal, Swedish Minister of Foreign Affairs met with a representative of Egyptian government in order to establish whether there was an option to remove the author to Egypt without Swedish violation of principle of non-refoulement.¹²⁹ Diplomatic assurances provided by the Egyptian government were approved as a condition, without which the deportation would not have been possible.¹³⁰ The assurances stated:

*“We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates.”*¹³¹

The Committee determined whether Sweden violated the Article 7 of ICCPR including prohibition of refoulement, exposing the applicant to “real risk”¹³² of torture or other ill-treatment by removal.¹³³

The Committee held that by expelling the author to Egypt, Sweden violated the Article 7 of ICCPR. In the reasoning, the Committee reiterated the importance of examination of “all relevant elements”¹³⁴ in the risk assessment, including the general state of human rights in the receiving state and procurement of diplomatic assurances, which were a condition for the removal.¹³⁵ The Committee found that the assurances “contained no

¹²⁸ Mohammed Alzery v. Sweden, CCPR/C/88/D/1416/2005 (Alzery v. Sweden), paras 3.2, 3.8, 3.10

¹²⁹ Ibid., para 3.6

¹³⁰ Request for assurances was provided in the form of Aide Mémoire, which stated: “It is the understanding of the Government of the Kingdom of Sweden that [the author and another individual] will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally, it is the understanding of the Government of the Kingdom of Sweden that the wife and children of [another individual] will not in anyway be persecuted or harassed by any authority of the Arab Republic of Egypt.” Ibid., para 3.6

¹³¹ Ibid., para 3.7

¹³² Ibid., para 11.3

¹³³ The Committee had expressed independent assessment of the author’s claim that the Article 7 of the ICCPR was violated by his expulsion to Egypt, irrespective of the decision of Committee Against Torture in the case of his counterpart, Agiza, and the fact that Sweden admitted the violation itself. See *ibid.*, para 11.2

¹³⁴ Ibid., para 11.3

¹³⁵ Ibid., para 11.4

mechanism for monitoring of their enforcement”¹³⁶ and held that they were insufficient to mitigate the risk below the threshold of what constituted violation of Article 7 of the ICCPR.¹³⁷

2.1.5 *Mr. Zhakhongir Maksudov and 3 others v. Kyrgyzstan*

Shortly after the Agiza communication, the Human Rights Committee examined, another case concerning the use of diplomatic assurances against torture. The authors were among the individuals who fled Uzbekistan in the aftermath of a demonstration at Andijan Square in 2005. The authors were charged in absentia with serious crimes related to overthrowing of the constitutional order of Uzbekistan and terrorism. Uzbek authorities requested their extradition from Kyrgyzstan.¹³⁸ Their asylum application were rejected on the grounds that they tried to hide facts about their participation at the demonstration.¹³⁹ They were granted a refugee status with the UNHCR on the basis of the circumstances.¹⁴⁰ All authors were subsequently extradited to Uzbekistan.¹⁴¹ According to the State party, the Kyrgyz General Prosecutor’s office had received assurances from the Uzbek General Prosecutor’s office, “that full and objective investigation would be carried out into the author’s cases, and that none of them would be persecuted for political reasons or subjected to torture.”¹⁴² Furthermore, Uzbekistan reiterated their international obligations in provided assurances.¹⁴³

¹³⁶ The Committee noted, among others insufficiencies, that the first visit by the ambassador took place five weeks after deportation, the visits were not conducted in private, and the individual was not inspected by a trained forensic or medical professional, which rendered them inconsistent with “international good practice”. See *ibid.*, para 11.5

¹³⁷ *Ibid.*, para 11.5

¹³⁸ *Mr. Zhakhongir Maksudov and 3 others v. Kyrgyzstan*, CCPR/C/93/D/1461, 1462, 1476&1477/2006, (*Maskudov and others v. Kyrgyzstan*), paras 2.1 -2.5

¹³⁹ *Ibid.*, para 2.10

¹⁴⁰ *Ibid.*, paras 2.13, 3.1 – 3.7, 4.1 - 4.10, 5.1-5.9

¹⁴¹ *Ibid.*, para 8.1

¹⁴² *Ibid.*, para 8.7

¹⁴³ *Ibid.*, paras 8.5-8.7

The issue before the Committee was whether the removal of authors to Uzbekistan violated Article 7 of ICCPR by exposing them to “real risk”¹⁴⁴ of torture or other ill-treatment.¹⁴⁵

The Committee held, that Kazakhstan breached its obligations under Article 7 of ICCPR. In the reasoning, the Committee took into consideration “all relevant elements”¹⁴⁶, stating that torture of detainees was widespread, consistent and widely known due to “credible public reports”¹⁴⁷ and that the individuals detained for political or security reasons were facing increased risk of torture.¹⁴⁸ Diplomatic assurances as another relevant factor, which “contained no concrete mechanism for their enforcement,”¹⁴⁹ were “insufficient to protect against such risk.”¹⁵⁰ According to the Committee, the monitoring mechanism should be “safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation.”¹⁵¹

¹⁴⁴ Ibid., para 12.4

¹⁴⁵ Ibid., para 12.4

¹⁴⁶ Ibid., para 12.4

¹⁴⁷ Ibid., para 12.5

¹⁴⁸ Ibid., para 12.5

¹⁴⁹ Ibid., para 12.5

¹⁵⁰ Ibid., para 12.6

¹⁵¹ Ibid., para 12.5

2.2 The regional jurisprudence: the European Court of Human Rights

The ECtHR has had an extensive case law on diplomatic assurances against death penalty or torture.¹⁵² Most importantly, it has upheld that the activities of the individual in risk of removal are irrelevant to the risk assessment when deciding on the prohibition of refoulement. Moreover, diplomatic assurances were deemed unreliable from countries where torture was widespread and systematic.¹⁵³ After the September 11, 2001, attacks in Madrid in 2004, and in London in July 2005, European states have increasingly advocated for a change in Court's approach, which would take into account the risk that person poses to national security of the sending country, or implicitly legitimized the practice of using diplomatic assurances against torture.¹⁵⁴ Following section describes five selected cases, which will be later analyzed to ascertain to what extent has the Court considered states' requests.

