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Diplomatic Assurances –
Safeguard against Torture or
Undermining the Prohibition of
Refoulement?

Master Thesis
20 points

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Public International Law

December 2005

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Summary

To eliminate terrorism and security risks in its country, States seek to return alleged terrorists to their countries of origin. This is sometimes problematic because of the human rights situation in the countries of origin; the return involves the prohibition of torture or ill-treatment, and the prohibition of *refoulement*. States are prohibited from practicing torture, including putting anyone in a situation where he might risk being subject to torture. Therefore the practice of relying on diplomatic assurances has developed. Diplomatic assurances have been used for a long time as a safeguard against death penalty or unfair trials. Now, States rely on assurances as to the treatment of a returnee. The assurances are secured on the diplomatic level of international relations between States. They can be either individual or collective and they are used mainly in the area of asylum and renditions.

Both the prohibition of torture and the prohibition of *refoulement* are absolute rights that are not possible to derogate from under any circumstances. States are prohibited by public international law to practice torture, and must protect persons from torture by other State officials or persons, in or outside the territory of the State. Organisations such as Amnesty International (AI) and Human Rights Watch (HRW) have ruled out the practice as being insufficient and illegal. International bodies and courts such as the European Court of Human Rights (ECtHR), the Human Rights Committee (HRC), and the Committee against Torture have considered cases involving diplomatic assurances, and in general deemed them insufficient, although not illegal as such. Therefore, the question whether there are circumstances that can make the assurances reliable and sufficient, and thus a safeguard against torture or ill-treatment, arises.

In this thesis, I argue that the existence of a transparent procedure, subject to judicial oversight, and insight by the concerned individual can possibly make the assurances reliable. To be an effective safeguard, I argue that there are further elements that are required of the assurance. First, the assurance should be legally binding and issued by an authority that has actual and effective control over the situation in the receiving State. Assurances should be reciprocal, and should include legal repercussions if violated. The assurance must be enforceable; it should include reference to a mechanism of enforcement, and provisions regarding settlement of disputes. The individual concerned must have ability to refute the assurance, i.e. the presumption created by the assurance, and the issuing authority, and he should have the right to appeal the decision to be returned under an assurance. Upon return, the treatment of the returnee should be closely monitored by officials from the sending State and independent bodies or organisations. Monitoring must start immediately and include private visits, medical examinations and the possibility of unannounced visits.

Preface

The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law.¹ The only absolute protection against irreparable and prohibited harm upon return [to the country of origin], is not to return a person if there is any doubt that he or she would be at risk of torture or ill-treatment.²

¹ G. Echeverria, REDRESS, *Terrorism, counter-terrorism and torture, international law in the fight against terrorism*, July 2004. Available at [www.redress.org], visited 30 June 2005. p. 1 - Statement by Mary Robinson at 59th session of the HRC, 20 March 2002.

² Human Rights Watch, "Empty Promises:" Diplomatic Assurances No Safeguard against Torture, Vol. 16, No. 4(D) 15 April 2004 [Henceforth Empty Promises], p. 14.

Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples Rights
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFR	Code of Federal Regulations
CHR	UN Commission on Human Rights
CIA	United States' Central Intelligence Service
CRC	The Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental freedoms
ECtHR	European Court of Human Rights
GA	United Nations General Assembly
HRC	Human Rights Committee
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
MOU	Memorandum of Understanding
POWs	Prisoners of War
Refugee Convention	1951 Convention Relating to the Status of Refugees
SC	United Nations Security Council
SIAC	Special Immigration Appeals Commission
UDHR	Universal Declaration of Human Rights
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
UK	The United Kingdom
US	The United States of America

1 Introduction

In December 2001, the Swedish government decided that they would trust the government of Egypt when it promised to treat *Agiza* and *El Zari* in accordance with its international human rights standards. They were promised a fair retrial and treatment not in violation of their human rights and human dignity. Shortly after the decision, a United State (US) plane deported them to Egypt. Already on the plane, and then upon return to Egypt, they were ill-treated and tortured. In May 2005, the Committee against Torture held Sweden responsible for breaches of articles 3 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) because of their undertakings.³ Sweden states that it regrets that the men were not treated in accordance with the assurance received or with international human rights standards, and the haste with which the decision was taken. However, it is also clear that Sweden does not regret the actual procedure of relying on diplomatic assurances.⁴

Sweden is not the only State, nor the first, to rely on diplomatic assurances. In the US for example, assurances have been used in renditions since, at least, the 1980s, and assurances regarding death penalty have been used for a long time between States. The practice of securing diplomatic assurances is also developing further. After the bombings in London 7 July 2005, the United Kingdom (UK) has arrested persons on their territory that it regards as a security threat of the country. These persons will be returned to their country of origin, and to that end, the UK has concluded a memorandum of understanding (MOU) with Jordan stating that they will be treated in accordance with the international human rights obligations of the States involved.⁵

It is no question that Sweden broke its international obligations when *Agiza* and *El Zari* were returned to Egypt. However, does that have to mean that the reliance on diplomatic assurances can never be trusted, or be in line with human rights and the prohibitions of torture and *refoulement*?

When I started working on this thesis, I read reports from organisations such as Amnesty International and Human Rights Watch, and agreed with them that the practice was in fact a breach of international human rights standards and a circumvention of the prohibition of *refoulement*. However, I also realized that Governments are determined to continue securing and trusting

³ *Agiza v. Sweden*, Communication No 233/2003, CAT/C/34/D/233/2003, 24 May 2005.

⁴ See e.g., D. Alling, Regeringen litar på diplomatiska garantier mot tortyr, *Sveriges Radio – Ekot*, 25 August 2005.

⁵ Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provisions on undertakings in respect of specified persons prior to deportation, 10 August 2005. Available at [www.bbc.co.uk], visited on 12 August 2005 [henceforth MOU between the UK and Jordan].

diplomatic assurances. For example, Sweden has said that it may very well rely on diplomatic assurances again, and the UK has published a list of grounds for deporting people who “foment, justify or glorify terrorist violence.” The conclusion of agreements, such as the MOU with Jordan, is one of the points of that list.⁶

Therefore, I came to think that maybe the only way to fight inadequate and non-transparent assurances would be to develop them rather than outlaw them. I wanted to analyse the possibility to render them an instrument not undermining the *refoulement* prohibition and at the same time giving States the opportunity not to become safe havens for terrorists. If possible, that would mean that States will be complying with their international obligations and that criminals would be prosecuted and punished. The main concern when it comes to diplomatic assurances regarding the treatment of returned individuals is that they may not be tortured. States may not resort to torture, or in any way put an individual in a situation where he might risk being subject to torture or ill-treatment. As a US court once put it, “the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.”⁷ This must not be facilitated by the practice of securing diplomatic assurances.

1.1 Subject and Aim

The practice of diplomatic assurances gives rise to a number of issues under international law. The aim of this thesis is to examine and analyse the use of diplomatic assurances and to determine whether the practice can become part of an effective human rights protection.

In the different sections of the thesis, I will compare the diplomatic assurance such as those issued by Uzbekistan in 1999,⁸ the assurances issued by Egypt in 2001,⁹ and the assurances agreed by the UK and Jordan in August 2005.¹⁰ Based on the criticism of Sweden’s undertakings from the Committee against Torture and international organisations, the opinions of the European Court of Human Rights (ECtHR) in the *Mamatkulov* case, and the differences between the assurances themselves, I will try to outline how to make diplomatic assurances adequate and reliable.

What I want to do is to see if, and how, the practice can be developed and strengthened. The line of action by Sweden in December 2001 was a breach of public international law. With this thesis, I am trying to outline what

⁶ At-a-glance, *BBC News* at [www.bbc.co.uk], visited at 1 September 2005.

⁷ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), 30 June 1980.

⁸ Issued by Uzbekistan to Turkey in the context of extradition. See *Mamatkulov and Askarov v. Turkey*, 4 February 2005, ECHR, no. 46827/99; 46951/99, (Grand Chamber).

⁹ Issued in the form of a MOU, see the Aide-Mémoire between Sweden and Egypt, 12 December 2001, in the context of returning the two asylum seekers *Agiza* and *El Zari* to Egypt.

¹⁰ Agreed in the form of a deportation MOU, see MOU between the UK and Jordan, *supra* note 5.

could have been done differently in order to make the assurance an actual safeguard against *refoulement* and torture or ill-treatment, and the actions of Sweden in line with its international obligations. My point of view is that it is better to make the assurances enforceable and transparent, rather than condemn them and risk further situations where States enter into secret and hasty agreements that cannot be monitored.

1.2 Delimitations

Diplomatic assurances are a practice most widely used in removals from Europe and the US, and I will therefore concentrate on these regions. In the sections on regional laws and jurisprudence, I will consequently not touch upon instruments from for example the African or Latin-American regions.

Due to differences between the assurances, I will not specifically deal with diplomatic assurances regarding the death penalty or receiving a fair trial. Unlike torture and ill-treatment, death penalty is not illegal under international law and therefore such an assurance is quite different from those of relevance to this thesis, and is in addition easier to monitor. *Refoulement* is also different from assurances of a fair trial because even such an assurance is easier to monitor, and an unfair trial does not invoke irreparable harm to the individual similar to illegal treatment. Therefore, the elements required in those kinds of assurances might differ. This thesis will deal with the use of assurances where the person in question risks torture or inhuman or degrading treatment or punishment. The treatment that the assurance is meant to hinder is torture or ill-treatment in violation of human rights.

Returning asylum seekers to third countries, or first country of asylum, may cause indirect *refoulement*. I will touch upon this briefly in the legal background but will not deal further with returns to other countries than the country of origin. As a consequence I will not either touch upon assurances that individuals will not subsequently be returned to the country of origin.

While collective assurances are briefly dealt with to facilitate comparison, I will focus primarily on the use of individual assurances. This is also the fact regarding diplomatic assurances in the context of the death penalty or a fair trial.

The issue of alternatives to diplomatic assurances, such as prosecution in the sending State, is interesting and of relevance for this thesis.¹¹ I have

¹¹ In spite of the delimitations dealt with above it can be mentioned that prosecution in the sending State would be an alternative to returning the persons to their countries of origin. This may require specific safety precautions, or the setup of special tribunals or commissions and the persons concerned will be kept in high security detentions pending trial, or kept in detention indefinitely. A reason for the setup of such bodies is illustrated by the current *Ramzy* case with the ECtHR. *See Ramzy v. the Netherlands*, lodged with the Court on 15 July 2005, Application no 25424/05. Press release issued by the Registrar of the ECtHR, 20 October 2005, [www.echr.coe.int/Eng/Press/2005/Oct/]. In the Netherlands,

however chosen not to include it in this thesis because I consider it a topic for a separate thesis. It would be too spacious to deal properly with possible alternatives in addition to finding elements rendering the assurance sufficient as a safeguard.

1.3 Method and Material

In trying to outline what elements should be included in an assurance, I look at assurances given in cases from different jurisdictions, namely *Soering v. the UK*,¹² *Chahal v. the UK*,¹³ *Mamatkulov and Askarov v. Turkey*¹⁴ from the ECtHR, and *Agiza v. Sweden*¹⁵ from the Committee against Torture, and those included in the deportation MOU between the UK and Jordan.¹⁶ I have also looked at the American programme of extraordinary renditions and the use of assurances in individual cases under this practice.

I will analyse the assurances based on criticism from NGOs and monitoring bodies or courts, and use this as a basis for proposing elements and character of the assurance.

My material consists mainly of case law from different international and national jurisdictions, reports from various human rights organisations, in particular Amnesty International and the HRW, and articles from scholars published in different international journals. The cases I use, I have chosen because diplomatic assurances are actual parts of the examinations or the communications, because they clearly illustrate why the respective assurances have been insufficient or inadequate and because they are dealt with by international organisations in their criticism of the practice.

Regarding terminology, I will use “he” or “him” in referring to the object of the assurance, even though returned individuals, and terrorist suspects, might just as well be women. This is not a statement but merely a way to make the text more accessible. The term “return” as I use it will include extradition, deportation and expulsion. When outlining the elements of

the criminal case versus *Ramzy* was acquitted by the court because the evidence used by the prosecution was denied access to the court and to the defence. The evidence was regarded non-accessible by intelligence officials due to secrecy of the intelligence reports. In a special tribunal or commission, this evidence would have been accessible and a possibility of conviction would have existed. A European country that has reacted on this is the UK. The regular procedure of appeals under the Nationality, Immigration and Asylum Act 2002 does not apply in some cases making appeals not possible. Instead, appeal should be done to a body called the “Special Immigration Appeals Commission” (SIAC). This is applicable when a person is to be removed from the UK for special reasons involving national security or international relations or if the appeal requires disclosure of sensitive information. See Government of the United Kingdom of Great Britain and Northern Ireland, Home Office, Immigration and Nationality Directorate, [www.ind.homeoffice.gov.uk].

¹² *Soering v. United Kingdom*, 7 July 1989, ECHR, no. 14038/88, Series A161.

¹³ *Chahal v. United Kingdom*, 15 November 1996, ECHR, no. 22414/93, Reports 1996-V.

¹⁴ *Mamatkulov case*, *supra* note 8.

¹⁵ *Agiza case*, *supra* note 3.

¹⁶ MOU between the UK and Jordan, *supra* note 5.

agreements including assurances, since the actual assurance is the essence of the agreement, I use the term “assurance” for the entire agreement, or MOU, containing the assurance. For the treatment guaranteed against, I alter between terms such as torture, ill-treatment, illegal treatment or treatment in violation of human rights law. This I do to render the text more accessible.

1.4 Outline

After the introduction chapter, I will give a general overview of relevant provisions regarding counterterrorism, the obligations of states to prevent torture, and the prohibition of *refoulement*.

In chapter three, I go into the issue of diplomatic assurances. First, I discuss different objects for the assurances, and existing national, regional, and international laws and jurisprudence on diplomatic assurances. Thereafter, I address the use of diplomatic assurance in the context of extraordinary rendition. I briefly provide information about countries that give assurances and their human rights record, and discuss possible alternatives to the practice. Finally, in looking at how States assume legal obligations, and at State responsibility for internationally wrongful acts, I will analyse whether the assurances are legally binding or not, and whether they form part of possible breaches of international obligations.

Chapter four contains a list of elements. These are the elements I put forward as necessary in order to render the assurance a possible safeguard. I try to outline requirements for the assurance to become a legal instrument that in an actual safeguard against torture and *refoulement*.

In the concluding chapter, I outline whether diplomatic assurances can in fact become an effective instrument protecting individuals from torture and *refoulement*.

2 Legal Background

Diplomatic assurances are sought in circumstances when States have individuals on their territory that they fear are a security threat to the State, most commonly because they are suspects of terrorism. No State wants to become a safe haven for terrorists; a State with such individuals present will seek ways to transfer them somewhere else. Often, these persons are asylum seekers or refugees. States have legal obligations to protect these persons, and are under certain circumstances prohibited to remove them to risk, i.e. it is prohibited for States to remove a person to risk of torture or ill-treatment. Thus, the practice of seeking and relying on diplomatic assurances involves the legal issues of counter-terrorism, the prevention of torture or other forms of ill-treatment, and States' obligation never to resort to *refoulement*.

2.1 Counter-Terrorism under International Law

Situations where diplomatic assurances are sought and relied on risk being an occasion when States give priority to counterterrorism and safety of the State rather than to human rights. In spite of the lack of a global, uniform definition of terrorism, several documents and instruments under international law consider the question of terrorism and counterterrorism.¹⁷ Many of these include the provision that counterterrorism need to be in line with States' obligations under international law and human rights law.

“States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”¹⁸

In resolution 1373, the UN Security Council (SC) created an international obligation to adopt specific measures to combat terrorism.¹⁹ The SC resolution concerned refugee law by calling upon States to ensure that terrorists be excluded from refugee status, even though their actions may be politically motivated.²⁰ In the exclusion clause of the Refugee Convention,

¹⁷ E.g. the International Convention for the Suppression of the Financing of Terrorism gives States an obligation to criminalise acts of terrorism and to make them punishable. *See* article 4, International Convention for the Suppression of the Financing of Terrorism, (A/RES/54/109), 9 December 1999.

¹⁸ SC resolution 1456 (2003), S/RES/1456(2003), 20 January 2003, para. 6.

¹⁹ Under SC resolution 1368 (2001), S/RES/1368(2001), 12 September 2001, it is determined that terrorism constitutes a threat to international peace and security, thus giving the SC power to act under Chapter VII of the Charter of the UN.

²⁰ SC resolution 1373 (2001), S/RES/1373(2001), 28 September 2001, article 3(f) and 3(g), indication of exclusion of terrorists under Article 1F of the Refugee Convention.

to be excluded from refugee status because of crimes committed, the crime should be a serious *non-political* crime.²¹

In the later resolution 1456, the SC called on States to ensure that any measures adopted to combat terrorism comply with international law, human rights law, refugee law and humanitarian law. However, while creating an international obligation under Chapter VII of the UN Charter to take measures against terrorism, the resolutions do not establish a clear mechanism to review that such measures comply with other international obligations, including those arising under human rights and international humanitarian law.²²

The UN Draft Comprehensive Convention on International Terrorism is still under preparation.²³ Hopefully, the Convention will give an agreed definition and lay down general outlines for counter-terrorism measures.

2.2 The Prohibition of Torture

Torture, often defined as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment,”²⁴ has been, and continues to be, practiced in many parts of the world. There are many reasons why governments resort to torture, including obtaining information, influencing the behaviour of an individual, or remaining in power.²⁵ Torture is prohibited under international law in all situations, and at all times. The prohibition is absolute and has the character of *jus cogens* why states are bound to put in place all those measures that may pre-empt the perpetration of torture.²⁶ The prohibition of torture also, in itself, includes the obligation for States not to expose individuals to the danger of torture upon return to another country.²⁷

²¹ Article 1F, the 1951 Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S 150, emphasis added.

²² G. Echeverria, REDRESS, *supra* note 1, p. 15.

²³ Draft Comprehensive Convention on International Terrorism, UN Doc. A/C.6/56/L.9, 29 October 2001.

²⁴ Article 1(2), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Resolution 3452 (XXX) 9 December 1975. Another definition is included in CAT article 1 where the definition of torture is subject to the purpose of the treatment, and the person committing the treatment. See also A-M. Bolin Pennegård, *Article 5*, in G. Alfredsson and A. Eide, *The Universal Declaration of Human Rights, A Common Standard of Achievement* (Kluwer Law International, The Hague, 1999), p. 122, and C. Ovey and R. C.A. White, *Jacobs and White European Convention on Human Rights* (Oxford University Press, Oxford, 2002), p. 59.

²⁵ A-M. Bolin Pennegård, *supra* note 24, p. 121 *et seq.*

²⁶ See *The Prosecutor v. Furundžija*, 10 December 1998, Case No: IT-95-17/1-T, para. 148. See also S. Kapferer, Protection Policy and Legal Advice Section, UNHCR, *The Interface Between Extradition and Asylum* (Geneva, November 2003), p. 43.

²⁷ See e.g., HRC General Comment No. 20, Prohibition of torture or cruel, inhuman or degrading treatment or punishment (article 7), 10 March 1992, para. 9.

The prohibition of torture in international instruments started with the Universal Declaration of Human Rights (UDHR) article 5. Since then, many other international and regional instruments in human rights humanitarian law and administration of justice have followed.²⁸ The prohibition has entered into binding treaty obligations as well as it has become a part of international customary law. The most authoritative international legal standard on the subject is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which contains a definition of torture in article 1. The definition limits torture to pain or suffering inflicted by a specific actor.²⁹ However, the prohibition under the International Convention on Civil and Political Rights (ICCPR) article 7 contains broader coverage since the Covenant does not contain a definition. An example of this is that CAT does not prohibit “pain or suffering arising only from, inherent in or incidental to lawful sanctions,”³⁰ which can come under the more general prohibition in the ICCPR.

Several regional instruments contain the prohibition of torture.³¹ In Europe, the ECtHR has defined torture in a combination of cases as always being also inhuman and degrading and that torture differs from inhuman treatment in attaching a special stigma of deliberate inhuman treatment causing very serious and cruel suffering.³² In the *Ireland v. United Kingdom* judgement, the Court held that conduct must attain a minimum level of severity to be prohibited under the Convention.³³

The ECtHR has ruled that the obligation under article 3 includes the positive obligation to ensure that those within its jurisdiction are not subjected to treatment prohibited by the article. A State is not only prohibited to practice torture, it is also obliged to provide effective protection against such treatment.³⁴ The obligation includes protection against prohibited treatment by another agent than the State officials, such as private agents, or agents from another State.³⁵ In *Agiza*, the Committee against Torture held Sweden

²⁸ A-M. Bolin Pennegård, *supra* note 24, p. 121. In international instruments, torture is prohibited in e.g., the Genocide Convention, the 1949 Geneva Conventions and protocols, the Convention on the Rights of the Child (CRC) article 37, CAT article 2 and ICCPR article 7.

²⁹ CAT article 1, ‘the lawful sanctions clause’; “...pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

³⁰ CAT article 1 *in fine*.

³¹ See e.g., the ECHR article 3; the ACHR article 5(2); the ACHPR article 5; and more specific in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment article 1; and the Inter-American Convention to Prevent and Punish Torture article 5.

³² The case of *Ireland v. United Kingdom*, 18 January 1978, ECHR, no. 5310/71, Series A25, para. 167, the *Greek case* and *Aksoy v. Turkey*. C. Ovey and R. C.A. White, *supra* note 24, pp. 59-63.

³³ *Ibid.* para. 162.

³⁴ C. Ovey and R. C.A. White, *supra* note 24, pp. 66-68.

³⁵ *Ibid.*

responsible for not protecting *Agiza* against illegal treatment by US State officials on Swedish territory.³⁶

The torture prohibition also has extraterritorial effect in the sense that a State may violate the prohibition by exposing an individual to the likelihood of prohibited treatment in another jurisdiction.³⁷ For example, the obligation under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) applies in cases of refusal to admit persons to the territory, and deportation or extradition of persons to countries where they risk torture.³⁸ A breach of article 3 requires substantial grounds for believing that the person returned faced a real risk of being subject to torture or inhuman treatment in the country of destination.³⁹ In such a case, the responsibility lies with the sending State. The ECtHR has held that:

“the establishment of such a responsibility inevitably involves an assessment of the conditions in the [receiving State] against the standards of article 3 of the [European] Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving State, whether under general international law or, under the Convention, or otherwise. In as far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”⁴⁰

Thus, the negative obligation to protect any individual under its jurisdiction and prevent prohibited treatment includes the obligation for a State to protect the individual from such treatment by or in another State. The HRC has interpreted article 2 of the ICCPR to give the same extraterritorial effect to the prohibition under article 7.⁴¹

In *Soering*, the US as receiving State was not a State Party to the European Convention, so the Court put the responsibility solely on the sending State, the UK.⁴² However, this cannot be interpreted as the receiving State not being responsible for the actual treatment if it occurs. That the sending State is held responsible for its own actions of course does not diminish the responsibilities of the receiving State under its own obligations. However, no precedent exists on the responsibilities of the receiving State.

³⁶ *Agiza* case, *supra* note 3, para. 13.5.

³⁷ See C. Ovey and R. C.A. White, *supra* note 24, p. 70, and the *Soering* case, *supra* note 12, para. 91.

³⁸ C. Ovey and R. C.A. White, *supra* note 24, Chapter 5, and the *Soering*, *Cruz Varas* and *Vilvarajah* cases dealt with below.

³⁹ See e.g., *Vilvarajah v. United Kingdom*, 30 October 1991, ECHR, no. 13163/87; 13164/87; 13165/87; 13447/87; 13447/87, Series A215, para. 107.

⁴⁰ *Soering* case, *supra* note 12, para. 91.

⁴¹ HRC General Comment No. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, (CCPR/C/21/Rev.1/Add.13), 29 May 2004.

⁴² *Soering* case, *supra* note 12.

2.2.1 Prohibition of Torture as *Jus Cogens* and an Obligation *Erga Omnes*

The prohibition against torture is considered a peremptory norm or *jus cogens*, and as such takes precedence over conflicting rules of treaty law or customary international law.⁴³ As a peremptory norm, it forms part of the body of customary international law⁴⁴ that binds all states, regardless of which treaties they have ratified. In addition, human rights established under a treaty may constitute obligations *erga omnes*⁴⁵ for the states parties. The prohibition of torture and other forms of ill-treatment is such an obligation.⁴⁶ In *Furundžija*,⁴⁷ the International Criminal Tribunal for the former Yugoslavia (ICTY) argued that the universal revulsion against torture has led to a cluster of treaty and customary rules on torture having a status similar to that of the principles prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force, and the forcible suppression of the right of peoples to self-determination.⁴⁸ The Court thus argued that the prohibition imposes upon States obligations *erga omnes*, and a violation of the prohibition constitutes a breach of the correlative right of all members of the international community.⁴⁹

Having the character of *jus cogens*, the prohibition of torture permits no derogation or limitation, even in times of war or emergency threatening the life of a nation.⁵⁰ This is also explicitly provided for in for example article 2(2) CAT, article 4(2) ICCPR,⁵¹ and article 15 ECHR.⁵² In *Ireland v. United Kingdom*, the ECtHR held that the Convention prohibits torture in absolute terms and that no derogations are possible even in the event of public emergency threatening the life of the nation.⁵³ The Court reiterated its holding in *Chahal*⁵⁴ where it said that considerations of national security had no application where the issue was violations of article 3. The Court

⁴³ VCLT article 53, *see also e.g.*, G. Echeverria, REDRESS, *supra* note 1, p. 17, and S. Kapferer, *supra* note 26, p. 45.

⁴⁴ *See e.g.*, the *Furundžija* case, *supra* note 26, para. 160, and the HRC General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, (CCPR/C/21/Rev.1/Add.6) 11 April 1994, para. 8.

⁴⁵ I.e. obligations of a state towards the international community as a whole, that concerns all states and all states can be held to have legal interest in their protection. *See e.g.*, M. Shaw, *International Law* (Cambridge University Press, Cambridge, 2003, fifth edition), p. 116.

⁴⁶ M. Shaw, *supra* note 45, p. 116.

⁴⁷ *Furundžija* case, *supra* note 26, paras 143-157. *See also* S. Kapferer, *supra* note 26, p. 43.

⁴⁸ *Ibid.* para. 147.

⁴⁹ *Ibid.* paras. 151-152.

⁵⁰ *See e.g.*, HRC General Comment No. 20, *supra* note 27, para. 3.

⁵¹ *See e.g.*, HRC General Comment No. 29, States of Emergency (article 4), (CCPR/C/21/Rev.1/Add.11), 31 August 2001, para. 7.

⁵² *See e.g.*, M. K. Addo and N. Grief, Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights? Vol. 9 No. 3, *European Journal of International Law* (1998), pp. 510-524.

⁵³ *Ireland v. United Kingdom* case, *supra* note 32, para. 163.

⁵⁴ *Chahal* case, *supra* note 13.

also stated that the prohibition applies irrespective of a victim's conduct,⁵⁵ i.e. also to suspects of terrorism. The Committee against Torture has recognised the difficulties that State parties faces in their prolonged fight against terrorism, but recalls that no exceptional circumstances can be invoked as a justification for torture.⁵⁶

Even though the prohibition is absolute, there exists some extent of relativity or proportionality. In other words, the prohibition is not static and it should be awarded a living interpretation and consideration in the light of present-day circumstances.⁵⁷ Ill-treatment must reach a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case.⁵⁸ The assessment of seriousness, the qualification of the treatment, will be relative. The ECtHR, and earlier the Commission, have used age, sex and mental state of the victim; the nature and the context of the punishment; and the risk that the prisoner poses, as relevant factors for the assessment.⁵⁹ This implies that there might be a proportionality balancing between the treatment and the behaviour of the victim. Although culture has not been said to be a relevant factor in the assessment, a difficult aspect of the reliance of assurances from another State may be the definition of the treatment protected against, and differences in qualification of treatment in the sending and receiving States.

2.2.2 Death Row Phenomenon and Death Sentence as Torture

The phenomenon of death row is increasingly becoming considered a violation of a prisoner's human rights. The phenomenon itself does not have a specific definition. Generally, it is regarded as the prolonged delay under the harsh conditions of death row.⁶⁰

It was in the landmark case of *Soering v. the United Kingdom*⁶¹ which first questioned death row, rather than the death penalty in itself, as equivalent to cruel and inhuman punishment.⁶² Numerous cases and academic writers

⁵⁵ *Chahal* case, *supra* note 13, para. 80.

⁵⁶ See e.g., the Committee's conclusions and recommendations upon reports submitted by Yemen (CAT/C/CR/31/4), para. 5, where it stressed that "in particular the reactions to such threats [terrorism] must be compatible with article 2 (2) of the Convention and within the limits of SC resolution 1373 (2001)"; and by Israel (CAT/C/SR.297/Add.1), para. 6.

⁵⁷ C. Ovey and R. C.A. White, *supra* note 24, pp. 60-61.

⁵⁸ See e.g., *Vilvarajah* case, *supra* note 39, para. 197(3).

⁵⁹ *Ibid.* See also *Ireland v. United Kingdom* case, *supra* note 32, para. 162.

⁶⁰ P. Hudson, Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law? *European Journal of International Law* (2000). Vol. 4. pp. 833-856. [www.ejil.org], visited on 15 June 2005, p. 834.

⁶¹ *Soering* case, *supra* note 12.

⁶² Cruel and inhuman punishment is prohibited under international and domestic constitutions of most countries in the world and, in spite of lack of a uniform terminology, the underlying concept of the prohibition remains the same; to protect persons from unnecessary and undue suffering.

have cited the decision that thus has very strong relevance in international law. In order to be torture, the conditions of the death row phenomenon must rise to the minimum severity required for a violation of the prohibition. Not only the delay, but also elements as the conditions on death row and the mental state of the prisoner are relevant. Both the ECtHR and the HRC⁶³ have explicitly adopted the doctrine, and have stated that only conditions taken as a whole may constitute a violation.⁶⁴ The violation is not dependent on who caused the delay; even a delay attributable to the prisoner, e.g. by using the legal rights to appeal, can constitute a violation. The essential principle is that a death row prisoner is sentenced to execution, not lengthy periods of harsh treatment, followed by execution.

The manner in which a death sentence precedes can also amount to torture. The HRC stated that if death penalty is not abolished it must be carried out in such a way as to cause the least possible physical and mental suffering.⁶⁵ In the case of *Ng. v. Canada*, the Commission ruled that the execution by the gas asphyxiation is contrary to internationally accepted standards of humane treatment and that it amounts to treatment in violation of article 7 of the Covenant.⁶⁶

2.2.3 Universal Jurisdiction and the Prohibition of Torture

Although it is of greater importance that the prohibition of torture is enforced at the national level, it can be argued that torture in some circumstances is referable to the principle of universal jurisdiction. The 1949 Geneva Conventions contain provisions for universal jurisdiction over grave breaches, including torture.⁶⁷ Crimes falling under the principle are piracy; war crimes; crimes against peace; and crimes against humanity. Under the statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR),⁶⁸ torture may be a crime against humanity and as such, it may be subject to universal jurisdiction. The ICTY held that the *jus cogens*

⁶³ The first decision by the HRC where the phenomenon was accepted was *Francis v. Jamaica*, Communication No. 606/1994, (CCPR/C/54/D/606/1994), 3 August 1994.

⁶⁴ *Pratt and Morgans v. Jamaica*, Communication No. 210/1986(A/44/40, Annex X, Appendix II, F, at p. 222), 6 April 1989.

⁶⁵ HRC General Comment No. 20, *supra* note 27, para. 6.

⁶⁶ *Ng v. Canada*, HRC Communication No. 469/1991, (CCPR/C/49/D469/1991), 7 January 1994, paras 16.1 and 16.4. *See also* W. Patten and N. Shamir, Human Rights Watch Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 7 June 2005, p. 22.

⁶⁷ *See* article 49 of the First Geneva Convention; article 50 of the Second Geneva Convention; article 129 of the Third Geneva Convention; and article 146 of the Fourth Geneva Convention. *See also* M. Shaw *supra* note 45, p. 595.

⁶⁸ ICTY Statute article 5 and ICTR Statute article 3 torture is a crime against humanity if committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic racial or religious grounds. *Compare* with article 5 of the Rome Statute for the International Criminal Court (ICC), which limits jurisdiction to the most serious crimes of concern to the international community as a whole.

character, as well as CAT article 5, is a legal basis for States' universal jurisdiction.⁶⁹

CAT provides for the exercise of State jurisdiction upon a variety of bases, sometimes termed quasi-universal jurisdiction.⁷⁰ It is in the Convention coupled with an obligation for states parties to establish such jurisdiction in domestic law.⁷¹ In the Pinochet case, one of the judges argued that where a *jus cogens* norm under customary international law was involved, universal jurisdiction as such, may be created.⁷² The House of Lords held in the case that the *jus cogens* nature of the international prohibition on torture justified the extension of domestic criminal jurisdiction over acts of torture wherever committed.⁷³

2.3 The Principle of *Non-Refoulement*

States can violate their human rights agreements not only by directly breaching the rights of individuals, but also by sending individuals to other states that will breach those rights. The prohibition of torture and ill-treatment includes in addition to the prohibition of the practice, also an obligation to protect a person from being subjected to it, and to prevent it from happening in a State's own jurisdiction, or anywhere else.⁷⁴ Similar to this is the prohibition of *refoulement* that establishes a mandatory bar applying to any form of removal of an asylum-seeker or refugee. The rationale for this is the same, not to return person to other States in certain circumstances.⁷⁵ In other words, the prohibition obliges States to protect a person from persecution or other human rights violations also outside its jurisdiction.⁷⁶

The principle of *non-refoulement* applies regardless of whether or not it is explicitly provided for in an international treaty or legislation and the only exceptions to the principle are those in the refugee convention article 33(2). Similar to the determination of refugee status, the decision on the existence of a prohibition of *refoulement* is an assessment of what might happen to the person upon return to another country, i.e. a hypothesis of the future. The prohibition of *non-refoulement* also applies in the context of extradition and

⁶⁹ *Furundžija* case, *supra* note 26, para. 156. The Court stated that "one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present under its jurisdiction."

⁷⁰ M. Shaw, *supra* note 45, p. 597.

⁷¹ CAT articles 4, 5, 7 and 8 obligate states to ensure that all acts of torture are criminal, establish jurisdiction over such crimes and that they constitute extraditable crimes so that the state involved will either extradite or prosecute.

⁷² See M. Shaw, *supra* note 45, p. 597.

⁷³ G. Echeverria, REDRESS, *supra* note 1, p. 19.

⁷⁴ See above section 2.2.

⁷⁵ G. S. Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, Oxford, 1996), p. 117.

⁷⁶ See *ibid.* p. 111 and 138.

expulsion.⁷⁷ The principle of *non-refoulement* is not limited to refugee law; in fact, the principle is, in some respects, stronger in international human rights law.

2.3.1 The Refugee Convention

The Refugee Convention prohibits States from expelling or returning (“*refouler*”) a refugee to a territory where his life or freedom would be threatened on account of any of the persecution grounds.⁷⁸ The principle refers not only to the refugee’s country of origin, but also equally to any country where a person has reason to fear persecution.⁷⁹ The principle applies also to extradition.⁸⁰ However, if a refugee on reasonable grounds is regarded as a danger to the national security or community of the country of refuge, the protection against *refoulement* does not apply.⁸¹ In addition, the protection of *refoulement* only applies to refugees,⁸² if a person is excludable under article 1F he is not protected against *refoulement* under the Refugee Convention.

2.3.2 Human Rights Law

CAT prohibits *refoulement* in article 3. There are no exceptions allowed, but the prohibition is limited to torture, as defined under article 1 of the Convention.⁸³ The Committee against Torture has formulated a standard formula for the element of probability, i.e. the level of risk. Article 3 requires a determination on whether there are substantial grounds for believing that a person would be in danger of being subjected to torture

⁷⁷ See generally *ibid.* chapter 4.

⁷⁸ Article 33(1). The grounds for persecution are race, religion, nationality, membership of a particular social group, and political opinion.

⁷⁹ See Sir E. Lauterpacht and D. Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* in E. Feller et al (ed), *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003), pp. 122-123.

⁸⁰ The State is according to the wording of the article prohibited to return a refugee “in any manner whatsoever”; any act of removal is prohibited, the formal description of the act is not material. It has sometimes been suggested that *non-refoulement* does not apply to acts of extradition or to non-admittance at the frontier, this is however not correct. See Sir E. Lauterpacht and D. Bethlehem, *supra* note 79, p. 112.

⁸¹ The Refugee Convention article 33(2). See generally S. Kapferer, *supra* note 26, p. 76. See also UNHCR, *Addressing Security Concerns without Undermining Refugee Protection*, where the UNHCR appeals to governments to increase criminal law enforcement to avoid persecution and enlargement of the exclusion clauses of the Refugee Convention. If an asylum seeker is not excluded from refugee status, and return would amount to persecution, prosecution in the country of asylum based on the principle *aut dedere aut iudicare* would be the appropriate response.