2.2.1 *Case of Saadi v. Italy*

The landmark case decided by the Court regarding the diplomatic assurances against torture in the fight against terrorism concerned Mr. Saadi, a Tunisian national and an asylum seeker in Italy.¹⁵⁵ The applicant was prosecuted and acquitted for being involved with terrorism in Italy, and also convicted in absentia in Tunis for a membership in terroristic organization.¹⁵⁶ He was served with a deportation order on the grounds of financially and logistically assisting "fundamentalist Islamist cells" in August 2006.¹⁵⁷

As a condition for deportation, the Italian embassy in Turkey sought diplomatic assurances from Tunisian government by a note verbale, which included a request to provide guarantees that the applicant would not be tortured or ill-treated after deportation, or suffer a

¹⁵² See for example, *Case of Soering v. Germany* supra note 79, *Case of Chahal v. the UK*, supra note 71, *Case of Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99) 4 February 2005, *Case of Shamayev and Others v. Georgia and Russia* (Application no. 36378/02) 12 October 2005

¹⁵³ See *Case of Chahal v. the UK*, supra note 71, para 105

¹⁵⁴ see *Case of Saadi v. Italy* (Application no. 37201/06) 28 February 2008, paras 117-123, submission of the UK as a third party intervener, also submissions of Lithuania, Portugal, the UK and Slovakia to the *Case of Ramzy v. Netherlands*: Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom intervening in application No. 25424/05, *Ramzy v. The Netherlands*, 21 November 2005

¹⁵⁵ *Case of Saadi v. Italy* (Application no. 37201/06) 28 February 2008

¹⁵⁶ *Ibid.*, paras 11- 20,

¹⁵⁷ *Ibid.*, para 32

“flagrant denial of justice”.¹⁵⁸ The Tunisian government responded in a note verbale from Tunisian Minister for Foreign Affairs stating that “*the Tunisian government confirms that it is 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.*”¹⁵⁹ Second note verbale from the Minister of Foreign Affairs of Tunisia included a confirmation 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. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.*”¹⁶⁰

The issue before the Court was whether the deportation of the applicant to Tunisia would be contrary to the prohibition of refoulement as established by the Article 3 of ECHR.

The Court held that the deportation of the applicant would violate Article 3 of the Convention.¹⁶¹ In the reasoning, the Court firstly acknowledged that the applicant was in a real risk of being tortured after his deportation to Tunisia, referring to reliable international reports, which portrayed human rights situation in Tunisia as “disturbing”¹⁶², and his personal circumstances as a terrorist suspect in Italy and a convict in Tunisia.¹⁶³ The Court acknowledged that Italy has sought the assurances from Tunisian counterparts. However, the Court was not satisfied that a mere reiteration of international obligations is “*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.*”¹⁶⁴ Even if the Tunisian authorities had provided their Italian counterparts with adequate guarantees, the Court would examine

¹⁵⁸ Ibid., paras 51, 52

¹⁵⁹ Ibid., para 54

¹⁶⁰ Ibid., para 55

¹⁶¹ Ibid., para 149

¹⁶² Ibid., para 143

¹⁶³ Ibid., paras 143, 144

¹⁶⁴ Ibid., paras 143, 147

them independently to assess whether they would have sufficiently mitigate the real risk of torture.¹⁶⁵

2.2.2 *Case of Ismoilov and Others v. Russia*

Closely after the decision in the Saadi case, the Court examined another case concerning extradition with assurances of twelve Uzbek nationals and one Kyrgyz national from Russia to Uzbekistan. All applicants were charged in Uzbekistan of being members of an extremist organization, providing financial aid to terrorist groups, and other serious crimes in relation to events, which took place in Andijan in 2005.¹⁶⁶ The Prosecutor General of Uzbekistan requested their extradition from Russia, assuring that the applicants would neither be extradited to third-party state without the Russian consent, nor prosecuted for crimes not mentioned in the extradition order.¹⁶⁷ The First Deputy Prosecutor General of Uzbekistan provided additional assurances, which included guarantees that the applicants would not be tortured or ill-treated, or subjected to death penalty.¹⁶⁸

The issue before the Court was whether the extradition of applicants would violate the principle of non-refoulement provided by Article 3 ECHR.

The Court decided that Russia would be in breach of Article 3 of the Convention in case the extradition went through.¹⁶⁹ The Court based its decision on acknowledging ill-treatment as “pervasive and enduring problem”¹⁷⁰ in Uzbekistan, referring to reliable international sources.¹⁷¹ Together with the applicants’ personal circumstances, the court was persuaded that that there were substantial grounds to believe that the applicants were “at real

¹⁶⁵ Ibid., para 148

¹⁶⁶ *Case of Ismoilov and Others v. Russia* (Application no. 2947/06), 24 April 2008, “other charges included attempts to violent overthrow of the constitutional order of Uzbekistan, aggravated murder and organizing mass disorders”, para 25, referring to the events in Andijan, Uzbekistan on 13 May 2005

¹⁶⁷ Ibid., para 30

¹⁶⁸ Ibid., para 31

¹⁶⁹ Ibid., para 128

¹⁷⁰ Ibid., para 121

¹⁷¹ Ibid., paras 120, 121

risk of suffering ill-treatment”¹⁷² if extradited to Uzbekistan. Because of the poor state of human rights in Uzbekistan, the Court found that the provided assurances would not sufficiently mitigate the risk of ill-treatment after removal.¹⁷³

2.2.3 *Case of Al-Moayad v. Germany*

Al-Moayad, a Yemeni national, was extradited from Germany to the United States on the grounds of being a member of, and aiding terrorist groups, particularly Al-Qaeda and Hamas.¹⁷⁴ The United States Embassy provided German authorities with assurances in the form of note verbal, that the applicant “would not be prosecuted by a military tribunal, or by any other extraordinary court.”¹⁷⁵

The issue before the Court was whether Germany violated Article 3 of the Convention by extraditing the applicant to the United States placing him, as terrorist suspect, in the risk of torture during interrogation.

The Court declared the application inadmissible¹⁷⁶, as the applicant “failed to substantiate that he faced a real risk of being subjected to treatment contrary to Article 3 during interrogation in custody in an ordinary US prison”¹⁷⁷, based on following reasoning. The court expressed “grave concern”¹⁷⁸ over “worrying”¹⁷⁹ reports of international organizations, which exposed the interrogation methods of the US authorities of individuals suspected of terrorism. However, it noted that according to these reports, such treatment

¹⁷² Being charged with crimes connected to the events of Andijan placed them under the risk of ill-treatment, referring to various reports on treatment of detainees in similar situation. See *ibid.*, paras 122 -125 para 125

¹⁷³ *Ibid.* para 127

¹⁷⁴ *Case of Al-Moayad v. Germany* (Application no. 35865/03), (admissibility decision, 20. July 2007) (Al-Moayad v. Germany), paras 1- 11

¹⁷⁵ *Ibid.*, para 13, As later explained, according to the US President’s Military Order dealing with non-US nationals suspected of aiding and abetting, or being a members of Al-Qaeda, suspected terrorists can be detained outside or within the US, and can be tried by military commission, to which decision there is no remedy available. See para 38. The assurances precluded that the applicant would be subject to the Military Order. Moreover, German courts considered the assurances as binding before public international law, and securing that the applicant would be brought before ordinary court within the US. Therefore, the assurances mitigated the risk of torture which according to then known information happened outside of the US territory. See *ibid.*, paras 16, 21