⁸² However, not limited to *formally recognized* refugees, since a person is a refugee as soon as he fulfills the convention’s criteria, and the status is only declaratory. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees*, (HCR/IP/4/Eng/REV.1), Geneva, January 1992, UNHCR 1979, para. 82.

⁸³ Thus, *non-refoulement* under CAT only relates to danger of torture emanating from a State actor, and not including cruel, inhuman or degrading treatment or punishment.

upon return. The aim of the determination is to establish whether the individual concerned would be *personally* at risk. Therefore, the Committee stated, the individual concerned must face a foreseeable, real and personal risk of being tortured.⁸⁴ When it comes to the requirement of necessity and predictability, the risk must be assessed on grounds that go beyond mere theory or suspicion; however, it does not have to meet the test of being highly probable.⁸⁵

The prohibition of torture in ICCPR article 7 has extraterritorial effect and includes a *non-refoulement* obligation. The HRC has also interpreted article 2 of the Convention to entail “an obligation not to extradite, deport, expel or otherwise remove” to the risk of torture or ill-treatment.⁸⁶

Even though article 3 ECHR does not explicitly prohibit *refoulement*, the ECtHR has construed the article also to cover such a prohibition, and to cover the prohibition in a manner more expansive than the Refugee Convention.⁸⁷ According to the Council of Europe, each State has the duty to ensure that the possible return (“*refoulement*”), or expulsion, of an asylum applicant to his country of origin, or to another country, will not expose him to the death penalty, to torture, or to inhuman or degrading treatment or punishment.⁸⁸ Article 3 of the ECHR is not only absolute and unconditional, it also applies to everyone, even illegal entrants, whatever their activities or personal conduct, whereas the Refugee Convention applies only to refugees. In addition, the ECHR provides for a mechanism of enforcement, which the Refugee Convention does not.⁸⁹

In the European Union, the principle of *non-refoulement* can be found in the Qualification Directive,⁹⁰ and in the European Arrest Warrant.⁹¹ Here the principle is more restrictive than the Refugee Convention, providing for *refoulement* only when not prohibited by States’ international obligations. Thus, the wider protection under international human rights law can be used as a saving clause for the Qualification Directive.

⁸⁴ *Haydin v. Sweden*, Communication No 101/1997, (CAT/C/21/D/101/1997), 20 November 1998, paras. 6.3 and 6.5.

⁸⁵ Committee against Torture, General Comment No. 1, Implementation of article 3 of the Convention, A/53/44, annex IX, 21 November 1997, para. 6.

⁸⁶ HRC General Comment No. 31, *supra* note 41. Paragraph 12 reads in part: “article 2 [...] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant [...]”

⁸⁷ The Principle was first held in the *Soering* case, *supra* note 12, paras 104-105, and has later been extended by *e.g.*, *Chahal* case, *supra* note 13, para. 80.

⁸⁸ Guideline XII, Human rights and the fight against terrorism, the Council of Europe guidelines, March 2005.

⁸⁹ H. Lambert, Protection Against *Refoulement* from Europe: Human Rights Law comes to the Rescue, 48 (3), *International and Comparative Law Quarterly* (1999), p. 516.

⁹⁰ Council Directive 2004/83/EC on minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the contents of protection granted, article 21.

⁹¹ European Arrest Warrant, introduction, para. (13).

In the American States, the central features of *non-refoulement* are present in article 22(8) of the American Convention on Human Rights (ACHR). In Latin America, the Cartagena Declaration contains the most explicit prohibition and emphasizes the importance of *non-refoulement* for the protection of refugees.⁹²

In addition, extradition conventions preclude extradition in situations where it could amount to *refoulement*.⁹³

2.3.3 International Humanitarian Law

There is additional support in international humanitarian law (IHL), applicable in times of war for the prohibition of *refoulement*. The Geneva Conventions explicitly permit the transfer of prisoners of war and civilians only to states that are parties to the conventions and willing to comply with the protection emanating from them. For example, article 12 of the Third Geneva Convention regulates the transfer of prisoners of war (POWs) to a third State, and article 45 of the Fourth Geneva Convention prohibits the transferral of a protected person⁹⁴ to a country where he may have reason to fear persecution. During internal conflicts, common article 3 is applicable and even though not expressly addressing the issue of transfer, it prohibits certain acts such as torture.⁹⁵

The applicability of IHL is important to note in the context of the US global campaign against terrorism. The US defends its rendition policy partly on ongoing state of war. The enemy combatants, caught in Afghanistan and detained at Guantánamo, thus fall under the protection of IHL. If it is not a state of war, they fall under the, always applicable, protection of international human rights law.⁹⁶

2.3.4 Customary International Law

It is clear that the prohibition of *refoulement*, in any form, is a recognised principle of customary international law,⁹⁷ with the same content as in the

⁹² The 1984 Cartagena Declaration on Refugees, Conclusions and Recommendations, III, 5.

⁹³ E.g., the 1957 European Convention on Extradition article 3 (2), and the 1981 Inter-American Convention on extradition article 4 (5). See also Sir E. Lauterpacht and D. Bethlehem, *supra* note 79, p. 93.

⁹⁴ In article 4, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (fourth Convention of 12 August 1949); protected persons are defined as “Those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

⁹⁵ Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, Vol. 17, No. 4(D) 15 April 2005 [Henceforth *Still at Risk*], p. 11.

⁹⁶ W. Patten and N. Shamir, *supra* note 66, p. 17.

⁹⁷ To be part of customary international law there are two requirements: State practice; such practice undertaken by States because of their opinion that they are under a legal obligation to do so. See e.g., J. Allain, *The jus cogens Nature of non-refoulement*, Vol. 13 No. 4, *International Journal of Refugee Law* (2002), footnote 17, and his reference to the *Nicaragua* case, ICJ reports, 1986, para. 77.

instruments. Thus, the prohibition is binding on all States whether or not they are parties to the above-mentioned instruments.⁹⁸ State practice is persuasive evidence of the concretisation of a customary rule. Opposition to the principle is hard to find. The core element of the rule is the prohibition of return, in any manner whatsoever, of refugees to countries where they may face persecution.⁹⁹ In addition, international organisations like the United Nations General Assembly and the UN High Commissioner for Refugees (UNHCR) have regularly confirmed *non-refoulement* as a rule of customary international law without any objections of States.¹⁰⁰ The Special Rapporteur on Torture has stated that “[t]he principle of *non-refoulement* is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.”¹⁰¹

2.3.5 Indirect Refoulement

The prohibition of *refoulement* also precludes the removal of a refugee or asylum seeker to a third State where there is a risk of further removal to a territory where he might be at risk of prohibited treatment.¹⁰²

In *T.I. v. the United Kingdom*,¹⁰³ the ECtHR held that the indirect removal to an intermediate State does not affect the responsibility of the removing State. The removing State has the responsibility to ensure that the transferee is not exposed to treatment contrary to article 3 of the ECHR, including treatment that might result in *refoulement*.¹⁰⁴

CAT article 3 prohibits the expulsion, return (“*refoulement*”) or extradition of any person to another State where there are substantial grounds for believing that he would be subjected to torture. The Committee against Torture has stated that the term “another State” includes not only the State to which the individual concerned is expelled, returned or extradited, but also any other State where he may subsequently be expelled, returned or extradited.¹⁰⁵ The risk assessment should therefore weigh the risk of further

⁹⁸ See, e.g., J. Allain, *supra* note 97, p. 538 and S. Kapferer, *supra* note 26, p. 76.

⁹⁹ G. S. Goodwin-Gill, *supra* note 75, pp. 143, 167-168. The words “in any manner whatsoever” further give the principle extraterritorial application. On the content of the customary rule, see also Sir E. Lauterpacht and D. Bethlehem, *supra* note 79, pp. 140-164.

¹⁰⁰ See, e.g., J. Allain, *supra* note 97, pp. 538, 539.

¹⁰¹ Theo van Boven, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, (A/59/324), 1 September 2004, paras. 25-29.

¹⁰² See e.g., Guideline XII, Human rights and the fight against terrorism, The Council of Europe Guidelines.

¹⁰³ *T.I. v. United Kingdom*, 7 March 2000, ECHR, no. 43844/98, Decision as to the admissibility of Application No. 43844/98 by T.I. against the United Kingdom, [henceforth *T.I. v. the United Kingdom*].

¹⁰⁴ *T.I. v. the United Kingdom* case, *supra* note 103, para. 228. See also Cases and Comments by the UNHCR pp.269-270.

¹⁰⁵ Committee against Torture, General Comment No. 1, *supra* note 85, para. 2. See also *Mutombo v. Switzerland*, Communication No 13/1993, (CAT/C/12/D/13/1993), 27 March 1994, para. 10, and *Korban v. Sweden*, Communication No 88/1997, (CAT/C/21/D88/1997), 16 November 1998, para. 7.

deportation, and the legal possibilities for the applicant to submit communications to the Committee in the country of transfer.¹⁰⁶

The HRC has stated that indirect *refoulement*, by virtue of the article 2 obligation, is included under article 7 ICCPR. Article 7 thus includes the situation where a person is subsequently removed to a country where he risks torture or ill-treatment.¹⁰⁷

2.3.6 The Principle of *Non-Refoulement* as *Jus Cogens*

The characterisation of the obligation of *non-refoulement* as *jus cogens* would be a powerful weapon to guarantee protection of individuals and their human rights in the time of war against terrorism. If accepted and recognized as a peremptory norm of international law, every treaty, treaty obligation, and every act by a State or an international organisation that is in conflict or violation of this norm, is void.¹⁰⁸

Since there is no international convention stating that *non-refoulement* is *jus cogens*, one must trace its recognition as such through customary international law, State practice, and the rationale for the State practice.¹⁰⁹ The Executive Committee of the UNHCR, reflecting the consensus of States, has confirmed that the principle of *non-refoulement* is *jus cogens* law.¹¹⁰ Further, State practice under the Cartagena Declaration on Refugees,¹¹¹ is evidence for the rationale behind the State practice being the status of *jus cogens*.¹¹² Although debated, no clear consensus exists as to whether *non-refoulement* has the character of *jus cogens*.¹¹³ For the purpose of this thesis however, it suffices to conclude that the prohibition of torture has the character of *jus cogens*, and that the prohibition of *refoulement* is non-derogable and absolute.

¹⁰⁶ *Mutombo* case, *supra* note 105, para. 9.6, and *Korban* case, *supra* note 105, paras. 6.5 and 7.

¹⁰⁷ HRC General Comment No. 31, *supra* note 41, para. 12.

¹⁰⁸ R. Bruin and K. Wouters, Terrorism and the Non-Derogability of Non-Refoulement, Vol. 15 No. 1, *International Journal of Refugee Law* (2003), p. 11.

¹⁰⁹ J. Allain, *supra* note 97, p. 538.

¹¹⁰ J. Allain, *supra* note 97, p. 539, *see also* Sir E. Lauterpacht and D. Bethlehem, *supra* note 74, p. 107.

¹¹¹ The 1984 Cartagena Declaration on Refugees, which includes a reference to the actual or imminent *jus cogens* status of the principle of *non-refoulement* in its Conclusions and Recommendations, III, 5. "... the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*."

¹¹² J. Allain, *supra* note 97, p. 539.

¹¹³ E.g. J. Sztucki argues that the principle is frequently violated which stands in the way of a consistent State Practice. J. Sztucki, The Conclusion of the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme, 1 No. 3, *International Journal of Refugee Law* (1989), pp. 285-318.

It is not possible to derogate from CAT article 3, ICCPR article 7 or ECHR article 3. CAT article 3 explicitly includes, and the two latter norms have been interpreted to include, the prohibition of *refoulement*. Therefore, under these articles, the prohibition against returning someone to a State where there are substantial grounds to fear that he may be subjected to torture or cruel, inhuman or degrading treatment or punishment, is absolute.¹¹⁴

That the Committee against Torture considers CAT article 3 to be absolute was stated in the case of *Tapia Paez v. Sweden*. The applicant was refused asylum based on the exception clause of article 1F of the Refugee Convention.¹¹⁵ The Committee however, said that it considers the application of article 3 of the Convention to be absolute.

“Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under the obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”¹¹⁶

The ECtHR judgement in the case of *Chahal v. United Kingdom* held the prohibition of *refoulement* as absolute, even in situations relating to national security. The rule according to the Court applies regardless of what the individual is suspected of, i.e. even terrorism.¹¹⁷

The HRC has held the prohibition contained in ICCPR art 7 to be absolute and non-derogable in its general comments.¹¹⁸

As mentioned above, the only instrument that provides an exception to the principle of *non-refoulement* is the Refugee Convention. Even so, article 33 embodies the humanitarian essence of the Refugee Convention and it is not possible to derogate from the prohibition or make reservations to the article.¹¹⁹ In addition, some writers argue that even the prohibition contained in the Refugee Convention is absolute and unconditional in cases where the persecution at risk can be qualified as torture, even if the person would be possible to deport under the exception in article 33(2).¹²⁰

¹¹⁴ International Helsinki Federation for Human Rights (IHF), *Anti-terrorism Measures, Security and Human Rights. Developments in Europe, Central Asia and North America in the Aftermath of September 11*, 15 April 2003 [henceforth IHF report], p. 169.

¹¹⁵ *Tapia Paez v. Sweden*, Communication No 39/1996, (CAT/C/18/D/39/1996), 28 March 1997, para. 14.4.

¹¹⁶ *Ibid.* para. 14.5.

¹¹⁷ See *Chahal* case, *supra* note 13.

¹¹⁸ HRC General Comment No. 20, *supra* note 27, para. 3, and General Comment No. 29, *supra* note 51, para. 7.

¹¹⁹ Reservations are precluded under article 42(1) of the Refugee Convention and article VII(1) of the 1967 Protocol. See Sir E. Lauterpacht and D. Bethlehem, *supra* note 79, p. 107.

¹²⁰ R. Bruin and K. Wouters, p. 9, and IHF report p. 146.

3 Diplomatic Assurances

To avoid the risk of violating their obligations under international law while fighting the threat of terrorism, States rely on diplomatic assurances when returning asylum seekers to another country. Diplomatic assurances are formal promises from the government in the country of return stating that the returnee will not be subjected to illegal treatment upon return. Several international organisations have called for States to stop relying on diplomatic assurances as they consider them insufficient as safeguards for treatment in accordance with human rights.¹²¹

The object of the assurance is in general either returned to the country of origin in the context of migration control, or extradited or deported under criminal suspicions, i.e. because he is considered a security threat. Assurances are most widely used in asylum law. *Suresh, Chahal, Mamatkulov* and *Agiza*, were all asylum seekers.¹²² However, assurances are also used in the context of extraordinary renditions, practiced mainly by the US.

There are different kinds of treatment, such as death penalty, unfair trials, and the risk of torture or ill-treatment, which may stand in the way of transfers or removals of aliens. In extradition cases involving the risk of death penalty, States have secured diplomatic assurances for many years.¹²³ Unlike cases involving the potential risk of torture or ill-treatment, assurances have been found compulsory in the context of death penalty in order for States not to violate their international human rights obligations.¹²⁴ In addition, the UN Model Treaty on Extradition of 1990 includes the possibility for States to supply sufficient assurances against death penalty to avoid the refusal of extradition.¹²⁵

¹²¹ See e.g., Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation against Torture, *Call for Action Against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment, Joint Statement*, 12 May 2005 [henceforth Joint Statement].

¹²² *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, 11 January 2002; *Chahal* case, *supra* note 13; *Mamatkulov* case, *supra* note 8; and *Agiza* case, *supra* note 3.

¹²³ See e.g., S. Kapferer, *supra* note 26, p. 44.

¹²⁴ The HRC in the case of *Ng v. Canada*, *supra* note 66, and the ECtHR in the *Soering* case, *supra* note 12, found that the failure to secure assurances against the death penalty was in violation of the prohibition against ill-treatment under article 7 ICCPR and article 3 ECHR. See W. Patten and N. Shamir, *supra* note 66, p. 22-23.

¹²⁵ Model Treaty on Extradition, A/RES/45/116, 14 December 1990, article 4(d), available at [<http://www.un.org/documents/ga/res/45/a45r116.htm>]. See also W. Patten and N. Shamir, *supra* note 66, p. 22.

However, the contexts of death penalty and fair trial are different from the context of torture and ill-treatment, and the general opinion is that diplomatic assurances in the former context may provide an adequate safeguard. The reasons why diplomatic assurances are adequate in the context of death penalty are that death penalty is not *per se* a violation of international human rights law, it is lawful in many States and it is in general possible to discover a violation of the assurance before the person is executed. The sending State therefore has an effective opportunity to react to stop the violation.¹²⁶

In the context of torture, States rely on assurances only in cases involving receiving States that have a well-documented, widespread pattern of violations of international human rights obligations. A UN independent expert once said “[t]he mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated.”¹²⁷ Assurances have been regarded as acknowledging an actual risk of treatment illegal under international human rights law.

“The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment.”¹²⁸

However, when there is no risk of torture, there is really no need of an assurance.

3.1 Persons Removed under Assurances

The circumstances surrounding diplomatic assurances differ. Depending on why States want to remove persons from their territory, they will specify the object for the assurance differently. The assurance may regulate the treatment of a specified person, or persons, named in the agreement constituting the assurance; or it can be a specific clause in readmission agreements, usually referring to a collective group of persons. The former assurances are individual, the latter collective.

3.1.1 Individual

Persons regarded as a security threat to a State,¹²⁹ or someone subjected to an extradition request from another State are persons individually subjected

¹²⁶ See e.g., W. Patten and N. Shamir, *supra* note 66, p. 23-24.

¹²⁷ CHR, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, (E/CN.4/2005/103), 7 February 2005), para. 56.

¹²⁸ W. Patten and N. Shamir, *supra* note 66, p. 26.

¹²⁹ E.g., *Chahal*, *Suresh* and *Agiza* were all regarded to be threats to the security of the States removing them.

to removal from the territory where they are present.¹³⁰ In this context, assurances are requested for a specific person.