¹⁷⁶ *Ibid.*, para 57

¹⁷⁷ *Ibid.*, para 70

¹⁷⁸ *Ibid.*, para 66

¹⁷⁹ *Ibid.*, para 66

happened outside the territory of the United States, especially in Guantánamo Bay, Afghanistan, and other third countries. The Court also acknowledged the decision of Federal Court of Germany, which considered provided assurance as a legally binding before the international law and guaranteeing that the applicant would not be held outside of the US territory.¹⁸⁰ The Court assessed the assurance independently, noting longstanding and reliable use of practice between the countries, and detailed German inspection.¹⁸¹ The assurance, according to the Court, was adequate to alleviate the risk under the threshold which rendered violation of Article 3.¹⁸²

2.2.4 *Case of Othman (Abu Qatada) v. the United Kingdom*

The case of Othman is considered as another landmark case in which the Court for the first time examined permanent bilateral form of assurances between the United Kingdom and Jordan.

The applicant, a Jordanian national was made a subject to anti-terrorism legislation.¹⁸³ He was served with a deportation order on the grounds of being a threat to national security.¹⁸⁴

Memorandum of Understanding containing “specific and credible assurances”¹⁸⁵ between the UK and Jordan was signed on August 10th, 2005 as a condition that would allow the deportation without the UK violating its international obligations.¹⁸⁶ It was consulted between the Prime Minister of the United Kingdom and the King of Jordan, and between the Secretary of State for the Home Department and the Minister of Foreign Affairs of Jordan.¹⁸⁷

¹⁸⁰ Ibid., paras 66, 67. Further reports on the whereabouts of applicant also confirmed that he was held in detention inside the USA, see para 67

¹⁸¹ Ibid., para 68

¹⁸² Ibid., para 71

¹⁸³ *Case of Othman (Abu Qatada) v. the United Kingdom* (Application no. 8139/09), 9 May 2012 (Othman v the UK), paras 7, 8

¹⁸⁴ Ibid., para 25

¹⁸⁵ Ibid., para 21

¹⁸⁶ The Foreign and Commonwealth Office issued a statement that deportations to Jordan would violate the UK’s obligations on prohibition of non-refoulement, see *ibid.*, para 21

¹⁸⁷ Ibid., para 22

The MoU included general principles compatible with international law that would be observed after deportations from one state to another. The UK Chargé d’Affaires in Jordan and Minister of Interior of Jordan further agreed on individualized assurances related to the applicant. The MoU also established a monitoring mechanism, which was to be conducted by Adaleh Centre for Human Rights Studies (“the Adaleh Centre”).¹⁸⁸

The Court was tasked to decide whether the deportation of the applicant to Jordan would violate Article 3 of the ECHR, specifically, if there were substantial grounds to believe that the applicant would be in the real risk of torture or other ill-treatment if deported.¹⁸⁹

The Court held that the deportation of the applicant would not violate Article 3 of the Convention.¹⁹⁰ In the reasoning, the Court acknowledged that torture in Jordan was perpetrated systematically and with impunity. Together with personal circumstances of the applicant, the threshold of substantial grounds for believing that there exists a real risk of being tortured if deported to Jordan was established.¹⁹¹ The Court also held that the general human rights situation in the receiving country served a pre-screening factor, which determined whether any weight at all could be given to the assurances. The Court stated that “it will be only in rare cases”¹⁹² when the situation in the country would render the assurances wholly unreliable.¹⁹³ Therefore, the Court assessed the impact of the MoU on the existing risk of torture according to its defined eleven indicators of the quality and trustworthiness of the assurances. The indicators are following:

¹⁸⁸ Ibid., paras 23, 24, The content of MoU between United Kingdom and Jordan is available in the case. First eight paragraphs are general provisions. Further specific assurances can be provided by the receiving state in individual cases. Terms of reference of monitoring body Adaleh Centre were also set up. A person monitoring the case was to be in close contact with the returning person during transfer and if placed home or to another place. Weekly contact with the returned person was established for the first year in detention. Conditions specifying how interviews with returned person were set up, including right to private visits. See also *ibid.*, paras 76, 79, 80-82

¹⁸⁹ Ibid., para 185

¹⁹⁰ Ibid., para 207. However, the Court then decided that the deportation would violate Article 6, extending the protection of non-refoulement on derogatory right for the first time. See *ibid.*, para 287

¹⁹¹ Ibid., paras 191, 192, of particular personal circumstances is his status as a high profile Islamist, and the fact that he claimed to be previously tortured in Jordan.

¹⁹² Ibid., para 188

¹⁹³ Ibid., para 188

- “(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 objectively 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 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.”¹⁹⁴*

Based on the provided criteria, the Court found that the MoU was „superior in both its detail and its formality to any assurances which the Court has previously examined.”¹⁹⁵ Therefore, the assurances in the form of a more permanent and elaborated Memorandum of Understanding sufficiently and reliably mitigated the risk of torture or other ill-treatment of the applicant after deportation to Jordan.¹⁹⁶

2.2.5 Case of *Azimov v. Russia*

The final examined case concerns a Tajik national living in Russia, who was accused of being a member of several opposition movements, and having a leadership role of a terrorist cell operating from Russia.¹⁹⁷ Office of the General Prosecutor of Tajikistan requested his extradition from Russia, providing diplomatic assurances, which included a

¹⁹⁴ Ibid., para 189

¹⁹⁵ Ibid., para 194

¹⁹⁶ Ibid., para 205

¹⁹⁷ *Case of Azimov v. Russia* (Application no. 67474/11), 9. September 2013, (*Azimov v. Russia*), paras 1, 12, 17, 20

guarantee that the applicant would not be subject to torture or other ill-treatment after extradition.¹⁹⁸

The issue before the Court was whether there were substantial grounds to believe that there was a real risk of torture if the applicant would be extradited to Tajikistan, which would violate Russia's obligations under Article 3 of Convention.

The Court answered in affirmative, stating that potential extradition of the applicant to Tajikistan would violate Article 3.¹⁹⁹ The Court based reasoning on widespread and systematic use of torture in Tajikistan and the applicant's personal situation, expressing concern over treatment of persons suspected of terrorism as portrayed by relevant international reports. The Court established that there were substantial grounds to believe that he would be exposed to a real risk of being subjected to torture or other ill-treatment or punishment.²⁰⁰

Regarding the impact of assurances on the mitigation of the risk, the Court reiterated that "the mere reference to diplomatic assurances to membership of international treaties prohibiting torture, and to the existence of domestic mechanisms set up to protect human rights, is insufficient."²⁰¹ It also accentuated, that the provided assurances did not include any provisions on monitoring the compliance.²⁰² Finally, the Court emphasized the obligation of Russia to assess the provided assurances, referring to eleven criteria as established by the Othman case.²⁰³

¹⁹⁸ Other guarantees included the right to legal assistance, prosecution "only in relations to the crimes mentioned in the extradition request,..." and a guarantee that he "would not be expelled, transferred or extradited to a third State without the Russian authorities 'consent.'" Ibid., para 20

¹⁹⁹ Ibid., para 143

²⁰⁰ Ibid., para 112

²⁰¹ Ibid., para 133

²⁰² Ibid., para 134

²⁰³ Ibid., para 135, 143

This chapter described selected ten cases concerning transfers of individuals suspected or charged with terrorism before the international and regional human rights bodies. Following chapter analyzes the decisions of these bodies more profoundly, which leads to the last chapter on answers and conclusions.

3 Analysis of selected international and regional jurisprudence

The focus of the present chapter is on the analysis of previously described cases, which is conducted at two levels according to the research questions. Firstly, the development within each jurisdiction, international and regional, is analyzed in order to establish to what extent is standardization visible. Secondly, the analysis also serves to examine to what extent the standardization impacts other factors in the risk assessment, in confirmation of the underlying argument of the thesis, that the diplomatic assurances are a relevant factor in the risk assessment.

Analysis of the case law is the primary method for this chapter, complemented by additional secondary sources from scholarly work on cases where such work is available and relevant for analysis.

By analyzing the cases, this chapter provides the base for the concluding chapter of the present thesis. It presents a set of findings which are formulated into answers of research questions in the final chapter.

3.1 The Committee Against Torture

In the first examined communication, *Attia v. Sweden*, the Committee referred in the first place to the general human rights situation in the country in the risk assessment. However, the Committee stated that there are also other factors relevant for the examination,

*“[...]the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.”*²⁰⁴

This approach suggests that the state of human rights in the receiving/requesting country is the most important factor in the risk assessment. However, personal circumstances of the individual can prevail over the general situation, as shown in the *Attia* communication.

²⁰⁴ *Attia v. Sweden*, supra note 91, para 12.2

The Committee considered her family status as not sufficient to prove that there would be substantial grounds to believe that she will have a real risk of torture after deportation. Additionally, diplomatic assurances were considered as another factor relevant in the risk analysis. Based on the regular monitoring of the complainant's husband in detention in Egypt by Swedish authorities, the Committee was satisfied regarding the compliance with the assurances.²⁰⁵ Because the Committee did not address any other elements of the assurances, it can be assumed that the monitoring mechanism was considered as the most important segment. The Committee did not explicitly establish any requirements.

Two years later, the Committee examined the case of Attia's husband, Agiza. While the initial facts of the case were the same, the nature of Agiza's transfer to Egypt was revealed together with torture he suffered while in detention in Egypt, showing that the provided assurances were breached. In the examination, the Committee acknowledged routine usage of torture, especially on persons suspected of terrorism, referring to the applicant's personal circumstances. Unlike in the case of *Attia*, where the Committee was convinced that the assurances had been complied with, in this case it stated that the guarantees "provided no mechanism for their enforcement."²⁰⁶

In the risk assessment, diplomatic assurances were considered as one of the factors among others; however, the crucial factor appears to be the persistent nature of torture used, with special attention paid to use on persons suspected of terrorism, thus in similar personal circumstances as Agiza.

In sum, Agiza showed that the Committee followed the established jurisprudence, considered the general state of human rights, and its impact on the transferred individual as

²⁰⁵ *Attia v. Sweden*, supra note 91, para 12.3

²⁰⁶ *Agiza v. Sweden*, supra note 104, para 13.4. However, the Committee appears to decide against its previous establishment of taking into account only events that were known at the time of consideration of the deportation, as it clearly acknowledged the events which took place during and after deportation. As stated in the partly dissenting opinion by Mr. Yakolev, Sweden acted in accordance with Article 3 of CAT- Separate opinion of Committee Member Mr. Alexander Yakovlev

the most important factors in the risk assessment. Additionally, provided diplomatic assurances were considered as not sufficient to mitigate the risk of torture, due to the lack of an enforcement mechanism. Again, the Committee did not explicitly refer to a requirement, or a set of requirements the assurances should have contained, even though Lena Skoglund argues that the “conclusion might have been different, were there a mechanism for their enforcement.”²⁰⁷

Unlike previous communications, which were all decided in the aftermath of the revelation of secret rendition projects, the *Abdussamatov and others* case was decided in 2012. In this case, the Committee considered the general state of human rights in the country, and deliberated particularly on the “existence of a consistent pattern of gross, flagrant or mass violations of human rights”²⁰⁸ which appeared to bear the greatest weight.²⁰⁹ In line with previous cases, personal circumstances of the individuals were considered as an important factor, as their Muslim religion placed them in danger of being tortured, consist with similar cases.²¹⁰ Diplomatic assurances provided by Uzbekistan were considered as another factor valid for the risk assessment, and the monitoring mechanism, or the lack thereof, being the most important requirement of their impact assessment on the risk.²¹¹ The Committee acknowledged importance of objective, impartial, and sufficiently trustworthy monitoring as a form of enforcement mechanism.²¹²

²⁰⁷ Lena Skoglund, *supra* note 6, p.344

²⁰⁸ *Abdussamatov and Others v. Kazakhstan*, *supra* note 118, para 13.3

²⁰⁹ In the decision, the Committee has referred to its latest report on Uzbekistan noting “numerous, ongoing and consistent allegations of routine use of torture and other cruel, inhuman or degrading treatment or punishment by law enforcement and investigative officials or with their instigation or consent.” See *Abdussamatov*, para 13.6

²¹⁰ *Abdussamatov and Others v. Kazakhstan*, *supra* note 118, para 13.8

²¹¹ The Committee explicitly stated, “the State party failed to provide any sufficiently specific details as to whether it has engaged in any form of monitoring and whether it has taken any steps to ensure that the monitoring is objective, impartial and sufficiently trustworthy.” *Abdussamatov and Others v. Kazakhstan*, *supra* note 118, para 13.10

²¹² *Abdussamatov and Others v. Kazakhstan*, *supra* note 118, para 13.10

Based on the analysis of the selected communications, the use of diplomatic assurances has not been explicitly ruled out by the Committee Against Torture. The assurances were considered as one valid factor among others during the risk assessment. According to the examination of cases, CAT emphasizes two central factors in risk assessment: the general state of human rights in the country and the personal circumstances of the concerned individual.²¹³ Even though it has not explicitly established a set of criteria for the assurances, and preferred to assess each case independently, the analysis suggests that the most important element of diplomatic assurances is the monitoring mechanism, which should be objective, impartial, and sufficiently trustworthy.