An assurance issued in the context of extradition was the assurance in *Soering*, an assurance with the purpose of securing the returnee from the death sentence.¹³¹ Also the alleged terrorists *Mamatkulov* and *Askarov* were subjected to extradition. The Turkish police arrested *Mamatkulov* under an international arrest warrant when he entered Turkey, and Uzbekistan requested his extradition under a bilateral treaty with Turkey.¹³² Turkey also arrested *Askarov* on a request for his extradition.¹³³ Both applicants were suspected of planning and organising terrorist attacks against the leaders of Uzbekistan.¹³⁴ The government of Uzbekistan issued assurances that *Mamatkulov* and *Askarov* should not be tortured. The assurance was given in the specific context of extraditing them and it concerned only the two individuals *Mamatkulov* and *Askarov*.¹³⁵

The assurances concerning *Agiza* and his family and *El Zari*,¹³⁶ present in Sweden as asylum seekers, and concerning *Chahal*¹³⁷ and *Suresh*,¹³⁸ were also issued for the treatment of specified persons. In the case of *Agiza* and *El Zari*, the Swedish Security Police advised the Migration Board that *Agiza* and *El Zari* held leading positions in an organisation responsible for terrorist acts and that they were responsible for the organisation's activities. The Migration Board referred the pending claim for asylum and the assessment of the Security Police to the government for decision. The government rejected the asylum applications and ordered immediate deportation of the applicants.¹³⁹ The government later said that they regarded the applicants as a security threat, and stated that Sweden may not become a safe haven for terrorists.¹⁴⁰ When reaching the decision, the government relied on the assurance issued by Egypt. Without the assurance, regulating the treatment of *Agiza* and *El Zari* upon return to Egypt,¹⁴¹ they would not have been deported.¹⁴²

¹³⁰ E.g., *Mamatkulov* case, *supra* note 8. See also e.g., Speech by Barbro Holmberg, Minister of Migration, to the Parliament, 26 January 2005.

¹³¹ *Soering* case, *supra* note 12.

¹³² *Mamatkulov* case, *supra* note 8, paras. 12-13.

¹³³ *Mamatkulov* case, *supra* note 8, para. 18.

¹³⁴ *Mamatkulov* case, *supra* note 8, para. 29.

¹³⁵ *Mamatkulov* case, *supra* note 8, para. 28.

¹³⁶ See Aide-Mémoire between Sweden and Egypt, 12 December 2001, and *Mamatkulov* case, *supra* note 8 para. 28.

¹³⁷ *Chahal* case, *supra* note 13.

¹³⁸ *Suresh* case, *supra* note 122.

¹³⁹ *Agiza* case, *supra* note 3, para. 2.4, and adjudication by the Chief Parliamentary Ombudsman, section 2.1.

¹⁴⁰ Speech by Barbro Holmberg, Minister of Migration, to the Parliament, 26 January 2005. [www.regeringen.se], visited on 15 September 2005.

¹⁴¹ See Aide-Mémoire between Sweden and Egypt, 12 December 2001.

¹⁴² See e.g., Comments by the Government of Sweden on the concluding observations of the HRC, CCPR/CO/74/SWE/Add.1, 14 May 2003, paras. 13-14.

3.1.2 Collective

Migration control includes the return and readmission of individuals from one State to another. States have an interest in removing unsuccessful protection seekers, persons no longer in need of protection, or illegal immigrants from their territory. In general, States send these persons either to their country of origin, or to a transit country regarded to be a safe third country. The procedures for such returns or readmissions are stipulated in, usually reciprocal, international agreements on readmission. This mutually allows two or more States to reduce costs, and to combat and prevent illegal migration. If the readmitting State is not a State party to the Refugee Convention, the risk of *refoulement* is aggravated. A clause in the readmission agreement gives prevalence to refugee protection thereby offering adequate safeguard. To safeguard other human rights of protection seekers moved back under readmission agreements, provisions on respect for human rights and dignity are sometimes inserted.¹⁴³

Readmission agreements, unlike diplomatic assurances, do not regulate extradition. Readmission agreements are concluded when individuals are on the territory of a State illegally; however, they are not seen as a security threat to the State.

The MOU between the UK and Jordan regarding deportation of unwanted persons includes an assurance that the countries will comply with their human rights obligations. The assurance is collective in the sense that the memorandum regulates more than one person, and can apply to any citizen of the receiving State specified prior to deportation.¹⁴⁴ When applied to a specific person, a request under the MOU may include requests for further specific assurances by the receiving State, if appropriate in an individual case.¹⁴⁵

3.2 Existing Laws and Jurisprudence Regulating Diplomatic Assurances

Non-governmental organisations describe diplomatic assurances as formal promises obtained through diplomatic channels, i.e. as a set of understandings between two governments.¹⁴⁶ Is there any existing international law, or jurisprudence, applicable to them?

In *T.I.*, the ECtHR stated that the removing State (the United Kingdom) could not automatically rely on arrangements made in the Dublin Convention in order not to breach its obligations under the ECHR when expelling a foreigner. If the involved countries apply different approaches

¹⁴³ G. Noll, The Non-Admission and Return of Protection Seekers in Germany, 9 No. 3, *International Journal of Refugee Law* (1997), pp. 415-452.

¹⁴⁴ MOU between the UK and Jordan. *supra* note 5.

¹⁴⁵ MOU between the UK and Jordan, *supra* note 5.

¹⁴⁶ See e.g., Empty Promises, *supra* note 2, p. 3.

to the scope of protection offered by the Refugee Convention, this could give rise to breaches of the *non-refoulement* obligation.¹⁴⁷ The Court argued that it would be incompatible with the purpose and object of the Convention if Contracting States were absolved from their responsibilities by establishing international organisations, or *mutatis mutandis* international agreements, which implicate for the protection of fundamental rights. The obligations under the ECHR, which in this case offered broader protection of refugees against *refoulement*, will continue to be in place.¹⁴⁸

Applied on the practice of diplomatic assurances, this would mean that, if the involved countries have different approaches to the scope of protection offered by human rights law, a removing State could not rely automatically on the fact that the receiving States gives the assurance. The removing State must assess the credibility of the assurance and should be satisfied that the receiving State in practice complies with its commitments. If the removing State has not undertaken a reliable assessment of the risks in the receiving State, it cannot, by relying on the assurance, claim to have abided by its international obligations. Thus, if comparable to such international agreements, a diplomatic assurance is a legal possibility; however, it does not give automatic protection.

3.2.1 Public and Regional International Law

International law does not currently prohibit States from using diplomatic assurances with the receiving State to eliminate the risk of torture. However, if used, the assurance must not only be sincerely intended on the part of the receiving State, it must also be enforceable and possible for the sending State to monitor.¹⁴⁹ The assurances could arguably be one of the “relevant considerations” to be taken into account under CAT article 3 when determining the danger for a person to be subjected to torture.¹⁵⁰

The prohibitions of torture and *refoulement* are absolute and non-derogable. Therefore, jurisprudence from international bodies is important in finding legal bars or support to the practice of relying on diplomatic assurances. The HRC commented briefly on the use of diplomatic assurances in its concluding observations to Sweden 2002. The Commission expressed

¹⁴⁷ In the case the UK and Germany had different approaches as to whether the persecution feared needs to be by the State, or if the Refugee Convention also gives protection against persecution by non-State actors.

¹⁴⁸ *T.I. v. the United Kingdom* case, *supra* note 103, p. 260. See also G. Noll, Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law, 70 *Nordic Journal of International Law* (2001), pp. 161-182.

¹⁴⁹ The Swedish NGO Foundation for Human Rights and the Swedish Helsinki Committee for Human Rights, *Alternative report to “Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee”* (CCPR/CO/74/SWE/Add.1), Stockholm, 4 July 2003 [henceforth *Alternative report*], p. 23.

¹⁵⁰ The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center For Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* New York, 29 October 2004. [henceforth *Torture by proxy*], p. 84.

concerns that the person would still be at risk, and said that counter-terrorism measures need to be fully in conformity with the Covenant. The concern over terrorism cannot be a source of abuse of the Covenant.¹⁵¹ Other than that, the Commission has not expressed anything regarding the legality of the assurance or the practice in itself.¹⁵²

In the Committee against Torture, the treatment of diplomatic assurances was part of the cases of *Attia v. Sweden*¹⁵³ and *Agiza v. Sweden*.¹⁵⁴ Even though dealing with the same assurance, the former applicant is the wife of the latter, assured by the same MOU,¹⁵⁵ the Committee came to conflicting conclusions in the cases. The Committee expressed satisfaction with the assurance provided regarding *Attia*, but not regarding *Agiza*. The cases, although largely analogous, raised different issues. *Agiza* had a number of facts that were not present in *Attia*,¹⁵⁶ and the Committee held no substantial personal risk of torture existed for *Attia*. In *Agiza*, the Committee said that the assurance did not suffice to protect against the manifest risk of torture.¹⁵⁷ The Committee found the assurance insufficient due to *inter alia* the “progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad.”¹⁵⁸

Attia cited her relationship with her husband as her risk, a ground that the Committee generally regards as insufficient for a claim under article 3.¹⁵⁹ Due to the assurance, combined with the passage of time¹⁶⁰ and the monitoring done by Sweden, she was held not personally at risk.¹⁶¹ Thus, the assurance was only sufficient where there was not a personal risk of torture.¹⁶² In addition, a dissenter¹⁶³ in *Agiza* was of the opinion that the expulsion did not constitute a breach. The key point in time for the

¹⁵¹ HRC Concluding observations: Sweden, CCPR/CO/74/SWE, 24 April 2002, para. 12.

¹⁵² The Commission has expressed similar concerns in concluding observations to e.g., New Zealand (CCPR/CO/74/NZL), 7 August 2002, para. 11, and Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 7, but again nothing on the legality of the assurance or the practice itself.

¹⁵³ *Attia v. Sweden*, Communication No 199/2002, (CAT/C/31/D/199/2002), 24 November 2003.

¹⁵⁴ *Agiza case*, *supra* note 3. See also *Empty Promises*, *supra* note 2, p. 12.

¹⁵⁵ Aide-Mémoire between Sweden and Egypt, 12 December 2001.

¹⁵⁶ *Agiza case*, *supra* note 3, para. 13.5. Facts available to the Committee in the later case included the report by the Swedish Ambassador of mistreatment in Egypt, the procedure and mistreatment surrounding the actual removal, the breach of Egypt of the assurance regarding fair trial and the unwillingness of Egypt to conduct an independent investigation.

¹⁵⁷ *Agiza case*, *supra* note 3, para. 13.4.

¹⁵⁸ *Agiza case*, *supra* note 3, para. 13.5.

¹⁵⁹ *M V v. The Netherlands*, Communication No. 201/2002, (CAT/C/30/D201/2002), 13 May 2003, para. 7.3.

¹⁶⁰ *Attia case*, *supra* note 153, para. 12.3, the Committee considered the case two years after the return of *Agiza* and *Attia* was at that time present in Sweden.

¹⁶¹ *Attia case*, *supra* note 153, para. 12.3.

¹⁶² This is the same argument as the Special Rapporteur on torture use in his report A/59/324, *supra* note 101, para. 40.

¹⁶³ *Agiza case*, *supra* note 3, in part dissenting separate opinion of Committee Member Mr. Alexander Yakovlev.

assessment is the time of removal, and at that time, Sweden was entitled to accept the assurance. The dissenter argued that Sweden sought the assurance precisely because it was aware of its obligations under CAT article 3. Sweden relied upon information available at the time of removal and according to the dissenter “acted in good faith and consistent with the requirements of article 3 of the Convention.” That the situation was different at the time of the assessment by the Committee than at the time of removal could not be referred to Sweden.¹⁶⁴ Thus, according to the Committee against Torture, apparently there are situations where resort to diplomatic assurances should not be ruled out.

In Europe, the only explicit provisions for the use of diplomatic assurances as a safeguard are when a returned person risks the death penalty¹⁶⁵ or when he will have the opportunity of a retrial from a judgement carried out *in absentia*.¹⁶⁶ Such provisions exist for example in guidelines issued by the Council of Europe which reaffirm the absolute prohibition of torture and extradition to face such treatment. The non-binding guidelines do not permit exceptions or derogations, and as the other instruments only expressly permits States to seek assurances regarding death penalty.¹⁶⁷ Another example is a working document in which the European Commission has ruled extradition legal when it is possible to obtain legal guarantees relating to the non-application of capital punishment. However, they do not mention guarantees regarding the risk of being subjected to torture, inhuman or degrading treatment or punishment.¹⁶⁸

In *Soering*, the ECtHR establish the standard that diplomatic assurances are an inadequate guarantee for returns to countries where torture is “endemic” or a “recalcitrant and enduring problem.”¹⁶⁹ However, the assurance assessed did not involve torture but was a guarantee against the use of the death penalty. In *Chahal*, the ECtHR again looked at the adequacy of a diplomatic assurance from a country where torture was reported to be endemic. The assurance was guaranteeing that Chahal would not suffer mistreatment of any kind upon return, however the Court held the assurance inadequate but did not comment generally on the use of diplomatic assurances.¹⁷⁰

The main case from the ECtHR involving diplomatic assurances and torture or other form of ill-treatment, is *Mamatkulov*. The decision does not go into

¹⁶⁴ *Agiza case, supra note 3*, in part dissenting separate opinion of Committee Member Mr. Alexander Yakovlev.

¹⁶⁵ The European Convention on Extradition, article 11, and the Protocol amending the European Convention on the Suppression of Terrorism, article 4. See Empty Promises, *supra note 2*, pp. 21-22.

¹⁶⁶ The European Arrest Warrant, article 5.

¹⁶⁷ Guidelines IV, Absolute prohibition of torture, XIII, Extradition, and XV, Possible derogations, *Human Rights and the fight against terrorism, The Council of Europe Guidelines*. See also Empty Promises, *supra note 2*, p. 22.

¹⁶⁸ R. Bruin and K. Wouters, pp. 5-6.

¹⁶⁹ *Soering case, supra note 12*, paras. 104-105. See also Still at risk, *supra note 95*, p. 15.

¹⁷⁰ *Chahal case, supra note 13*, paras 37, 89 and 104-105.

the legality of the actual assurance. However, in a joint dissenting opinion, three of the judges stated that a diplomatic assurance is not in itself a sufficient safeguard, even if given in good faith. The weight given to the assurance most depend on the situation prevailing in the assuring State at the material time.¹⁷¹ Thus, the Court does not rule out the practice and there may be circumstances where they are permissible.

3.2.2 Domestic Law and Jurisprudence

In the United States, regulations permitting the use of diplomatic assurances against torture exist in federal law implementing CAT.¹⁷² The Secretary of State may secure assurances and the Attorney General determines whether they are “sufficiently reliable,” and the alien accordingly can be removed. The individual concerned does not have any opportunity to challenge the determination, and the decision is not subject to any judicial or administrative review.¹⁷³ When it comes to extradition and the application of CAT, applicable regulations have no explicit mention of diplomatic assurances. The NYC Bar however, has stated that they appear to be possible to include in the conditions to which the Secretary of State may subject extraditions.¹⁷⁴

Several countries in Europe have relied on diplomatic assurances when returning persons to their country of origin. At the time of writing, there is no national legislation in the region regulating the practice. However, there exists State practice in the area, and national judiciary often serves as a check on the use of diplomatic assurances as a safeguard.¹⁷⁵

In the United Kingdom, a London Magistrate court considered a diplomatic assurance from Russia to be inadequate as a safeguard against torture of a Chechen. The court said that it was sure that the assurance was given in good faith, but that it would be impossible for the official giving the assurance to enforce it.¹⁷⁶ In Germany, a court rejected diplomatic assurances as insufficient protection. In a case where a Turkish national, Metin Kaplan, was requested for extradition to Turkey, the court stated that such guarantees could only provide sufficient protection if it can be expected that that they will be correctly implemented through the

¹⁷¹ *Mamatkulov* case, *supra* note 8, joint partly dissenting opinion of judges Bratza, Bonello and Hedigan, para. 10.

¹⁷² 8 CFR §208 and §235; *see* *Torture by Proxy*, *supra* note 150, p. 21, and *Empty Promises*, *supra* note 2, p. 15.

¹⁷³ 8 CFR §8; the Attorney General determines whether the assurance is “sufficiently reliable” to permit the alien’s removal to the State without violating U.S. obligations under CAT article 3. If the assurance is satisfactory to the attorney general, the alien’s case “shall not be further considered by an immigration judge, the Board of Immigration Appeals, or an asylum officer” and he may be removed; *See Torture by Proxy*, *supra* note 150, pp. 20-21.

¹⁷⁴ 22 CFR. §95; *See Torture by Proxy*, *supra* note 150, pp. 85-86.

¹⁷⁵ *Empty Promises*, *supra* note 2, p. 29.

¹⁷⁶ *Empty Promises*, *supra* note 2, pp. 29-30.

institutions of the assuring State.¹⁷⁷ Also a Dutch court concluded that diplomatic assurances could not guarantee that an extradited person would not be tortured upon return to the requesting State. According to the court, the assurances were too general and did not offer any concrete guarantees. The assurances did not add anything to the human rights obligations that the assuring State had before the assurances, nor did they mention anything about the ongoing violations of those obligations. The case is currently pending in the Dutch Supreme Court.¹⁷⁸

The courts, in line with the decision in *T.I.*, do not rely automatically on the assurances themselves, but assess their credibility and reliability as a safeguard against torture. When evaluating the assurances, its elements and surrounding circumstances, the courts do not seem to consider them illegal as such, which mean that assurances might in some cases be adequate as a safeguard. The arguments in the courts seem to be similar to those in *Soering, Chahal, Attia, Agiza* and *Mamatkulov* where the assurances are not ruled out as such but for different reasons deemed inadequate in the specific case.

In Canada, a strong case on the practice of diplomatic assurances is *Suresh* in which the Canadian Supreme Court has a similar argument as the UN Special Rapporteur on torture.¹⁷⁹

3.3 Extraordinary Rendition

The practice of rendition started as a limited programme aimed at capturing criminals against whom there were outstanding foreign or international arrest warrants, and deliver them to justice to stand trial for criminal charges. Primarily, the captured persons were brought to the US, but also renditions from one foreign country to another occurred.¹⁸⁰ It is stated that in the beginning, a legal process surrounded the renditions, and that, when renditions occurred to States other than the US, US laws required that assurances were sought from the foreign governments that the rendered suspects would not be tortured.¹⁸¹ However, after the attack on 11

¹⁷⁷ Empty Promises, *supra* note 2, pp. 31-32, *see also*, G. Echeverria, REDRESS, *supra* note 1, p. 33.

¹⁷⁸ Still at Risk, *supra* note 95, pp. 72-76.

¹⁷⁹ *Suresh* case, *supra* note 122.

¹⁸⁰ The practice developed in the late 1980s in order to allow US law enforcement personnel to apprehend wanted individuals in “lawless” States. In the beginning, it was exclusively law enforcement operations in which suspects were brought in for trial or questioning. *See* Torture by Proxy, *supra* note 146, p. 15. *See also* G. Echeverria, REDRESS, *supra* note 1, pp. 36 *et seq.*; S. Grey, United States: trade in torture, *Le Monde Diplomatique*, 4 April 2005; and W. Patten and N. Shamir, *supra* note 66, p. 4.