3.2 The Human Rights Committee

The jurisprudence of the Human Rights Committee on the prohibition of *non-refoulement* with diplomatic assurances against torture was examined in two cases.

The communication *Azery v Sweden* was closely related to the case of Mr. Agiza, examined by the CAT. After independent examination by the HRC, the risk of torture was held as real, which was not disputed by Sweden due to the preceding decision of the UN CAT in the Agiza case.

The assurances were acknowledged by the Committee as one relevant factor among many. Contrary to the position of CAT, the Committee did not establish any hierarchy as to the importance of factors. Similarly to CAT, however, the state of human rights and personal circumstances of the individual appear to prevail over diplomatic assurances.

²¹³ Schimmel also adds that that an effective review mechanism allowing challenging the decision might also be another factor for consideration based on her analyse of the communication concerning Mr. Agiza. Schimmel, *supra* note 7, p. 20. Similar tendency can be observed in the Abdussamatov communication, where the Committee noted inability of complainants to challenge the deportation decision as this was decided on the grounds of being a threat to state security. See *Abdussamatov and others v. Kazakhstan*, *supra* note 118, para 13.5

In their examination, the Committee focused on “content, existence and implementation of the monitoring mechanism.”²¹⁴ Also in consistency with the CAT, the Committee did not explicitly establish any requirements.

The second case concerned the removal of Uzbek nationals from Kyrgyzstan. Again, the Committee reaffirmed that the risk assessment included examination of all relevant factors. The Committee analyzed the general situation in the receiving country together with the personal status of the authors, and provided assurances, suggesting a similar approach to the risk assessment as CAT. Unlike CAT however, it could not be decisively determined which factor or factors were considered central to the assessment. Again, however, because the Committee firstly referred to the state of human rights in the country and the personal circumstances which placed the complainants at risk of torture, it can be estimated that these factors take precedence over diplomatic assurances.

The Committee again referred to the important elements of assurances, placing emphasis on the content, existence and implementation of a monitoring mechanism, and an enforcement mechanism agreed upon outside diplomatic assurances.²¹⁵ This approach implicitly suggests, that the character of the enforcement mechanism of the assurances should be independent in nature. The Committee did not voice any specific requirements, consistent with the *Agiza* case.

From the scarce case-law of the HRC on diplomatic assurances on torture, certain similarities are consistent with the jurisprudence of CAT. Firstly, diplomatic assurances are not explicitly ruled out. Consistent with the CAT approach, they are one factor among others in the risk assessment and risk reduction. Unlike the CAT approach, however, the weight HRC gives to the assurances can only be estimated to be consistent with the CAT, as the

²¹⁴ *Alzery v. Sweden*, supra note 128, para 11.3

²¹⁵ *Maksudov and others v Kyrgyzstan*, supra note 138, para 12.5

HRC in both cases firstly examined the state of human rights and personal circumstances of the individual/individuals.

Finally, Skoglund further argues that the emphasis that both CAT and HRC place on the enforcement mechanism suggests that they both “could accept reliance on assurances against torture were they differently modeled.”²¹⁶ However, neither of the Committees has so far provided concrete standards apart from emphasizing the importance of the monitoring mechanism.

3.3 The European Court of Human Rights

Despite previous existing case law on the matter, this thesis is only focused on five cases decided by the ECtHR after September 11, 2001.

The first selected case of *Saadi v. Italy* is considered to be among the most important cases the Court decided regarding the jurisprudence on the principle of *non-refoulement* and diplomatic assurances. This decision strongly opposed the third party intervention by the United Kingdom, which advocated for a change of approach and balancing the weight of national security threat posed by the individual against the risk of treatment in the receiving country, by invoking positive obligations of the state to secure the right to life of its citizens.²¹⁷

In the risk assessment, the Court emphasized the importance of the state of human rights in the receiving country, emphasizing the findings of international human rights organizations such as Amnesty International or Human Rights Watch.²¹⁸ Personal circumstances of the individual at risk were taken into consideration as another factor.²¹⁹ After the risk was determined as real, diplomatic assurances provided by the Tunisian

²¹⁶ Lena Skoglund, supra note 6, p.344

²¹⁷ *Case of Saadi v. Italy*, supra note 155, para 139

²¹⁸ *Ibid.*, supra note 155, para 143

²¹⁹ *Ibid.*, supra note 155, para 144

government were examined to assess whether they were capable of reducing the substantial risk of torture or ill-treatment.

The Court explicitly stated that mere reiteration or enumeration of existing domestic legislature and international obligation is not considered as an assurance, developing a first important factor for consideration.²²⁰ Furthermore, even though it is the state party's obligation to independently assess all the factors, as the assurances themselves are not sufficient to mitigate the risk, the Court would always perform its own independent analysis of the risk and provided guarantees.²²¹ Alice Izumo's analysis of *Saadi* confirmed this, stating that "Tunisia's assurances were just one piece of this assessment; they did not trump the other evidence. Thus in *Saadi* the ECtHR made clear that the sending State must look beyond the word of the receiving State and examine its actions."²²²

Moeckli's analysis confirmed that the Court places great emphasis on the human rights situation in the receiving country. He affirmed that because the Court did not consider the verbal note from the Tunisian government as a diplomatic assurance, the ECtHR "did not have to answer the question of whether diplomatic assurances that explicitly state that the deported person will not be tortured or mistreated can provide 'adequate protection'."²²³ According to Moeckli, this suggests that diplomatic assurances, if formulated differently, might be considered to provide "a sufficient guarantee against the risk of ill-treatment."²²⁴

International organizations reacting to the decision in *Saadi* had praised the Court for upholding the absolute prohibition of torture in the cases of individuals suspected to pose a threat to national security. On the other hand, they also noted the ambiguity of the Court regarding the applicability of diplomatic assurances. For example, Human Rights Watch

²²⁰ Ibid., supra note 155, para 147

²²¹ Ibid., supra note 155, para 148

²²² Izumo, supra note 20, p.259

²²³ Daniel Moeckli, 'Saadi v. Italy: The Rules of the Game Have *Not* Changed', (2008), 8 *Human Rights Law Review* 3, p. 545

²²⁴ Ibid., p. 546

stated that “[t]he court left open whether assurances might ‘in their practical application’ provide a sufficient guarantee against the risk of ill-treatment”²²⁵, suggesting, in line with Moeckli, that assurances developed according to some requirements might pass the Court’s scrutiny. The organizations however added that, including *Saadi*, none of the guarantees had been found sufficient if such risk was established, emphasizing prevalence of the state of human rights over procurement of diplomatic assurances.

Saadi was followed by the case against Russia concerning the extradition of several individuals to Uzbekistan. The Court followed the approach established in *Saadi*, as it emphasized that torture was still widespread and systematically used in Uzbekistan.²²⁶ Secondly, all individuals were in danger of being subjected to torture due to their personal circumstances. Unlike in *Saadi*, where the Court cautioned against reliance on the diplomatic assurances from countries where torture was widespread, in *Ismoilov and others v. Russia*, the systematic practice of torture in Uzbekistan caused the Court to not consider the assurances a reliable protection against torture.²²⁷

Ismoilov illustrates a shift in the Court’s position. Correlation between the situation of human rights in the receiving country and reliance on diplomatic assurances was taken into consideration in *Saadi*. However, as the *Ismoilov* case shows, despite the fact that the Court took into consideration procurement of assurances, it has found that since the torture was widespread and systematic in the country, the assurances were *a priori* not reliable. The importance of the state of human rights in Uzbekistan again prevailed over procured assurances. Moreover, the Court does not consider any requirements, which would render diplomatic assurances in this case acceptable.

²²⁵ Human Rights Watch, ‘European Court of Human Rights Reaffirms the Absolute Prohibition on Return to Torture’, 28. February 2008, available at <http://www.hrw.org/news/2008/02/27/european-court-human-rights-reaffirms-absolute-prohibition-return-torture>, accessed 15. September 2014

²²⁶ *Case of Ismoilov and Others v. Russia*, supra note 166, para 121

²²⁷ *Ibid.*, supra note 166, para 127

In the case of *al-Moayad v. Germany*, the Court first examined the state of human rights in the receiving country and the personal circumstances of the individual, which had identified him as being in danger of increased risk of torture or ill-treatment. Although the Court had expressed concern over poor respect for the human rights of individuals suspected of terrorism by the United States authorities during interrogations, it acknowledged that such treatment occurred outside the US territory, where the applicant would be extradited.²²⁸ Therefore, if the applicant was to be transferred for interrogations to a third country, such treatment could raise a violation of the principle of *non-refoulement*. However, the Court also assessed the provided assurance which implicitly guaranteed that the applicant would be interrogated and detained on the territory of the United States.²²⁹ In the assessment, the Court acknowledged the longstanding relationship between the two countries as an important factor determinative for assessing the reliance of assurances. The final factor the Court took into consideration was the binding character of assurances, as proclaimed by the German authorities. The Court itself did not rule on the legal status of guarantees.

The case of *Al-Moayad* confirms the importance of the state of human rights in the receiving country for risk assessment, followed by the personal circumstances of the individual. Diplomatic assurances were examined as one factor among others. However, due to the strong bilateral relationship and the nature of the assurances which were considered as binding, the Court for the first time in the examined cases held that the provided assurances mitigated the risk below the threshold of existence of substantial grounds.²³⁰ Therefore, for the first time, assurances which were provided on the background of a long-term, reliable relationship prevailed over the state of human rights and personal circumstances.

²²⁸ *Case of Al-Moayad v Germany*, supra note 173, para 66

²²⁹ *Ibid.*, supra note 173, para 67

²³⁰ *Ibid.*, supra note 173, para 68

Alice Izumo summarized the approach of the Court following *Saadi* and the other cases as clarifying

*“the relative importance of circumstances internal to the assurances themselves (such as form, content, consistency, and the position of the individual or office providing the assurance) and of circumstances external to the assurances (such as the reputation of the receiving country, the national security profile of the individual subject to transfer, the possibility of post-transfer monitoring, and the cause of the transfer).”*²³¹

Izumo then identified factors of no significance, with some significance and with the most significance that the Court takes into consideration when examining the impact diplomatic assurances have on the risk assessment. In sum, the Court awarded little or no significance to the form of the assurances, and the nature of transfer. Significant factors included the authority that issued the assurances, the national importance of the individual in question, the possibility of an enforcement mechanism in the form of post-return monitoring and consistency of assurances. According to Izumo, the most significant factor remained the state of the human rights of the receiving country.²³²

In the case of *Othman v. The United Kingdom*, a more standardized form of diplomatic assurances was developed between the UK and Jordan, making it the first case when the Court was tasked with ruling on such formalized cooperation among the states.

The Court began its risk assessment by confirming that the “assurances constitute a further relevant factor which the Court will consider.”²³³ Referring to *Saadi*, the Court confirmed that the mere existence of diplomatic assurances is not sufficient enough to mitigate the risk of torture which was acknowledged as widespread and systematically used in the country.²³⁴ Stating that “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,”²³⁵ the Court implicitly

²³¹ Alice Izumo, *supra* note 20, p. 261

²³² *Ibid.*, *supra* note 20, pp. 260 - 265

²³³ *Case of Othman v. The United Kingdom*, *supra* note 182, para 187

²³⁴ *Ibid.*, *supra* note 182, para 187

²³⁵ *Ibid.*, *supra* note 182, para 188

suggested that the threshold for accepting diplomatic assurances shifted from previous cases.

Conor McCarthy explained in his critical opinion that:

*“[G]iven that the ECHR itself found that torture was a ‘widespread and routine’ practice in Jordan and that, notwithstanding this, weight could still be placed on Jordanian assurances, it is hard to envisage a case where no weight, however slight, could be placed on the assurances of a state even one whose officials consistently or systematically violated the prohibition of torture.”*²³⁶

He further adds that,

*“[i]t is clear that there are now few countries, however bad their human rights record may be, which are so bad that assurances cannot be sought to enable deportation, subject to sufficiently rigorous standards being put in place to prevent ill-treatment.”*²³⁷

Significantly, the Court listed eleven indicators that it would take into consideration when assessing the strength of assurances and their impact on the risk assessment. Christopher Michaelson expressed concern over the relatively low threshold set by the Court by this case, arguing that “ [it] sets a relatively low threshold for such assurances to be sufficient to avoid breaching the prohibition on refoulement.”²³⁸ Furthermore, he acknowledged the strength of the provided MoU, but emphasized also its weaknesses.²³⁹

What the case of *Al-Moayad* suggested, the case of *Othman* further extends. Firstly, the Court lowered the threshold of the state of human rights to *rare* cases in which the assurances cannot be awarded any weight. Secondly, it established eleven requirements of the diplomatic assurances, which can serve as guidelines for states not only to apply at the national level for examination, but also for developing in order to pass the risk assessment test of the Court. The decision of *Othman* suggests that in case these standards are complied

²³⁶ Conor McCarthy, ‘Diplomatic Assurances, Torture and Extradition: The Case of *Othman (Abu Qatada) v. The United Kingdom*,’ *Blog of the European Journal of International Law, EJIL:Talk!* (January 18, 2012), available at <http://www.ejiltalk.org/diplomatic-assurances-torture-and-extradition-the-case-of-othman-abu-qatada-v-the-united-kingdom/>, accessed 18. October 2014

²³⁷ Connor McCarthy, *supra* note 217

²³⁸ Christopher Michaelson, ‘The Renaissance of non-refoulement? The *Othman (Abu Qatada)* decision of the European Court of Human Rights’, (2012), 61 *International and Comparative Law Quarterly*, p.764

²³⁹ *Ibid.*, p. 764

with, the assurances will be adequate enough to prevail over a poor state of human rights in the country.