¹⁸¹ J. Mayer, Outsourcing Torture, the secret history of America’s “extraordinary rendition” program, *The New Yorker*, 14 February 2004.

[www.thenewyorker.com/printables/fact/050214fa_fact6], visited on 12 July 2005; the captured suspects were all sentenced in absentia and brought back to the country where they were wanted by the legal system.

September 2001, the US declared a global war on terrorism.¹⁸² According to reports, the frequency of renditions increased and widened, and the practice became known as “extraordinary rendition.” Extraordinary rendition is the transfer of an individual, with the involvement of the US or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.¹⁸³ A great number of terrorism suspects are believed to have been transferred by the US to countries including Egypt, Morocco, Jordan, Syria, Pakistan and Uzbekistan, or detained in undisclosed locations.¹⁸⁴

3.3.1 Existing and Pending US Laws on Extraordinary Rendition

Extraordinary rendition is the transfer of an individual, a terrorism suspect, with the involvement of the US or its agents, from one foreign State to another, for interrogation and prosecution. What makes it extraordinary in comparison to the original, ordinary, practice is that it occurs outside of any legal framework; that it occurs extra-territorially; and that the transfer occurs in circumstances involving the risk of torture.¹⁸⁵ Critics have stated that the real purpose is to “outsource torture;” to submit suspects to aggressive methods of persuasion that are illegal in the US.¹⁸⁶

Presidential directives authorize rendition to justice.¹⁸⁷ Extraordinary rendition however is, or at least is considered to be, illegal. There are no direct provisions concerning extraordinary renditions under US laws.¹⁸⁸ However, the language of legislation implementing CAT supports the conclusion that it should be prohibited.¹⁸⁹ This would mean that the

¹⁸² It has been said that “there was a ‘before 9/11’ and there was an ‘after 9/11’; after 9/11 the gloves came off.” See e.g., *Torture by Proxy*, *supra* note 150, p. 5, and J. Mayer, p. 6.

¹⁸³ *Torture by proxy*, *supra* note 150, p. 4.

¹⁸⁴ See G. Echeverria, REDRESS, *supra* note 1, p. 36. See also S. Grey, *supra* note 180, and D. Jehl and D. Johnston, Rule Change Lets CIA Freely Send Suspects Abroad to Jails, *New York times*, 6 March 2005. The keeping of prisoners (enemy combatants captured abroad) under US custody in third countries, such as Guantánamo Bay in Cuba, outside of US territorial jurisdiction, has similarities to the rendition regime.

¹⁸⁵ See e.g., *Torture by Proxy*, *supra* note 150, p. 4 and W. Patten and N. Shamir, *supra* note 66, p. 2-3.

¹⁸⁶ J. Mayer, p. 1. Criticism come from for example the HRW that has said that a former US government official once said that “[i]f we are getting everything we need from the host government, then there’s no need for us to [conduct interrogations]. There are some situations in which the government can be more effective at getting information.” See W. Patten and N. Shamir, *supra* note 66, p. 8.

¹⁸⁷ See e.g., D. Jehl and D. Johnston, *supra* note 184.

¹⁸⁸ See e.g., S. Grey, *supra* note 180.

¹⁸⁹ This is based on the FARRA (Foreign Affairs and Restructuring Act of 1998) policy statement that the “Unites States [shall] not ... expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” See e.g., *Torture by Proxy*, *supra* note 150, p. 20 and W. Patten and N. Shamir, *supra* note 66, p. 20.

principle of *non-refoulement* would apply even to persons located outside the US.

Members of the US Congress have introduced new legislation seeking to end the practice. Pending bills are the “Torture Outsourcing Prevention Act,”¹⁹⁰ and the “Convention against Torture Implementation Act 2005.”¹⁹¹ The bills would provide protection for transfers to countries where torture is practiced if they occur outside of a legal process in which the person can challenge the transfer based on a risk of torture. They would also prevent circumventing the prohibition by obtaining diplomatic assurances from the foreign government that they will not torture the transferee.¹⁹²

3.3.2 Diplomatic Assurances in Extraordinary Rendition

When transferring persons in the sense of extraordinary rendition it is the policy of the US to obtain specific assurances from the receiving country that the transferee will not be tortured.¹⁹³ There are no provisions for obtaining assurances, and thus they are discretionary and not subject to judicial review. The assurances in extraordinary rendition cases come under the CIA. Together with the State Department, they seek, secure, evaluate and determine the reliability and sufficiency of these assurances. In some cases, the assurances include monitoring mechanisms, mostly made up of visits of the rendered person by diplomats from the sending State.¹⁹⁴

In its second periodic report to the Committee against Torture, the US states that it does not transfer persons to countries where it believes it is “more likely than not” that they will be tortured. When transferring a detainee the US obtains assurances, as appropriate, from the foreign government. Assurances are said to be considered in a very small number of cases, and in extradition cases the decision to rely on them are made on a case-by-case basis. The report continues to say that if the “assurances were not considered sufficient when balanced against treatment concerns, the United States would not transfer the person to the control of that government unless the concerns were satisfactorily resolved.”¹⁹⁵ These assurances however, are not provided for in any legislation, and the courts have no jurisdiction to

¹⁹⁰ At the time of writing, the status of the act is “referred to the Subcommittee on Africa, Global Human Rights and International Relations. See the Thomas database at the Library of Congress, [Thomas.loc.gov], last visited on 28 November 2005.

¹⁹¹ At the time of writing, the status of the act is “read twice and referred to the Committee on Foreign Relations. See the Thomas database at the Library of Congress, [Thomas.loc.gov], last visited on 28 November 2005.

¹⁹² W. Patten and N. Shamir, *supra* note 66, p. 32-33, and Statement by Satterthwaite March 10, 2005.

¹⁹³ W. Patten and N. Shamir, *supra* note 66, pp. 8 and 21.

¹⁹⁴ *Ibid.* pp. 24 et seq. See also, D. Jehl and D. Johnston, *supra* note 184.

¹⁹⁵ Second periodic Report of the United States of America to the Committee against Torture, 6 May 2005, [www.state.gov/g/drl/rls/4573.htm], visited at 5 September 2005, at paras 27, 30 and 37. See also W. Patten and N. Shamir, *supra* note 66, pp.13 and 25.

review the decisions.¹⁹⁶ Therefore, there are no procedural safeguards surrounding the assurances and there are no means of enforcement or monitoring.

3.4 Countries that Give Assurances, and Practice Torture

It is common for governments to deny that torture is practiced, despite the fact that it is systematic¹⁹⁷ or widespread. This is likewise true for many of the countries from which diplomatic assurances generally are secured.¹⁹⁸

Countries identified by the HRW in its reports “Empty Promises” and “Still at Risk” which give assurances include Egypt, Pakistan, The Philippines, Russia, Sri Lanka, Syria, Morocco and Uzbekistan. According to Amnesty International, these countries all practice torture.¹⁹⁹

Torture and ill-treatment is especially reported to occur in the context of “war on terror,” and consequently detainees and specific groups, such as the Chechens in Russia, are vulnerable. In the report on Egypt, the most frequent State to give diplomatic assurances, Amnesty International stated that torture continued to be systematic. The Egyptian authorities requested the extradition of Egyptian nationals from several countries and as a result, people were returned to Egypt and were at risk of human rights violations, including torture.²⁰⁰

These countries routinely deny that they practice torture, often despite well-documented evidence to the contrary. Under these circumstances, it can seem naïve to believe that an assurance in a specific case is given by the same country in good faith.

¹⁹⁶ W. Patten and N. Shamir, *supra* note 66, p. 26.

¹⁹⁷ The Committee against Torture defines systematic as “when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be part of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.” See Report of the Committee against Torture: Activities of the Committee against Torture pursuant to article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Turkey. 15/11/93. A/48/44/Add.1, para. 39. See also Empty Promises, *supra* note 2, pp. 8-9.

¹⁹⁸ See generally Amnesty International, Report 2005, the state of the world’s human rights, available at [web.amnesty.org/report2005/index-eng]; Empty Promises, *supra* note 2; and Still at Risk, *supra* note 95.

¹⁹⁹ Amnesty International, *supra* note 198.

²⁰⁰ Amnesty International, *supra* note 198, section on Egypt, [web.amnesty.org/report2005/egy-summary-eng]. See also Torture by Proxy, *supra* note 150, pp. 38-40.

However, that a country practices torture does not mean that an individual is always personally at risk of being subjected to that kind of treatment. As the Committee against Torture has stated, the risk assessment under the torture prohibitions under international human rights law should take into account the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country. It does not as such constitute a sufficient ground for determining that a particular person was in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned was personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person could not be considered to be in danger of being subjected to torture in his or her specific circumstances.²⁰¹

3.5 Creation of Legal Obligations for States

As mentioned above, State obligations include the prohibition not to torture and the obligation not to cause torture or ill-treatment by someone else, by way of for instance *refoulement*. These are obligations for both States involved; the receiving State is obligated not to practice torture, and the sending State has the obligation not to surrender a person to an extraterritorial situation where he might be subjected to torture.

If the assurances of relevance to this thesis are not respected, the factual implications for the person returned under the assurance are easy to foresee; he is tortured or ill-treated in the receiving State. What, on the other hand are the legal implications for the States involved? Diplomatic assurances in general reiterate existing international obligations of the receiving State.²⁰² Does it make a difference for the receiving State that it is violating its international obligations as well as the assurance? Is also the sending State violating the assurance as well as its international obligations?

The aim of the assurance is that the sending State should be able to rely on performance of international obligations by the receiving State, in order not to violate its own obligations. States cannot relinquish their international obligations or make agreements that indirectly disregard human rights obligations.²⁰³ As a contractual obligation, the States involved should of course respect the assurance according to the principle *pacta sunt servanda*.²⁰⁴ The question then remains whether the assurances create legally binding obligations for the States, and consequently mean that the sending State is living up to its international obligations rather than exonerating itself from them.

²⁰¹ See e.g., *Agiza case*, *supra* note 3, para. 13.3.

²⁰² See *Still at Risk*, *supra* note 95, p. 23.

²⁰³ See S. Kapferer, *supra* note 26, pp. 49-50.

²⁰⁴ See generally M. Shaw, *supra* note 45, p. 97.

One way to assume legal obligations for a State is by declarations made by way of unilateral acts. The International Court of Justice (ICJ) in the *Nuclear Tests* cases stated that:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. [...] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking [...].”²⁰⁵

The Court stated that the fact that France in this case had intended to enter into a binding commitment implied an obligation.²⁰⁶ The declaration was legally binding even though no other State had indicated acceptance of the declaration to give rise to a contractual or conventional obligation. The normal consequence of a unilateral declaration is either that it is accepted by the State or States it addresses or it will be ignored or rejected. In the first situation, it will become in effect part of a treaty settlement, in the latter the addressed State or States will not seek to enforce it why it will become a dead letter.²⁰⁷ The Court held further that:

“one of the basic principles governing the performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operations, in particular in an age when this co-operation in many fields is increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based in good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”²⁰⁸

Diplomatic assurances are generally secured in order to reduce the risk of torture in the country to which a State wants to return a person. With the assurance the returning State want to be sure that the person is not tortured, and that thus the sending State is not resorting to *refoulement*. It must therefore be reasonable to assume that at least the sending State secures the assurance with the intention to enter into a binding obligation. Applying the argumentation from the *Nuclear Tests* cases, *mutatis mutandis*, to the practice of diplomatic assurances, they invoke legal obligations on the States involved. Seen as a declaration from a State to a specific treatment, by way of an assurance, it gives rise to a contractual obligation between the States. As provided by the Vienna Convention on the Law of Treaties (VCLT) article 26, a contractual obligation is binding upon the parties and it must be performed in good faith.²⁰⁹

Another way to enter into legal obligations is to enter into a treaty. When entering into a treaty the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves.²¹⁰ According to the phrase “governed by international law” in VCLT article 2, the States must have the intention to create legal relations for the agreement

²⁰⁵ *Nuclear tests (Australia v. France)*, Judgement, ICJ Reports 1974, p.267, para. 43.

²⁰⁶ *Ibid.* para. 44.

²⁰⁷ M. D. Evans, *International Law* (Oxford University Press, Oxford, 2003), pp. 139-140.

²⁰⁸ *Nuclear tests* case, *supra* note 205, para. 46.

²⁰⁹ *Pacta sunt servanda*, VCLT article 26.

²¹⁰ M. Shaw, *supra* note 45, p. 88.

to be a treaty.²¹¹ Thus, as a treaty an assurance would be legally binding. Instead of a treaty the agreement could be qualified a memorandum of understanding which may or may not be legally binding.²¹² To create legal obligations the MOU has to be binding. Therefore, for an assurance in the form of a MOU to be a sufficient safeguard, the MOU must be legally binding.

Both the assurance that Egypt gave Sweden in 2001 regarding *Agiza* and *El Zari*, and the assurance anticipated between the UK and Jordan in returning terrorism suspects after the bombs in the London underground were in the form of MOUs. The Egyptian assurance was clearly no safeguard against abuses after return. In this case, therefore, the chosen form of a MOU was insufficient. If the intent of the MOU between the UK and Jordan is to create legal obligations, i.e. that it will be legally binding upon the contracting States, this will be a sufficient form. There is no explicit language expressing whether it is legally binding or not. However, the final clauses on withdrawal and continuance of application to persons returned under it can be seen as evidence to that end.

3.5.1 Diplomatic Assurances as part of Internationally Wrongful Acts

Committing an internationally wrongful act leads to international responsibility of a State. The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts set out the elements of acts that are internationally wrongful. To entail responsibility the act should be attributable to a State under international law, and constitute a breach of an international obligation of the State.²¹³

The same conduct may be attributable to several States at the same time.²¹⁴ Responsibility can also be invoked for acts of another State. If a State aids or assists in the commission of the wrongful act, directs and controls the commission, or coerces another State to commit acts that are internationally wrongful, both that State and the committing State are responsible for the act.²¹⁵

When it comes to obligations under peremptory norms of general international law, nothing precludes responsibility.²¹⁶ A serious breach

²¹¹ M. D. Evans, *supra* note 207, pp. 174-175.

²¹² A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge 2000), pp. 20-21 and chapter 3.

²¹³ International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts, part one, chapters I-III.

²¹⁴ Articles on Responsibility of States for Internationally Wrongful Acts, part one, chapter II; see C. James, *The ILC – introduction, text and comments* (Cambridge University Press, Cambridge, 2002), p. 80.

²¹⁵ Articles on Responsibility of States for Internationally Wrongful Acts, part one, chapter IV.

²¹⁶ Articles on Responsibility of States for Internationally Wrongful Acts, article 26 and part two, chapter III.

generates particular consequences for States. Under article 41 of the International Law Commission (ILC) articles, States shall cooperate to end such breaches, and no State shall recognise as lawful a situation created by the breach or aid or assist in the breach. Article 40 defines “serious” in its second paragraph as systematic and, or gross.²¹⁷ A violation is “systematic” if it is carried out in an organised and deliberate way, and “gross” refers to the intensity and effects of the violation. The obligations referred to in the article, the peremptory norms, arise from substantive rules of conduct, which prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States, their peoples, and the most basic human values.²¹⁸

The prohibition of torture has been generally accepted as a peremptory norm and thus is a prohibition that can generate a serious breach under article 40. If the practice of diplomatic assurances does not stop the returned person from being tortured, a breach has occurred. The next step will be to assess whether the breach is serious as provided for by article 40, which is more complicated. As provided for by the article, the breach will fall under the scope of the article, and generate State responsibility for the wrongful act, if the breach is serious. If the specific situation where the diplomatic assurance is used is part of a general failure of the receiving State not to torture, the breach is serious. If it instead is an isolated violation of the basic human rights of one or a few individuals, it is not necessarily serious. To fall under the scope of article 40 in that case, it has to be serious in another way than as part of the situation in the receiving State.

National legislation inconsistent with international rules normally generates State responsibility only when it is concretely applied. However, the ICTY held that when it regards torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture implicates international State responsibility.²¹⁹ The court continued:

“The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.”²²⁰

If the argument by the Court is applied on the practice of relying on diplomatic assurances, this would mean that there is another way to assess the breach as serious. In this case, the reliance of diplomatic assurances will be comparable to passing or applying a national legislative act facilitating torture. The breach will accordingly be serious because of the mere fact of the torture practiced.

²¹⁷ Article 40(2) reads: “a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”

²¹⁸ International Law Commission, *Commentaries to the draft Articles on Responsibility of States for Internationally Wrongful acts*, November 2001, pp. 282-283. For the section on articles 40 and 41, see also Crawford, pp. 240-253.

²¹⁹ *Furundžija* case, *supra* note 26, para. 150.

²²⁰ *Furundžija* case, *supra* note 26, para. 150.

The fact that the practice may possibly form part of an internationally wrongful act is important for the sending State to take into account when deciding whether to rely on a diplomatic assurance. Knowing that it can lead to State responsibility will make the sending State more careful in the drafting and risk assessment.

An international obligation that is violated still performs an obligation for States. Therefore, State responsibility for its wrongful acts generates obligations to cease the act violating the international obligation. The State will also have the legal consequences of making reparation.²²¹

States have under article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts a duty to co-operate to bring to an end any serious breach within the meaning of article 40, and not to recognise as lawful a situation created by a serious breach.²²² This includes also a legal obligation not to facilitate violations, either by their own agents or by agents of another State.²²³

By securing an assurance in a specific case, a State in a way recognises that the assuring state is actually resorting to torture in other cases. The securing of a diplomatic assurance could in that case be regarded as a tacit acceptance of torture in the assuring State. The assuring State is in principal asked to make an exception to its, alleged, general policy of abusing human rights. On the other hand, it could also be seen as an additional attempt of the State seeking the assurance to make sure that no breaches of international obligations occur in the future. As such, the assurance is an attempt to prevent future violations.

Where torture is systematic, it is a serious breach within the meaning of article 40. Pursuant to article 41(2), States have a duty of abstention not to “recognise as lawful a situation created by a serious breach”²²⁴ of a peremptory norm. This duty does not only refer to formal recognition, but also prohibits acts that would imply such recognition.²²⁵

Assurances not to torture a returned person is secured from States where there is a risk of torture. As mentioned in section 3.4 above, torture is reported to be practiced systematically in many assuring States. The act of securing the assurance can under these circumstances be seen as recognising the situation in that State. Following the application of article 41(2), assurances would be prohibited and seeking assurances a breach of the duty of abstention. Therefore, the assurance needs to be isolated to the specific case or individual; it needs to be formulated in order not to implicate this

²²¹ Articles 28-41, Articles on the Responsibility of States for Internationally Wrongful Acts.