The last examined case concerned the individual at risk of being extradited to Tajikistan. The Court determined that the state of human rights and the personal situation of the applicant proved that there were substantial grounds to believe that the applicant would face torture or other ill-treatment upon return.²⁴⁰ Diplomatic assurances provided by the Tajik Prosecutor General were, however, held to have no impact on the mitigation of the risk, as they were mere reiteration of international human rights obligations.²⁴¹ Moreover, the Court emphasized that the State party was responsible for an independent analysis of the assurances, according to the requirements developed in the case of *Othman v. the UK*.²⁴²

In sum, the case of *Azimov v. Russia* illustrates that the state of human rights and personal circumstances of the individual is still the most important factor in the risk assessment. The diplomatic assurances were considered as another part of the risk assessment. However, because they did not contain the set of criteria set up in the *Othman* case, they were not considered as adequate or sufficient, and were therefore irrelevant to the risk assessment, and did not prevail over the state of human rights or the personal circumstances of the individual.

By employing a descriptive analysis, this chapter formulated general outcomes of ten examined cases. The next and final chapter provides conclusions based on the findings from this chapter.

²⁴⁰ *Case of Azimov v. Russia*, supra note 196, para 112

²⁴¹ *Ibid.*, supra note 196, para 133

²⁴² *Ibid.*, supra note 196, para 135

4 Answers and Conclusions

The final chapter of the present thesis provides the conclusions and answers to two research questions, *R1: To what extent do international and human rights bodies increasingly develop standards of diplomatic assurances in the context of the war on terror?* And *R2: To what extent does the standardization affect the importance the international and regional human rights bodies award to diplomatic assurances against torture in risk assessment?*

The chapter summarizes findings from the previous chapter which analyzed ten cases, five at the international and five at the regional European level, as described in the second chapter.

The diplomatic assurances against torture are considered as one factor among others in a risk assessment the human rights bodies perform in order to determine if the removal violates the principle of *non-refoulement*. Certain standardization is visible at both the international and regional level, and that where available, standardized diplomatic assurances prevail over other factors in the risk assessment.

Based on the above-examined communications before the international human rights bodies, neither of the bodies explicitly identified a set of criteria for diplomatic assurances. Both of the bodies identified certain elements, which the examined assurances lacked. For example, emphasizing monitoring and enforcement mechanism suggests that implicitly, the bodies develop to a certain degree some minimum criteria. Constanze Schimmel also shared this position, observing that there were certain requirements which the Committee considered in diplomatic assurances, such as credibility, clarity, and an effective monitoring system.²⁴³ Lena Skoglund is in agreement with this position, stating, “it seems the Committee does not rule out the use of diplomatic assurances against torture, but there has to, at least, be some

²⁴³ Constanze Alexia Schimmel, *supra* note 7, p.20

form of enforcement mechanism.”²⁴⁴ However, neither of the international bodies has explicitly elaborated defining a set of criteria.

Secondly, the weight both the CAT and HRC awarded to each of the factors could be considered as similar. The CAT explicitly emphasized the general situation of human rights in the country and the personal circumstances of the individual at risk of removal over diplomatic assurances. The HRC on the other hand did not explicitly establish which factor is awarded the greatest importance. However, deducing from the order of examined factors, a similar approach as with the CAT is visible. In neither of the examined cases were the assurances awarded such importance as to prevail over other factors. In the one case where the principle of *non-refoulement* was found not to be violated in case of removal, the decisive factor appeared to be the personal circumstances of the individual, supported to a lesser degree by the diplomatic assurances which were believed to be respected at the time of examination.

In sum, the answer to the first research question is that there are certain tendencies to standardize the content of diplomatic assurances at the international level. However, neither of the Committees has explicitly established a certain set of criteria. On the contrary, the process of standardization has been more passive, in the form of identifying a lack of certain elements. Referring to the second research question, the findings did not point to the conclusion that the international bodies awarded the assurances more importance than to the other factors in the risk assessment.

Based on the examination of the cases on the regional level, the findings are slightly different than on the international level. The shift in the position of the Court towards the standardization of diplomatic assurances and the importance of them in the risk assessment

²⁴⁴ Lena Skoglund, *supra* note 6, p. 344

has gradually evolved. Until the case of *Al-Moayad*, the general human rights situation and personal circumstances of the individual were considered as the most important factors of the risk assessment, prevailing over the diplomatic assurances. No standardization was explicitly visible. The case of *al-Moayad v. Germany* suggested a certain shift in the position, where the general situation of human rights was still examined as the most important. However, diplomatic assurances were taken into consideration as a mitigating factor capable of reducing the risk below the threshold, which marked the violation of *non-refoulement*. In this case the Court also revealed a certain set of criteria which it took into consideration during an independent assessment, namely the bilateral relations between the countries and the fact that the State party – Germany, considered them as binding on the United State. The decision in the case of *Othman v. the UK* suggested a further shift in the position of the Court with regard to diplomatic assurances against torture. The Court, consistent with the previous approach determined that the applicant faced the real risk of torture upon return based on the general state of human rights in the country, and his personal background. However, the Court before the examination of the first comprehensive bilateral Memorandum of Understanding between the UK and Jordan enumerated eleven criteria that diplomatic assurances should contain. Based on these criteria, the Court held that the assurances were suitable and adequate to mitigate the existing risk below the threshold, which meant that the removal was in line with the principle of *non-refoulement*. Therefore, standardized diplomatic assurances were awarded more importance and prevailed over the fact that torture was widespread and routinely used in Jordan and that the applicant's personal circumstances placed him under the risk. Lastly, the case of *Azimov v. Russia* confirmed the established approach. The state of human rights in the receiving country was generally poor. In addition, due to the fact that the assurances were not consistent with eleven requirements set up in *Othman v. the UK*, the Court did not find them sufficient and adequate to mitigate the risk of torture.