²²² International Law Commission, *Commentaries to the draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, pp. 283-285.

²²³ W. Patten and N. Shamir, *supra* note 66, p. 19.

²²⁴ Article 41(2), Articles on the Responsibility of States for Internationally Wrongful Acts.

²²⁵ International Law Commission, *Commentaries to the draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, pp. 286-287.

kind of recognition. In chapter 4 below, I will discuss the possibility of adding a clause to the effect of not accepting the situation in the receiving State as lawful.

4 Elements of the Assurances

Neither the UN Special Rapporteur on torture, nor the HRC have said that assurances are illegal. However, they both create a high bar when they outline conditions for a guarantee in returns under counter-terrorism measures.²²⁶ In his interim report to the General Assembly (GA) 2004, the Special Rapporteur on torture believes that assurances when transferring persons under terrorist or other charges should not be ruled out all together.²²⁷ He reiterates the conditions from his report in 2002 for situations where assurances should not be ruled out *a priori*; and states that it is important that the assurances are solid, meaningful, and verifiable.²²⁸ As stated above, it is important that the assurance is sincerely intended, and that it is possible to enforce and monitor by the sending State.²²⁹ The Special Rapporteur draws up minimum provisions for assurances including prompt access to a lawyer, recording of all interrogation sessions, and recording the identity of all persons present, prompt and independent medical examination; and forbidding incommunicado detention or detention at undisclosed places.²³⁰

In 2002, the Canadian Supreme Court reviewed a case concerning an individual, *Suresh*, who was subject to deportation on national security grounds.²³¹ Sri Lanka offered diplomatic assurances that *Suresh*, a Sri Lankan national, would not be tortured. In the case, the Court offered guidelines to assess the adequacy of assurances. The court's guidelines included an evaluation of the human rights record of the government offering the assurances, the government's record of complying with its assurances, and the capacity of the government to fulfil the assurances particularly where there is doubt about the government's ability to control its security forces.²³²

Accordingly, the drafting of assurance must be taken seriously by the States involved. The text of diplomatic assurances to date is often general and vague and simply reiterates the receiving country's existing treaty

²²⁶ See e.g., Theo van Boven, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, (A/57/173), 2 July 2002, para. 35, and HRC Concluding observations: Sweden, CCPR/C/74/Swe, 24 April 2002, para. 12.

²²⁷ A/59/324, *supra* note 101, para. 30. However, he also states that where torture is systematic and widespread, assurances should not be used, report para. 37..

²²⁸ A/59/324, *supra* note 101, para. 40. In referring back to his report A/57/173 (*supra* note 226), para. 35, the Special Rapporteur states that it is essential that the assurances contain an unequivocal guarantee that the persons concerned will not be subjected to torture of any other form of ill-treatment, and that a system to monitor the treatment of that person has been put in place.

²²⁹ Alternative report, *supra* note 149, p. 23.

²³⁰ A/59/324, *supra* note 101, para. 41.

²³¹ *Suresh* case, *supra* note 122.

²³² *Suresh* case, *supra* note 122, para. 125, *see also* Empty Promises, *supra* note 2, p. 19.

obligations as the basis for the treatment of the transferee.²³³ It is also interesting to note that the normal way of drafting diplomatic assurances is by referring to existing domestic law, something that States are reluctant to accept in other situations.

In the case of *Agiza*, Sweden stated that the assurance was intended “to protect the complainant against treatment in breach of *Sweden’s obligations* under several human rights instruments.”²³⁴ Therefore, not only the existing obligations of the receiving State are important once the return has been effectuated, but also those of the sending State. The assurance must be reciprocal, and this should be visible in the text of the assurance. The MOU between the UK and Jordan is reciprocal in the way that either State can ask for, or issue, an assurance, and under the terms, both the UK and Jordan should comply with their human rights obligations.²³⁵

If the elements that I put forward are all present, the assurance will be legally binding and create legal obligations of the States involved. It could thus be comparable to the international agreement, (the Dublin Convention) dealt with in the *T.I.* case. As such, the assurance is a possible safeguard.

4.1 Assuring Authority

It is important for the credibility and enforceability of assurances that it is issued by the right authority. If it is not issued by an authority that has effective control over the actual treatment of the individual once in the country, and the monitoring of the assurance, i.e. by a public officer that can be expected to be able to ensure its effectiveness, it will not have any effect.

In *Soering*, the UK received the assurance from the person responsible for conducting the prosecution of *Soering*, the Commonwealth’s Attorney of Bedford County in Virginia. He expressed in the assurance that should *Soering* be convicted, a representation would be made in the name of the UK that they did not wish for the death penalty to be imposed.²³⁶ However, the ECtHR said that courts, as judicial bodies, could not bind themselves in advance as to their decisions.²³⁷ In addition, the Governor of Virginia had the power to commute capital punishment, but he would not, as a matter of policy, promise that he would later exercise this power.²³⁸ Consequently, the assurance was not a safeguard against the death penalty because it was not issued by a competent authority. Thus, an assurance cannot be issued by a court, and in a federal State, the distribution of power has to be taken into account.

²³³ E.g., *Still at Risk*, *supra* note 95, p. 23.

²³⁴ *Agiza case*, *supra* note 3, para. 12.24, (my emphasis).

²³⁵ MOU between the UK and Jordan, *supra* note 5.

²³⁶ *Soering case*, *supra* note 12, para. 20.

²³⁷ *Soering case*, *supra* note 12, para. 97.

²³⁸ *Soering case*, *supra* note 12, paras. 58-60 and 90.

Another case where the ECtHR assessed the authority that gave an assurance is *Chahal*. The Indian government provided the UK with an assurance that *Chahal*, if deported to India, “would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.”²³⁹ However, *Chahal* would have been surrendered to the security police in the region of Punjab that were known to be responsible for e.g. torture of their detainees. This was still the situation, in spite of efforts made by the Indian government. Because the government did not have effective control over the security police in Punjab, the Court did not find the guarantee sufficient.²⁴⁰ Therefore, sufficient assurances can only be issued by authorities with actual effective control over the country and over the body or authority that will be taking care of the returnee.

Thus, in the cases of *Soering* and *Chahal*, factors that diminished the credibility and adequacy of the assurances were either the wrong authority, or an authority without sufficient control over the treatment of the rendered person. It is not possible to say how the Court would have evaluated the assurances if a government with effective powers had given them, however it does not rule out the assurances as such.

In *Mamatkulov*, the issuing authority was the Public Prosecutor of the Republic of Uzbekistan. In a partly dissenting opinion, three of the judges refer to *Chahal* when doubting the effective implementation of the assurance. They do not regard the assurance as a sufficient safeguard but they do not declare the assurance *as such* insufficient. The judges held that:

“the weight to be attached to the assurances emanating from a receiving State must in every case depend on the situation prevailing at the material time.”²⁴¹

Concerning the situation in Uzbekistan, they rely on reports from Amnesty and conclude that the government issuing the assurance does not seem to have effective control.²⁴²

Sweden argued to the Committee against Torture that the assurance received from Egypt concerning *Agiza* was stronger than the one in *Chahal* in part because of the authority giving the assurance. In the submissions to the Committee against Torture, Sweden put forward the argument that the effectiveness of the assurance is dependent on the issuing authority. Were the authorities of the receiving State can be assumed to have control of the situation, they can also be assumed able to ensure the effectiveness of the assurance.²⁴³ The Committee does not use this argument in the decision on the communication. It is clear that *Agiza* was tortured upon his return to

²³⁹ *Chahal* case, *supra* note 13, para. 37.

²⁴⁰ *Chahal* case, *supra* note 13, paras. 89 and 105.

²⁴¹ *Mamatkulov* case, *supra* note 8, joint partly dissenting opinion of judges Bratza, Bonello and Hedigan, para. 10.

²⁴² *Ibid.*

²⁴³ *Agiza* case *supra* note 6, paras. 4.23-4.24.

Egypt, and that the monitoring was insufficient. To assess whether the right authority gave the assurance, it is necessary to evaluate the control the Egyptian government has over the prison authorities and of course, whether the assurance was given in good faith. This is an assessment that Sweden should have done before relying on the assurance, and certainly before executing the deportation.

The MOU between the UK and Jordan specifies the assuring authorities to be the Home Office in the UK and the Ministry of the Interior in Jordan. The response to a request should be given by the Home Secretary in the UK, and in Jordan by the minister of the Interior. Only if these authorities have the effective control over the situation in their countries will they be the proper authorities. If anyone rendered under the MOU will be under the supervision of bodies not controlled by these authorities, the assurance will have the same insufficiency as the one issued in *Chahal*.²⁴⁴

In the Jordan section of the Amnesty International annual report 2005, there are reports about incidents of death and abuse in custody and unfair trials in the State Security Court trying alleged terrorists. The Ministry of the Interior must be able to make sure that this will not happen to returnees under the MOU.²⁴⁵ In the UK section of the report, there are reports of incidents where the authorities seem to lack effective control. However, since these are in the specific context of the situation in Northern Ireland, this should probably not be regarded as evidence of the Home Office being the wrong authority.²⁴⁶

The competent and effective authority must be assessed on a case-by-case basis. Which is the right authority depends on factors such as the authority being in charge of the rendered person once in the country, the political and legal structure in the assuring State, and the prevailing situation at the material time.²⁴⁷

4.2 Procedural Safeguards – the Position of the Individual

National judiciaries play a crucial role in ensuring that the assurance is correctly evaluated and adequate for the protection of the individuals subject to return. They may only play this role if persons subject to return are provided with the opportunity of contesting the decision.²⁴⁸

²⁴⁴ *Chahal case*, *supra* note 13.

²⁴⁵ Amnesty International, *supra* note 198, section on Jordan.

²⁴⁶ Amnesty International, *supra* note 198, section on the UK.

²⁴⁷ If it is a Federal State, as in the *Soering* case, an assessment might have to be done of the distribution of powers between the federal government and the separate state authorities. See *Soering case*, *supra* note 12, para. 97.

²⁴⁸ See e.g., G. Echeverria, REDRESS, *supra* note 1, p. 34, and Empty Promises, *supra* note 2, p. 29.

The permissibility of diplomatic assurances under international law requires that the individual has an opportunity of due process protection. This includes the safeguard of judicial oversight to rely on diplomatic assurances. Without these rights, this procedural shortcoming is likely to violate international law. International law requires an effective opportunity to challenge the reliability and adequacy of diplomatic assurances.²⁴⁹ Without the right to an effective remedy for a breach of an international human rights convention, the protection would be rendered largely illusory.²⁵⁰ The right to an effective remedy is contained in ECHR article 13, in this context taken in conjunction with an arguable complaint of article 3,²⁵¹ in ICCPR articles 2(3) and 13, and in CAT article 3.

The provisions under the ECHR and the ICCPR are in essence the same. The ECtHR has stated that the remedy required by article 13 must be effective both in practice as well as in law.²⁵² To be effective, the remedy must be prompt and have the possible effect of preventing the execution of measures that are contrary to the Convention, and whose effects are potentially irreversible. Consequently, it is inconsistent with article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention.²⁵³ The authority must be competent and independent, however, it does not have to be a judicial authority, and the effectiveness does not depend on the certainty of a favourable outcome for the applicant.²⁵⁴ The individual also has to be given reasonable time before the execution of the removal to challenge the decision and contest the assurance.²⁵⁵ For this opportunity to be meaningful, it is also of importance that the individual concerned knows about the existence and the content of the assurance.²⁵⁶

In *Suresh*, the Canadian Supreme Court examined the procedural safeguards in the use of diplomatic assurances. There should according to the court, be fair and systematic procedures, and the decision to deport should for example be under the right of appeal.²⁵⁷ Applying the procedural safeguard in CAT article 3(1), the court found that the phrase “substantial grounds” in relation to the danger of being subjected to torture, raises a duty to afford an opportunity to demonstrate those grounds.²⁵⁸ According to the court, the refugee must also be given an opportunity to present evidence and make

²⁴⁹ See e.g., *Torture by Proxy*, *supra* note 150, p. 89.

²⁵⁰ See e.g., *Agiza case*, *supra* note 3, para. 13.6.

²⁵¹ See e.g., *Chahal case*, *supra* note 13, para. 147 and *Ćonka v. Belgium*, 5 February 2002, ECHR, no. 51564/99, Reports of Judgements and Decisions 2002-I, para. 76.

²⁵² *Ćonka case*, *supra* note 251, para. 75.

²⁵³ *Chahal case*, *supra* note 13, paras. 145 and 147; *Ćonka case supra* note 251, para. 79; and, *Mamatkulov case*, *supra* note 8, para. 124.

²⁵⁴ See e.g., *Ćonka case supra* note 251, para. 75.

²⁵⁵ See e.g., *Agiza case*, *supra* note 3, para. 13.9, See also Alternative report, *supra* note 144, p. 19.

²⁵⁶ See e.g., *Agiza case*, *supra* note 3, paras. 13.9 and 13.10.

²⁵⁷ *Suresh case*, *supra* note 122, para. 117.

²⁵⁸ *Suresh case*, *supra* note 122, para. 119.

submissions as to the value of the diplomatic assurances offered.²⁵⁹ For the right to challenge the deportation decision to be effective, the procedural rights should also include the right for the individual to examine the material being used against him, including the assurance.²⁶⁰

The ECtHR held in *Soering* that it is not normally for the Court to pronounce the existence of potential violations of the ECHR. However, the Court continued that the implementation of a decision to extradite could, if implemented, be a breach of article 3. In order to ensure the effectiveness of the safeguard provided by that article, the Court deemed the review relevant.²⁶¹ The Committee against Torture argued in a similar fashion, by interpreting some substantive provisions of CAT to contain a remedy for breach where not provided for specifically in the Convention.²⁶² The prohibition of *refoulement* should be such a substantive provision interpreted to encompass a remedy for its breach.²⁶³ In the case of *Arkauz Arana v. France*, the Committee against Torture held the inability to contest an expulsion decision before an independent authority to be a breach of CAT article 3.²⁶⁴ The remedy thus contained in article 3, requires an opportunity for an effective, independent and impartial review of the decision to return, even though a breach has not occurred.²⁶⁵

This is a problematic issue to include in the diplomatic assurance since the right to an effective remedy is subject to domestic legislation in the sending State. It is therefore not of relevance to the receiving State. However, the issue of an effective remedy in the sending State is important and relevant for the status of the diplomatic assurance as a safeguard. If not included in the actual assurance, in order to be enforceable, it needs to be required by the Sending State upon applying the assurance. Possibly, the assurance could be attached as compulsory guidelines guaranteeing this.

Agiza was regarded a threat to the security of Sweden by the Security police. Therefore, the Migration Board, as provided for by the Aliens Act,²⁶⁶ referred the case to the government for a decision. The Government would be the first and only instance.²⁶⁷ The Committee against Torture held Sweden responsible for a violation of the requirement for an effective, independent and impartial review in CAT article 3, since there was no possibility for review of the decision.²⁶⁸ In addition, the immediate removal

²⁵⁹ *Suresh* case, *supra* note 122, para. 123. See also *Empty Promises*, *supra* note 2, p. 18 and *Torture by Proxy*, *supra* note 150, pp. 90-91.

²⁶⁰ See e.g., *Suresh* case, *supra* note 122, para. 122.

²⁶¹ *Soering* case, *supra* note 12, paras. 90-91.

²⁶² See *Dzemajl v. Yugoslavia*, Communication No. 161/2000, (CAT/C/29/D/161/2000), 21 November 2002, para. 9.6 where CAT article 16 was interpreted to include an obligation to grant redress and compensate the victims. See also *Agiza* case, *supra* note 3, para. 13.6.

²⁶³ *Agiza* case, *supra* note 3, paras. 13.6 and 13.7.

²⁶⁴ *Arkauz Arana v. France*, Communication No. 63/1997, (CAT/C/23/D/63/1997), 9 November 1999, paras. 11.5 and 12.

²⁶⁵ *Agiza* case, *supra* note 3, para. 13.7.

²⁶⁶ Article 69 Aliens Act (Act No 1980:376).

²⁶⁷ See e.g., *Agiza* case, *supra* note 3, para. 2.4.

²⁶⁸ *Agiza* case, *supra* note 3, para. 13.8.

of *Agiza* made it impossible for him to invoke any kind of procedural rights in Sweden, a breach of his right under CAT article 22.²⁶⁹ In its reply to the Committee, Sweden claims to have solved this procedural shortcoming by a judicial reform at the domestic level.²⁷⁰ In security cases, such as *Agiza*, the Migration Board should be the first instance to determine the case, and appeal is to be made to the government. The appealed case should then be referred to the Supreme Migration Court for an opinion that will be binding on the government when taking the decision. The communication however, does not explain whether the decision by the government is possible to appeal.²⁷¹ Therefore, whether this will constitute an effective remedy or not will be dependent on when the diplomatic assurance was introduced. Only if the assurance was made subject also to the decision by the Migration Board, the appeal will constitute an effective remedy, otherwise the procedural shortcomings will remain.

Even though ECHR article 13 was not part of the complaint to the ECtHR in *Mamatkulov*, there were shortcomings of the procedure in the case.²⁷² *Mamatkulov* and *Askarov* were returned to Uzbekistan in spite of interim measures indicated by the ECtHR which prevented the Court from conducting a proper examination of the complaint. Thus, Turkey prevented the applicants from effectively exercising their right of individual application, guaranteed by article 34 of the Convention.²⁷³

The MOU between the UK and Jordan does not contain any provisions regarding procedural issues in the sending State before the deportation. Nor are there any references to domestic law in the sending State, or any guidelines for applying the assurance attached.

4.3 Difficulties in Detecting Torture – Post-Return Monitoring

Following the criticism by NGOs of diplomatic assurances, an acutely important issue of the reliance on diplomatic assurances is the post-return monitoring of its observance. This is also one of the most difficult aspects of the practice, partly because it involves the issue of who should be carrying out the monitoring, and who should be financing it, and because the difficulties in revealing abuses. The secrecy surrounding the practice of torture militates against effective post-return monitoring.²⁷⁴ Torture is generally practiced in secret, and practice shows that it most often happens shortly after the return.²⁷⁵ It appears in places rarely open to scrutiny by independent, well-trained monitors. The perpetrators are usually trained in

²⁶⁹ *Agiza* case, *supra* note 3, para. 13.9.

²⁷⁰ Communication No. 233/2003, Stockholm, 18 August 2005, at section II.

²⁷¹ *Ibid.*

²⁷² See e.g., Empty Promises, *supra* note 2, p. 29, and Still at Risk, *supra* note 95, p. 79.

²⁷³ *Mamatkulov* case, *supra* note 8, paras. 124-128.

²⁷⁴ Empty Promises, *supra* note 2, p.4.