In response to the first research question, the standardization of diplomatic assurances is visible to a greater degree at the regional level before the ECtHR. Contrary to the approach of the international bodies, the ECtHR has taken more active approach, elaborating on the criteria. This might be due to the fact that the Court examines significantly more cases concerning the principle of *non-refoulement* than international bodies. Secondly, after the Court established eleven standards, the importance it awarded to the assurances changed. Even though the Court still placed the greatest importance on the state of human rights in the country and personal circumstances of the individual, in case the assurances are decided to be sufficient and adequate according to the eleven criteria, they would prevail over the aforementioned factors. Therefore, standardization does affect to a certain extent the importance the regional body awards to diplomatic assurances in risk assessment. According to Mariagulia Giuffré, this approach placed the ECtHR into a position of “a tightrope walker,”²⁴⁵ balancing between paying attention to states’ national security considerations and the human rights law. She explained this position as that of a Court

*“that nimbly (yet not always convincingly) keeps the equilibrium between, on the one hand, the effort to protect human rights within and beyond borders, and on the other hand, the exigency to uphold States’ concern to face terrorist violence by displacing as far as possible the ‘foreign-born threat’ and, as a consequence, any responsibility for human rights violations.”*²⁴⁶

The position of both the international bodies and the ECtHR suggests that despite the numerous criticism of the practice of using the diplomatic assurances against torture coming from the human rights movement, the tendency of the human rights judicial bodies is to work on improving the diplomatic assurances making them more reliable and sufficient to mitigate the risk of torture or ill-treatment upon removal.

²⁴⁵ Mariagulia Giuffré, ‘Access To Protection: Negotiating Rights And Diplomatic Assurances Under Memoranda Of Understanding’ in Gauci, J.P., Giuffré M. and Tsourdi, L., (eds.), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill 2015, Forthcoming), p. 24

²⁴⁶ Ibid., p. 24

Conclusion

The present thesis focused on the counterterrorism measures in the context of the war on terror depicted in light of the states' human rights obligations. This thesis chose one aspect of the multi-faceted fight against terrorism: the removals or transfers of persons identified as a threat to a state's national security. Such transfers are governed by international human rights law and the refugee law under the principle of *non-refoulement*, which prohibits removals or transfers of an individual to countries where there is a risk that their human rights might be violated. In order to comply with their obligations under human rights law, sending states resort to the practice of seeking diplomatic assurances from receiving states. Diplomatic assurances provide guarantees, which aim to ensure that the individual's human rights will be protected. Thus, the sending states would not breach their obligations under international human rights law. Because torture or other ill-treatment are among the most common violations of human rights which persons identified as a threat to national security face, the thesis focused on the assurances provided in the context of the prohibition of torture. However, the practice of using diplomatic assurances is common to a variety of other situations, which fall out of the scope of this thesis.

Due to their controversial usage, the practice of seeking diplomatic assurances has become a widely discussed topic in the human rights discourse. Whilst many scholars, members of the international human rights movement, and international organizations have criticized states for resorting to diplomatic assurances on the grounds of their inherent unreliability, or negative impact on the principle of *non-refoulement*, the position of the human rights judicial bodies has not been strictly outlined. None of the international or regional human rights judicial bodies have explicitly prohibited the use of diplomatic assurances. All of them have accepted such assurances as one relevant factor among others when considering the cases invoking the principle of *non-refoulement*.

The present thesis examined the approach of the selected international and regional human rights bodies towards the diplomatic assurances, namely the Committee Against Torture, the Human Rights Committee, and the European Court of Human Rights. Unlike the majority of the work on diplomatic assurances, which has employed the case analysis of selected judicial cases, in order to answer the impact of diplomatic assurances on the prohibition of *non-refoulement*, the present thesis assessed the approach from a legal point of view. Specifically, this thesis chose to examine to what extent current usage of diplomatic assurances against torture in the context of the fight against terrorism alters the approach of international bodies. This issue was examined firstly by inspecting tendencies in developing standards, or sets of criteria of diplomatic assurances, and secondly by exploring to what extent might such tendencies reshape the risk analysis performed in the context of the prohibition of *refoulement*.

In order to answer the research questions, the thesis examined ten selected cases, five communicated and decided at the international level and five at the regional European level. Regarding the first research question, the thesis concluded that a certain standardization of the diplomatic assurances against torture is visible on both levels. The scope and nature of standardization, however, varies. On the international level, the standardization seemed to be more implicit. Both examined international bodies emphasized certain elements, which were lacking in the examined diplomatic assurances provided by the receiving states. Specifically, both the UNCAT and the UNHRC usually pointed to a lack of independent enforcement and monitoring mechanisms. On the other hand, the ECtHR has evolved in its approach towards the standardization of assurances within the five examined cases. Starting by determining what cases do not consider diplomatic assurances, it had evolved into an explicit formulation of eleven criteria to which the Court awards the greatest importance in its independent review and which should serve as a reference point to national authorities.

The second research question examined the importance that examined bodies awarded to diplomatic assurances against torture when performing the risk assessment, a procedural exercise employed to establish maintenance of the principle of *non-refoulement*. The extent to which standardization impacts the risk analysis again varies. This thesis stipulated that the standardization on the international level was more implicit, which had no relevance on the importance the bodies awarded to the diplomatic assurances in the risk assessment. Both bodies had taken into consideration all relevant factors, however, the most important factors remain the combination of the situation of the human rights in the receiving country, and the personal circumstances of the individual upon the risk of removal. This was confirmed in all of the examined cases.

On the other hand, again, a development within the regional European level was detected. Until the case of *Othman v. the UK*, the Court had taken a similar approach - most of the emphasis was placed on the situation of human rights in the receiving country in combination with personal circumstances of the applicant. After the formulation of the eleven criteria of diplomatic assurances, the Court altered the importance of examined factors. In cases where the requirements were determined to be fulfilled, the diplomatic assurances prevailed over both factors. In the later examined case, where the assurances were not assessed according to the developed criteria at the national level, provided assurances did not impact the importance awarded to the factors. Thus, the thesis concludes that standardization of assurances at the regional level leads to alteration of the importance the European Court awards to factors examined in the risk analysis.

The reasons for such conclusions fall out of the scope of this thesis. However, some may include both the alleged increased use of diplomatic assurances against torture which consequently reflects the need to standardize the practice. More research is however needed in this area. The difference in position between the international and regional European

bodies can be explained by the fact that the ECtHR deals with significantly more cases than the international bodies and the standards were established in order to simplify and effectively manage the backlog of cases.

In sum, it remains to be seen what faith awaits the use of the diplomatic assurances against torture in future years. The conclusions of the present thesis suggests that the practice is being standardized more or less, implying that diplomatic assurances against torture will continue to be a relevant factor accepted by both the international and regional human rights judicial bodies. More importantly, it also suggests that the courts are aware of their weaknesses and are continuously subjecting them to thorough scrutiny together with other relevant factors. Thus, despite the criticism from international NGOs, a variety of scholars, and representatives of the international human rights movement, diplomatic assurances strongly maintain their place in the current fight against terrorism.

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