²⁷⁵ See e.g., Empty Promises, *supra* note 2, p. 5, and the *Agiza* case, *supra* note 3, para. 2.6.

techniques that ensure secrecy, such as physical abuse that leaves few outward marks and intimidation tactics that frighten the victim into silence.²⁷⁶ Often, medical personnel are involved in covering up signs of torture, making detection even harder. In addition, family members or lawyers are often denied confidential access or private visits to the victim. Consequently, torture may go on for a long time before it is detected.²⁷⁷ Thus, the monitors have to be trained experts, the monitoring has to start immediately following the return, and unannounced visits should be carried out to see the real conditions of detention facilities and treatment of the returnee.

Any effective post-return monitoring system requires good faith concerning the actual assurance, and the necessary logistical capacity of both governments to provide a reliable safeguard against the risk of torture.²⁷⁸ Another concern to organisations such as the HRW is that, even if the monitoring is an adequate deterrent against the practice of torture, the monitors run the risk of being able to identify a breach only after torture or ill-treatment has already occurred.²⁷⁹

In 2002, the UN Special Rapporteur on torture appealed to all States to ensure that “a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.”²⁸⁰ States have interpreted that statement as a requirement for the assurance to contain provisions regarding its monitoring.²⁸¹ In the concluding observations to Sweden in 2002, the HRC also expressed concerns about monitoring the observance of an assurance. The Committee said that the countries of origin could pose risks to the personal safety and lives of the persons expelled:

“in the absence of sufficiently serious efforts to monitor the implementation of those guarantees... When a State party expels a person to another State on the basis of assurances as to that person’s treatment by the receiving State, it must institute credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion.”²⁸²

Thus, the monitoring included in the assurance should be effective from the moment of return. The monitors also have to have the authority and the political will to remedy the situation and seek accountability from the abusing government.²⁸³ In *Attia*, an additional difficulty regarding monitoring was at issue. *Attia* was not suspect or accused of any crime and was not requested for extradition. Therefore, if she had been returned she

²⁷⁶ As always in legal procedures and cases of justice, there is the issue of trust and credibility. A difficulty of the monitoring will be to give the removed person an incentive to reveal obligations, to be able to protect him from further ill-treatment if he does, and to trust him in telling the truth.

²⁷⁷ Still at Risk, *supra* note 95, pp. 24-26.

²⁷⁸ Empty Promises, *supra* note 2, p. 7-8.

²⁷⁹ W. Patten and N. Shamir, *supra* note 66, p. 30.

²⁸⁰ A/57/173, *supra* note 226, para. 35.

²⁸¹ See e.g., *Agiza* case, *supra* note 3, para. 4.10.

²⁸² HRC Concluding observations: Sweden, CCPR/CO/74/SWE, 24 April 2002, para. 12.

²⁸³ Empty Promises, *supra* note 2, p. 5.

would not have been handed over to the authorities in Egypt. It would have been difficult knowing her whereabouts and condition but, as a potential witness, she may also be at great risk. In other words, if the returned person is not to be detained following return, it is extremely difficult to put monitoring mechanisms in place.²⁸⁴

The return of *Agiza* and *El Zari* illustrates well the difficulties of implementing an effective and adequate post-return monitoring system that ensures that governments comply with the terms of the diplomatic assurances.²⁸⁵ Here, the monitoring was agreed upon after the assurance, and was later carried out in a questionable manner.²⁸⁶ The first visit to the prisoners was carried out more than five weeks after the return.²⁸⁷

The guarantee from Uzbekistan regarding *Mamatkulov* and *Askarov* did not contain any provisions on monitoring. The actual monitoring undertaken by Turkey consisted of one visit to the prisoners, occurring more than two years after the extradition, and the reliance on medical certificates drawn up by the prison doctors.²⁸⁸ With respect to the lack of monitoring, Turkey claimed to the Court, that ECHR article 3 could not engage indefinite responsibility for the extraditing State. Turkey argued that when the extradited person was found guilty in court, and had started to serve his sentence, the responsibility should end.²⁸⁹ Unfortunately, the Court was not able to conclude whether there had been a violation of the Convention due to lack of evidence. However, HRW deemed these minimal monitoring measures falling short of the requirement issued by the Special Rapporteur.²⁹⁰

The monitoring included in the MOU between the UK and Jordan is comparatively more specific and elaborate. It will consist of contact with, and visits from, an independent body to the rendered person if he is arrested, detained or imprisoned. The independent body is not specified in the MOU but is to be nominated jointly by the UK and Jordan should nominate it jointly. The visits are not dependent on a conviction, they will be permitted at least once a fortnight, and they should include opportunities for private meetings. After the visits, the body chosen shall report to the sending State.²⁹¹ If the rendered person is not arrested, detained or imprisoned, the receiving State may in no way hinder him from having contact with the consular posts of the sending State.²⁹²

²⁸⁴ See, e.g., Empty Promises, *supra* note 2, pp. 13 *et seq.*

²⁸⁵ See, e.g., Still at Risk, *supra* note 95, p. 57.

²⁸⁶ Empty Promises, *supra* note 2, pp. 34-35.

²⁸⁷ See, e.g., Still at Risk, *supra* note, 95, p. 57.

²⁸⁸ *Mamatkulov* case, *supra* note 8, paras. 33-34. See also Empty Promises, *supra* note 2, p. 28.

²⁸⁹ *Mamatkulov*, case, *supra* note 8, para. 64.

²⁹⁰ Empty Promises, *supra* note 2, p. 28.

²⁹¹ MOU between the UK and Jordan, *supra* note 5, para. 4.

²⁹² MOU between the UK and Jordan, *supra* note 5, para. 5.

The monitoring provisions in the MOU are at least partly, although quite restrictive, in line with the requirements of monitoring outlined in the following section. It is positive that the monitoring includes the important element of visits of a detained returnee, and that an independent body will be charged with this. Whether the monitoring will be adequate and sufficient will depend on the independent body nominated, and when the monitoring starts. It is unfortunate that the MOU does not more clearly state when the monitoring is to begin, and that it does not explicitly provide for visits not agreed on in advance. In addition to the monitoring, several of the minimum provisions drawn up by the Special Rapporteur²⁹³ are included in the MOU.²⁹⁴

When it comes to what the monitoring should consist of, regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture, according to the special Rapporteur on Torture.²⁹⁵

According to the special Rapporteur on Torture, and organisations such as the HRW and the Swedish Helsinki Committee for Human Rights,²⁹⁶ monitoring should be prompt and regular and should be carried out by expert monitors, trained in detecting signs of both physical and psychological torture and ill-treatment. Independent persons or organisations, such as the International Committee of the Red Cross (ICRC) or the Special Rapporteur, should be used. They should report regularly to the responsible authorities of the sending and the receiving States and their reports should be public. The independent NGOs should be authorised to have full access to all places of detention with a view to monitor the treatment of persons and their conditions of detention. However, bringing in an independent body cannot take the place of the Governments; States must not be allowed to shirk their own monitoring obligations.²⁹⁷ These elements of monitoring are included in the MOU between the UK and Jordan, with the exception of any provisions on the reports of the monitoring body being made public.

All interrogations of the detainee should be in the presence of a lawyer and should be audio and, preferable, also video recorded. There should be opportunities to interview the detainee in total privacy, and to visit them in

²⁹³ A/59/324, *supra* note 101, para. 41.

²⁹⁴ MOU between the UK and Jordan, *supra* note 5, paras. 1-3, 6-8: conditions of, and medical treatment in, detention; prompt decision of the lawfulness of a detention by a judge or other judicial officer; information regarding reasons for detention; religious freedom; fair and public hearing if charged with an offence; and opportunity to defence if brought to trial.

²⁹⁵ Report of the UN Special Rapporteur on Torture, E/CN.4/2003/68, para. 26 (f), and A/59/324, *supra* note 101, para. 41.

²⁹⁶ HRW and the Swedish Helsinki Committee for Human Rights draw on reports by the special Rapporteur on Torture when they criticise the monitoring carried out in cases of diplomatic assurances and outline elements that should be part of the monitoring. *See Still at Risk*, *supra* note 95, pp. 25-26 and Alternative report, *supra* note 143, pp. 24-27.

²⁹⁷ *See e.g.*, *Still at Risk*, *supra* note 95, pp. 25-26 and Alternative report, *supra* note 149, pp. 24-27.

their cells. The monitors should have unhindered access to a detainee at any time, without having to provide advance notice. In the interviews of the detainees, independent interpreters should be used or, as put forward by the Swedish Helsinki Commission, the interviews should be held in the language of the sending State if the returned person knows that language.²⁹⁸ These elements are unfortunately insufficient in the MOU between the UK and Jordan. Private interviews with the returnee are provided for, but there are unfortunately no provisions on recording of the interviews, or visits in the cells.

The detainees should undergo routine forensic medical examinations by an independent physician not associated with the detention facility and with experience of torture victims.²⁹⁹

When transmitting allegations of torture, HRW states that it is important that these should be confidential so that the detainee and his family do not suffer further retribution for having spoken out.³⁰⁰

The assurances should include provisions on who will be responsible for carrying out the monitoring and, perhaps more importantly, who will pay for it. The mandate for the independent body used needs to be clear, and it should specify whether the body is responsible for the costs of the monitoring provided. By securing the assurance, the sending State wants to remove someone unwanted from its territory. The intent of the assurance is to guarantee that the person concerned will be treated in accordance with obligations of the sending State. If not returned, the person will be subject to detention and trial in the sending State. Therefore, it would be natural that the monitoring should be paid for by that State, the assurance should not be a way for the State to save money.

4.4 Character of the Assurance

Whether a treaty or a MOU, I argue that the assurance must be legally binding to have the intended effect of being a possible safeguard against torture and *refoulement*, which the elements outlined in this chapter are aiming at. A political instrument may certainly have effect as to the relations between States, and in many ways be powerful. However, the agreements relevant for this thesis deal with the treatment of individuals and the individual concerned has to have the right to challenge it. Therefore, the only reasonable character of the assurance is legally binding. Organisations such as Amnesty International and HRW have seen difficulties with the assurances being an agreement concluded at diplomatic levels and a tacit acceptance of general abuse in the assuring State.³⁰¹ This invites the following discussion.

²⁹⁸ *E.g.*, Alternative report, *supra* note 149, pp. 24-27.

²⁹⁹ See *e.g.*, Alternative report, *supra* note 149, pp. 24-27.

³⁰⁰ *E.g.*, Still at Risk, *supra* note 95, p. 26.

³⁰¹ See *e.g.*, Still at Risk, *supra* note 95, pp. 19-21.

4.4.1 Non-Acceptance of other Abuse

The securing of, and reliance in diplomatic assurances may indicate an acceptance of situations of other abuses or violations in the receiving State. The assurance may not become a bilateral agreement that certain conduct in the receiving State is not to be regarded as a human right violation. Therefore, I put forward that there should be a clause in the assurance towards not accepting other abuse in the receiving State. Of course, this clause would have to be general not to be in itself harmful to the relations between the States. If possible, the clause could be drafted similar to this:

“By becoming a party to this agreement, the State is not evaluating the observance of international obligations of the other State party. The States parties to this agreement reserve the right to bring any suspicions of human rights violations to the attention of the United Nations or any other international body that the State concerned is a party to.”

The effect of the clause should be that diplomatic assurances do not alter the international obligations held by the contracting States. The inherent weakness in this clause might be that since the assurance is secured because there is a real risk of torture, the clause would anyway excuse the situation of human rights violations. It must therefore be carefully drafted to ensure that it is not an acceptance of, recognition of, or confession to, other abuses in the receiving State. The clause must mean for the receiving State that it is not by signing it confessing to resorting to torture or ill-treatment towards other persons under their jurisdiction. For the sending State, it will be an acknowledgement of continued responsibility over the treatment of the returnee, and that the assurance does not implicate abusive conditions in the receiving State.

States will probably only agree to the clause if the agreement or assurance is reciprocal, as the one between the UK and Jordan. A reciprocal assurance is not in the same way singling out an assuring or receiving country. It therefore has, probably even without the clause, less effect towards indicating other violations in one of the contracting States. The reciprocity will probably also diminish the risk of an assurance being used in any other way than for the intended purpose of safeguarding against torture.³⁰²

If diplomatic assurances can become part of an effective safeguard against torture, there might also be a tiny hope that they will be the beginning of a change of the human rights record in an assuring State with a bad record.

³⁰² E.g., being given in diplomatic relations as a return for other concessions, *see* section 4.4.2, or ask for with the intent of humiliating the assuring State and forcing it to confess to having a questionable human rights record, i.e. used as a “sword” in sore diplomatic relations.

4.4.2 Diplomatic Relations Between the Involved States

The delicacy of international relations is the largest obstacle to diplomatic assurances,³⁰³ and the one that may need most international attention. The lack of friendly relations between States may be an obstacle to monitoring the observance of the assurance. Moreover, the use of diplomatic tools as a means of compliance with the prohibition of torture is limited.

The characteristics of diplomacy and inter-state relations are negotiations; compromises; the need for caution and discretion; and the lack of transparency.³⁰⁴ The work by diplomats in the receiving State is restricted by the need to maintain diplomatic, trade, and commercial relations.³⁰⁵ If violations are found, they may be ignored for fear of harming those relations. There is always a risk that human rights issues, especially confrontations about breaches of international instruments or diplomatic assurances, are subordinated to diplomatic concerns, or even disregarded.³⁰⁶ In addition, the danger exists that the diplomatic assurance is sought or given in return for other concessions, such as military or economic assistance.³⁰⁷ The Sending State simply fears that strict monitoring risks sending a message of mistrust to the receiving country and harm the delicate diplomatic relations.

The use of diplomatic levels for the securing of the assurance is further a problem for the individual concerned. To be able effectively to challenge the adequacy and reliability of the assurance, and the presumption created by it, he has to be granted insight in the process of seeking and securing the assurance. This is rendered more difficult by the profound lack of transparency for third parties at the diplomatic levels.³⁰⁸

There are several diplomatic difficulties involved when one State has to monitor another State's respect for human rights. Also, criticising the compliance with the assurance entails a risk of criticism against the monitoring State. If violations of the assurance are found, the sending State will have to admit that relying on it was wrong or that it did not properly assess the risk or evaluate the assurance. Thus, the sending State is in a way also monitoring itself.³⁰⁹ HRW argues that government monitoring of an assurance would gain nothing but its own admission of violating the *non-refoulement* obligation by acknowledging that the receiving State is abusing

³⁰³ See e.g., Still at Risk, *supra* note 95, pp. 19 *et seq.*

³⁰⁴ Still at Risk, *supra* note 95, pp. 19-20 and 65-66, W. Patten and N. Shamir, *supra* note 66, pp. 29-32, Alternative report, *supra* note 149, p. 27.

³⁰⁵ Torture by Proxy, *supra* note 150, pp. 88-89.

³⁰⁶ Still at Risk, *supra* note 95, pp. 19-20 and 65-66, W. Patten and N. Shamir, *supra* note 66, pp. 29-32, Alternative report, *supra* note 149, p. 27.

³⁰⁷ Torture by Proxy, *supra* note 150, p. 89; Diplomats are subject to political pressure and are able in turn to exert it.

³⁰⁸ Still at Risk, *supra* note 95, p. 20.

³⁰⁹ See e.g., Alternative report, *supra* note 149, p. 27.

the assurance.³¹⁰ However, maybe that admission is actually diminishing the risk of harming the diplomatic relations between the States. Admitting one's own fault in violations occurred could be asking for a solution rather than singling out the other State. This of course requires that the State does admit to being equally responsible for the violation. If the blame is put entirely on the receiving State, nothing has been gained. Therefore, if the sending State acknowledges the self-monitoring, and takes part of the responsibility for any violation, this could make the receiving State more reluctant to accepting the monitoring and not see it as mistrust.

4.5 Enforceability and Reparation

To date the inability to enforce diplomatic assurances seems to be one of the biggest concerns to international organisations.³¹¹ Inserting a reference to a mechanism or body of enforcement, and including sanctions for breaches, could be the most effective way to make them an adequate safeguard. If the assurance creates legal obligations for the involved States, assurances can be enforced. To date no diplomatic assurances contain such provisions and the question is, is it possible to include them?

The question of enforceability of the assurance, and reparations for victims of violations of assurances bears similarities with the procedural rights for the individual discussed in section 4.2. However, the procedural safeguards I discuss above concerns the right of the individual before the return is effectuated, whereas the matter of enforceability of the agreement, and sanctions and reparations, concerns the situation after the return to the assuring country. Of course, the right to an effective remedy outlined in section 4.2 also applies in the assuring State. The individual concerned has to have access to domestic remedies. This requires knowledge about the existence and content of the assurance.³¹²

Mamatkulov and *Agiza* in the Committee against Torture show that individuals returned under diplomatic assurances in fact have the possibility to challenge their return to an international body. However, the complainants have not based their complaints on breaches of the actual assurance, but on breaches of obligations under international human rights law. The assurances were discussed in the context of the procedure of the returns, and referred to as vague and not possible to implement.³¹³ Consequently, none of the bodies to date has held any countries liable for non-compliance with the assurance, but rather for breaches of the respective conventions.³¹⁴ Due to the character of the issued assurances, and the legal

³¹⁰ Empty Promises, *supra* note 2, p. 5. See also W. Patten and N. Shamir, *supra* note 60, pp. 29-30.

³¹¹ See e.g., Empty Promises, *supra* note 2, pp. 5-6.

³¹² See section 4.2 and footnotes above.

³¹³ *Mamatkulov* case, *supra* note 8, para. 76, *Agiza* case, *supra* note 3, para. 5.3.

³¹⁴ The ECtHR is not able to find any violations due to lack of evidence, *Mamatkulov* case, *supra* note 8, para. 77, and the Committee against Torture merely said that the procurement

obligations stemming from international human rights obligations, this is not strange. The Committee against Torture commented that the diplomatic assurances did not provide for any mechanism for their enforcement.³¹⁵

The ECtHR in *Soering*,³¹⁶ and the Committee against Torture in *Agiza*,³¹⁷ discusses effective remedies and the use of the convention bodies and complaint procedures before a breach of the obligations has occurred. Applied on the issue of mechanisms of enforcement, the individual concerned should have the possibility of using these bodies. If the assurance contained a clause giving a body competence to enforce the terms of the assurance, the assurance in itself could serve as a basis for a complaint. The assurances could thus be enforced without relying on general culpability for human rights. If the assurance does not contain any rights in addition to those existing in conventions, no additional enforcement mechanism would be necessary. However, adding a clause that gives jurisdiction to an already existing body, for example the Committee against Torture, could add the element of enforceability, and the possibility for the individual to base complaints specifically on the assurance as well as on general human rights obligations.

The decision of which of the bodies of enforcement is the best has to be concluded on a case-by-case basis since there are only minor differences between them. The ECHR is a regional instrument but the ECtHR provides legally binding judgements. The ICCPR and the CAT on the other hand are global instruments, but the HRC and the Committee against Torture cannot legally enforce their views. State practice however, shows that the views of the Committee against Torture are being complied with, and the Special Rapporteur appointed by the HRC follows up the views of the Committee ensuring compliance.³¹⁸ To render the outcome of the HRC and the Committee against Torture the clause referring to a body of mechanism could also provide for the outcome being binding between the States concerned. Another difference is that the ECtHR has a time limit for admissibility of complaints, which is not applicable in the HRC or the Committee against Torture.³¹⁹

As for the diplomatic assurances used to date, they have been unenforceable and do not offer any remedies for the individuals when violations occur. However, a victim to torture has the right to reparation; a breach of an

of diplomatic assurances did not suffice to protect against the manifest risk of torture, *Agiza* case, *supra* note 3, para. 13.4.

³¹⁵ *Agiza* case, *supra* note 3, para. 13.4.

³¹⁶ *Soering* case, *supra* note 12, paras. 90-91. See also above section 4.2.

³¹⁷ *Agiza* case, *supra* note 3, para. 13.7. See also above section 4.2.

³¹⁸ H. Lambert pp. 516-522.

³¹⁹ Under ECHR art 35(1) a case is inadmissible if it more than six months have passed from the date of the final decision. There is no such admissibility criteria under ICCPR or CAT.

international obligation under international human rights and humanitarian law entails the duty to afford reparation.³²⁰

The UN Commission on Human Rights (CHR) stated that reparations might include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.³²¹ Restitution should, whenever possible also restore the victim to the original situation before the violations occurred.³²²

The assurances should contain provisions on reparation for the individual if the assurance is violated. The reparations should indeed be the ones included in the guidelines from the CHR. The requirement of restitution could give rise to an “automatic return” clause in the assurance, a clause with which both States have to comply. If the assurance is seriously violated and the person is indeed tortured or ill-treated, the assurance should guarantee that he will be removed from the situation where the violation occurred and transported back to the sending State. Once back in the sending State the person should be entitled other relevant reparations such as for example medical treatment and therapy. A danger of such a clause is that the removed person might lie about abuses in order to effectuate a return to the sending State.

None of the assurances discussed above contain any clauses on enforcement or reparation.

4.6 Settlement of Disputes

I have not seen any diplomatic assurances containing provisions on how to solve disputes or interpret the terms of the assurance. If the dispute regards the individual returned, this will fall under the procedural safeguards dealt with above. However, there might also be situations where the States have different opinions regarding, for example, the terms of the assurance; the qualification of the treatment of the returned person;³²³ which State has the responsibility for breaches; and for how long the sending State has influence over the treatment of the returned persons.

Upon allegations from *Agiza* that he was tortured, in spite of the assurance, Sweden states that it made efforts to investigate with the Egyptian

³²⁰ G. Echeverria, REDRESS, *supra* note 1, p. 55. See also article 1, International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts, arts 28-41.

³²¹ CHR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, (E/CN.4/2000/62, Annex) 18 January 2000. See also G. Echeverria, REDRESS, *supra* note 1 p. 56.

³²² CHR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, (E/CN.4/2000/62, Annex) 18 January 2000, para. 22.

³²³ Due to for example cultural differences, treatment that would be regarded as torture or ill-treatment in one State might be regarded acceptable treatment of detainees in another State.

authorities the ill-treatment during the initial stages of detention. Sweden believed that there was a need for a thorough, independent and impartial examination of the allegations, in accordance with the principle of the rule of law and in a manner that was acceptable to the international community.³²⁴ Egypt resisted for a long time but, according to the Swedish government, agreed to an international inquiry into the treatment of *Agiza* and *El Zari*.³²⁵ Sweden also made an inquiry to the UN High Commissioner for Human Rights (UNHCHR) regarding an independent investigation.³²⁶ The High Commissioner refused to carry out an inquiry because she deemed it evident that Sweden had violated its international human rights obligations, and said that an inquiry would not add anything to the decision by the Committee against Torture.³²⁷ In Sweden, the Chief Parliamentary Ombudsman carried out an investigation into the circumstances surrounding the execution of the Government's decision to expel *Agiza*.³²⁸ In his adjudication, he delivered severe criticism to the Security Police regarding the procedure of the expulsion and the use of American officials.³²⁹ However, Sweden puts the blame of the actual treatment and the breach of the assurance on Egypt.³³⁰ This clearly demonstrates the need for some kind of dispute and responsibility settlement and interpretation mechanism for assurances. In addition, it shows that there is a need for specific language in the assurance regarding which party should be responsible for carrying out inquiries if allegations to violations of the assurance are raised.

In the MOU between the UK and Jordan, there are unfortunately no clauses on interpretation of terms or settlement of disputes.³³¹

A possibility for the assurance regarding torture or ill-treatment might be to use the possibilities for examinations of disputes that CAT offers. Article 30 contains the possibility to submit a dispute concerning the interpretation or application of CAT to arbitration, or in a later stage refer it to the ICJ. Arbitration should follow if the dispute cannot be settled by negotiations.³³² Another possibility is a clause that refers to the interstate communications under article 21. This requires that all States parties to the assurance recognise both the competence of the Committee to deal with this kind of

³²⁴ *Agiza* case, *supra* note 3, paras. 12.5-12.9

³²⁵ A. Öbrink, Egypten accepterar utredning om tortyr, 21 May 2005, *Dagens Nyheter*. [www.dn.se], visited on 13 September 2005.

³²⁶ *Agiza* case, *supra* note 3, para. 12.10.

³²⁷ See e.g., P. Mattsson, Ingen FN-utredning av avvisade egyptier, 21 June 2005, *Sveriges Radio - Ekot*. [www.sr.se/ekot], visited on 13 September 2005.

³²⁸ Chief Parliamentary Ombudsman M. Melin, a review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens, 22 March 2005, adjudication No. 2169-2004, available at [www.jo.se], visited at 13 September 2005.

³²⁹ *Ibid.* sections 3.1 and 3.2.

³³⁰ Still at Risk, *supra* note 95, p. 62.

³³¹ MOU between the UK and Jordan, *supra* note 5.

³³² CAT article 30.

communications, and the fact that they are parties to the convention.³³³ To date, there have been no such cases in the Committee against Torture.³³⁴

4.7 Risk Assessment – Sending State’s Responsibility

The sending State is prohibited to *refoule* anyone from its territory and both States are prohibited from resorting to torture. Within the prohibition of torture is the obligation on the sending State not to put a person in a situation where he might risk being tortured or ill-treatment.³³⁵ Whenever sending a person away the risks upon return must be assessed. After the return, the receiving State will be responsible for its own actions, but this will never absolve the sending State from any responsibilities. It also does not absolve the sending State from the obligation to make sure, before it removes someone, that it will not *refoule* him or put him in the risk of torture or ill-treatment.³³⁶ The main responsibility for the compliance with the assurance must therefore be with the sending State.

When assessing the risk the sending State may also take into account issues such as its own monitoring and enforcement mechanism. If these are good, the presumption created by the assurance is strengthened, and the sending State will have a stronger case if anything goes wrong.

Applying the principle from *T.I.*, *mutatis mutandis*, States cannot automatically rely on an assurance; the assurance does not diminish the obligation not to expose people to torture. It is incompatible with the prohibition of torture if States could become absolved from their international responsibilities by establishing international agreements that could cause implications for the protection of the fundamental right. The agreement, or assurance, will be a complement to obligations under international human rights law.³³⁷

The assurance can also be seen as one of the relevant considerations that a State under CAT article 3 has to take into account in the determination of substantial grounds for believing that an individual would be in danger of being subjected to torture.³³⁸ Thus, the individual assessment of the risk, and the decision whether an individual can be returned without breaching international obligations or human rights law, must be made by the sending State, after receiving the assurance.

³³³ CAT article 21(1).

³³⁴ M. Nowak, *Introduction to the International Human Rights Regime* (Brill Academic Publishers, Leiden, 2003), p. 89.

³³⁵ *Soering* case, *supra* note 12, para. 111.

³³⁶ *See e.g.*, *Empty Promises*, *supra* note 2, p. 11.

³³⁷ *T.I. v. the United Kingdom* case, *supra* note 103, p. 260. *See also* Noll, *supra* note 148, p. 178.

³³⁸ *See* *Torture by Proxy*, *supra* note 150, p. 84.

Naturally, the sending State will also be the State responsible for the monitoring. After all, the monitoring is a way for the State to make sure that it has itself complied with international law, as well as of course being an additional safeguard for the individual concerned.

5 Concluding Remarks

There are circumstances where diplomatic assurances are called for. For example, when extradition is sought and the requesting State, contrary to the requested State, practices capital punishment. If the returned person is subject to a trial, assurances could guarantee the trial to be fair. In spite of the differences between the contexts of these assurances and assurances regarding the treatment of a returned person, the mere fact that the former assurances are sufficient and accepted implies that States will seek also the latter assurances. Therefore, they also need to be adequate and reliable.

Assurances to the treatment of returnees receive disparate treatment by NGOs and States. NGOs like Amnesty, HRW and the International Helsinki Federation want the practice to end, and are trying to initiate laws against using diplomatic assurances as a safeguard against torture.³³⁹ However, if States can ensure that the diplomatic assurances will have the intended effect, the practice will continue.³⁴⁰ To make the use legal, Sweden has initiated the elaboration of an instrument circumscribing the use of diplomatic assurances in alien cases.³⁴¹ However, States will continue to seek diplomatic assurances, and probably only from States where they see a risk of torture or ill-treatment. If there is no risk, they will not regard the assurance necessary.

Therefore, I have, based on existing State practice and case law, tried to outline what elements are necessary in the drafting of an assurance. The crucial point to take into consideration is after all the responsibility of the sending State not to *refoule* anyone and not to put him in a situation where he risks being subjected to torture or ill-treatment. The main responsibility lies with the sending State, if an assurance is not relied on, the individual would not have been returned and thus present in the situation of risk.

All assurances must be legally binding on all parties. If a violation does not imply any legal repercussions, it will not be effective. In addition, the assurance should be enforceable and include references to mechanisms of enforcement. The assuring government should have effective control over its institutions and security police and have the ability to control the observance and implementation of the assurance once given. If they do not have effective control, the assurance will not be a safeguard against mistreatment by other than the issuing authority itself.

The concerned individual should be granted insight in the process, and access to the assurance in order to have the possibility to refute it. The individual also needs to be granted knowledge about the issuing authority,

³³⁹ See e.g., Amnesty et al, *Joint Statement*, 12 May 2005.

³⁴⁰ See e.g., J. Sköld, Fler kan avvisas trots FN-kritik, *Dagens Nyheter*, 25 August, 2005. [www.dn.se].

³⁴¹ See e.g., Sweden's reply to the Committee against Torture, p. 4.

and enough time to prepare an eventual challenge of the authority and the assurance. When a decision to rely on an assurance has been taken, the individual should have the possibility to appeal that decision as any asylum decision, and return may not be effectuated until the decision has gained legal force.

After the return, the assurance has to offer effective monitoring that should start immediately, and should be carried out both by officials from the sending State, and by representatives from independent organisations. The monitoring should include private visits with the returned person, unannounced visits, visits to the cells, and medical examinations by independent physicians trained in detecting torture. The responsibility of the sending State does not end with the return. Relying on an assurance regarding the treatment of an individual, the sending State is responsible for the actual treatment of that individual, and has to ensure that the assurance is observed.

The returned person will most probably be detained upon return to his home country; he should therefore have the general rights to be brought promptly before a judge, to know the reasons for his detention, and to receive a fair and un-delayed trial or re-trial if he was sentenced *in absentia*.

If the assurance is violated, both States will or may have violated its international obligations towards the individual concerned.³⁴² The individual should be afforded relevant and reasonable reparations and should be taken back by the sending State. The individual should have the possibility to file a complaint regarding his treatment to national bodies of both States, and to international bodies. Inquiries should be undertaken, and the blame should not fall on the receiving State only.³⁴³ The States involved should each recognise their own responsibility and the assurance should contain provisions regarding settlement of disputes between the States that will not put the individual in a vulnerable situation while the dispute is being settled.

In addition, the assessment of the risk of torture or ill-treatment when returning a person to his country of origin must be done only after receiving the assurance. Such timing allows the assurance to be considered as a relevant consideration, not merely as a mitigating factor. The assurance cannot be relied on automatically by the sending State it has to be evaluated. Only if the assurance will effectively set aside the risk for the individual concerned, is it an effective safeguard. If there, in spite of the assurance, still is a real risk that the rendered person will be tortured, it may not be relied upon. Therefore, the risk assessment should include an evaluation of

³⁴² The sending State, if complying with the catalogue of suggested elements of the assurance, may however have complied with its obligations and is therefore not responsible. If the assurance is violated and the sending State has fulfilled its obligations, the blame will be only on the receiving State.

³⁴³ Unless of course the sending State has complied with its obligations and therefore has no responsibility.

the human rights record of the government offering the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfil the assurances, particularly where there is doubt about the government's ability to control its security forces. It will also be of importance for the risk assessment and the evaluation of the assurance that it is clear and unambiguous.

If all elements above are present, this will make the procedure surrounding the return lengthy and arduous. If all the procedural rights of the individual are ensured, in particular before the effectuation of a return, the procedure will however be transparent and careful. The process should involve the individual concerned, the possibility of judicial review, and oversight by the judicial authorities of the State.

The assurance should be carefully drafted and evaluated, and then taken into account in the risk assessment. The assurance generates legal obligations for the States involved and may lead to State responsibility and obligations of ceasing the violation and make reparations if violated. This renders the assurance an agreement comparable to the one in *T.I.*, an international agreement that cannot be relied on automatically, but is a possible way of cooperation between States.

The question that remains is whether these elements can be accepted by States. If they can, a diplomatic assurance might actually be reliable and thus a safeguard against torture or ill-treatment. It will not make the practice perfect,³⁴⁴ but it will bring it a step forward.

A positive side effect of the monitoring of an assurance and the required insight into the treatment of the detainee is that officials from other States and independent organisations will be present in the receiving State. This at least has the power of improving the situation in the facilities because it is under surveillance. It will be harder for the receiving State to violate its other, general human rights obligations. After all, justice works one case at the time, if an assurance could ensure that one person is treated in accordance with his human rights, this might be a step closer to reform and improvement of the general human rights observance in the receiving State.

³⁴⁴ Situations where the sending State is complying with all the elements of the assurance and is still not able to hinder abuses of the assurance may still occur, but it might not be referable to the sending State.

Supplement

Assurance from the US to the UK in *Soering*.³⁴⁵

I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out.

Assurance from India to the UK in *Chahal*.³⁴⁶

We [the government of India] have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.

I have the honour to confirm the above.

Aide-Mémoire between Sweden and Egypt³⁴⁷

Sweden's request:

It is the understanding of the Government of the Kingdom of Sweden that the above-mentioned persons 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 any 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.

Egypt's reply:

With reference to your aide-mémoire dated 12 December 2001 concerning repatriation of the following Egyptian citizens:

- Mohammed Mohammed Suleiman Ibrahim El Zary
- Ahmed Hussein Mustafa Kamil Agiza

³⁴⁵ *Soering* case, *supra* note 12, para. 20.

³⁴⁶ *Chahal* case, *supra* note 13, para. 37.

³⁴⁷ Aide-Mémoire between Sweden and Egypt, 12 December 2001. The request and the reply given by the Arab Republic of Egypt can be obtained from the Swedish Foreign Ministry, Stockholm.

- Hannan Fouad And El Khalek Attia (wife of the latter, together with her children)

We, herewith, assert our full understanding to all items of this mémoire, 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.

We will appreciate repatriation as soon as possible. Procedure of the process will be discussed upon your reply.

Assurance from Uzbekistan to Turkey in *Mamatkulov*³⁴⁸

The applicants' property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital punishment.

The Republic of Uzbekistan is a party to the United Nations Convention against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole.

Deportation MOU between the United Kingdom and Jordan³⁴⁹

Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation.

Application and scope

This arrangement will apply to any person accepted by the receiving state for admission to its territory following a written request by the sending state under the terms of this arrangement.

Such a request may be made in respect of any citizen of the receiving state who is to be returned to that country by the sending state on the grounds that he is not entitled, or is no longer entitled, to remain in the sending state according to the immigration laws of that state.

Requests under this arrangement will be submitted in writing either by the British Embassy in Amman to the Ministry of the Interior or by the

³⁴⁸ The assurance was in the form of two letters from the Public Prosecutor of the Republic of Uzbekistan, included in two notes from the Ministry of Foreign Affairs. See *Mamatkulov* case, *supra* note 8, para. 28.

³⁴⁹ Extracted from BBC news, visited at 12 August 2005.

Jordanian Embassy in London to the Home Office. Where a request is made under the terms of this arrangement, the department to which it is made will acknowledge receipt of the request within 5 working days.

A response to a request under the terms of this arrangement may be given verbally, but must be confirmed in writing within 14 days by the home secretary, in the case of a request made to the United Kingdom, or by the minister of interior in the case of a request made to the Hashemite Kingdom of Jordan before any return can take place.

To enable a decision to be made on whether or not to return a person under this arrangement, the receiving state will inform the sending state of any penalties outstanding against the subject of a request, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this arrangement may include requests for further specific assurances by the receiving state if appropriate in an individual case.

Understandings

It is understood that the authorities of the United Kingdom and of Jordan will comply with their human rights obligations under international law regarding a person returned under this arrangement. Where someone has been accepted under the terms of this arrangement, the conditions set out in the following paragraphs will apply, together with any further specific assurances provided by the receiving state.

1. If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.
2. A returned person who is arrested or detained will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.
3. A returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.
4. If the returned person is arrested, detained or imprisoned within three years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned

person. The nominated body will give a report of his visits to the authorities of the sending state.

5. Except where the returned person is arrested, detained or imprisoned, the receiving state will not impede, limit, or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discount rates.
6. A returned person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.
7. A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgement will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
8. A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Withdrawal

Either government may withdraw from this arrangement by giving six months notice in writing to the Embassy of the other government.

Where one or other government withdraws from the arrangement, the terms of this arrangement will continue to apply to anyone who has been returned in accordance with its provisions.

This memorandum of understanding represents the understandings reached between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan upon the matters referred to therein.

Signed in duplicate in Amman on 10 August 2005 in the English and Arabic languages, both texts having equal validity.

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