Diplomatic Assurances against Torture – An Effective Strategy?

- A Review of Jurisprudence and Examination of the Arguments -

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Abstract

Human rights organizations have warned repeatedly that basic human rights are being challenged in the so-called ‘War on Terror’. One particularly controversial area is the use of diplomatic assurances against torture.

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

This paper reviews international and selected national jurisprudence on the topic of diplomatic assurances against torture and examines if and/or when such assurances might render sufficient protection against torture to enable removals in accordance with international law.

The courts and committees that have reviewed the use of diplomatic assurances against torture have identified essential problems of using them, thus rejecting reliance on simple promises not torture. However, they have often implied that sufficient protection might be rendered by developing the assurances. I argue that this approach risks leading the governments into trying to perfect a system that is inherently flawed – whilst, incidentally, deportations to actual risk of torture continue. Even carefully modelled assurances render only unreliable protection against torture. For this, and reasons connected to undesirable side-effects of their use, I argue that the practise should be rejected.
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1 Introduction

1.1 Diplomatic Assurances and their function

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

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\(^1\) Diplomatic assurances are also referred to as ‘diplomatic guarantees’ or ‘memoranda of understanding’. Here, I will only use ‘diplomatic assurances’


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

\(^4\) See for example the reports of Human Rights Watch and Amnesty International cited in the Bibliography.
Diplomatic assurances against torture have also found a function in another arena. The presence of international peace-keeping or peace-enforcing troops abroad is increasing. Not the least Swedish troops, as the government has decided to restructure the Swedish defence from a defence for invasion to a defence primarily for international missions. The troops often find reasons to detain persons such as suspected criminals. The detainees are then handed over to national authorities for prosecution. Peace-keeping missions are mostly present in more or less failed-states where torture of prisoners is abundant. In these case, transfer of detainees to national authorities may, be illegal according to international human rights law forbidding transfer to substantial risk of torture. Diplomatic assurances are increasingly used to assuage concerns about torture in these transfers as well. This practise has come under fire from human rights advocates. Amnesty International recently criticized the trend in a report regarding detainee transfers of the troops of the ISAF mission in Afghanistan.5

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

1.2 Object and Purpose

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

have increasingly started to use more elaborate assurances providing, for example, mechanisms for post-return monitoring.

Many human rights organizations and intergovernmental human rights bodies have examined the topic of diplomatic assurances against torture. These have, however, seldom thoroughly examined the protection value rendered by the more elaborate assurances or the possibility of enhancing the tool of diplomatic assurances in order to render them efficient. There are a few academic contributions on the topic of diplomatic assurances against torture, but these examine the practise of diplomatic assurances as a mere promise and not comprehensively how and if diplomatic assurances might be modelled to render efficient protection against torture. Furthermore, much has happened in the area since it was last examined. During 2007, several new cases were decided and NGO reports released revealing new information about the use of diplomatic assurances. Indeed, the first weeks of 2008 have brought developments in the area: the 23rd of January, the Canadian Government announced that they will stop their practice of using diplomatic assurances against torture in order to transfer detainees in Afghanistan. The decision was taken after intense pressure from human rights advocates and a lawsuit by national NGOs.6

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

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

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1.3 Research Methodology, Sources, Delimitations

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

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

1.4 Outline

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

7 However, a Canadian case is pending, Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada, Court File Number T-324-07, online at http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-324-07 (consulted February 3, 2008).
2 International Law Framework

2.1 International Refugee Law

In the aftermath of the Second World War, with the widespread rejection of Jewish refugees close at hand, the Convention Relating to the Status of Refugees (the Refugee Convention) was adopted by the UN General Assembly. According to its Article 33(1), “No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. To receive the protection of non-refoulement according to the treaty, a person must fall under the refugee definition in Article 1 of the Convention. There are, however, grounds for a state to exempt someone from the protection of the Refugee Convention. A person is, according to Article 1(F), exempt from refugee status if there are “serious reasons for considering that he has committed serious non-political crimes prior to entry to the country” or has been guilty of “acts contrary to the purposes of the UN”. Furthermore, someone that has already obtained refugee status cannot claim the protection according to Article 33(1) if there are “reasonable grounds” for regarding the person as “a danger to the security of the country in which he is”. These exemptions have been applied in many cases for persons suspected of involvement in terrorist activities. For example, in the much discussed cases of the Egyptian asylum seekers Agiza and Alzery, the Swedish Government decided to exempt the men from protection, deeming them ‘security threats’ due to intelligence indicating connections with terrorist organizations. The increase in persons exempted from protection under the convention has led scholars to speak of a ‘securitization’ of immigration law, where control is emphasized over the

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9 Article 33(2).
11 See below, section 5.2.
original aim of protection.\textsuperscript{12} In summary, the Refugee Convention offers protection against \textit{refoulement}, however, not to everyone. The principle of \textit{non-refoulement} to torture is, conversely, universal and considered absolute.

\textbf{2.2 The Law of Non-Refoulement to Torture}

The ban against torture is perhaps one of the most well-established norms of international human rights law. It is widely considered a peremptory norm, \textit{ius cogens}.\textsuperscript{13} Furthermore, the ban is expressed in several global and regional human rights conventions. The \textit{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} (CAT)\textsuperscript{14} contains an absolute ban against torture: according to Article 2(2), no exceptional circumstances whatsoever may be invoked as a justification for torture. Furthermore, a non-derogable\textsuperscript{15} ban on torture is contained in the \textit{International Covenant on Civil and Political Rights} (ICCPR)\textsuperscript{16} Article 7, and another in the \textit{Convention for the Protection of Human Rights and Fundamental Freedoms}, (ECHR)\textsuperscript{17} Article 3.\textsuperscript{18} The prohibition against torture is, as other international human rights norms, considered an obligation \textit{erga omnes}, i.e. all states have legal interest in protecting it.\textsuperscript{19}

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

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

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

The principle of non-refoulement bans removal at a certain degree of risk of torture, rather than an actual treatment. The official making a removal decision must try and assess the risk of a future event. This special character much influences any discussion on refoulement and diplomatic assurances against torture. CAT article 3 contains certain guidance for the risk assessment: all relevant considerations must be taken into account, including, where applicable, the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In its jurisprudence, the Committee consistently repeats that the complainant who seeks to avoid removal based on the risk of torture: "must show a foreseeable, real and personal risk of

20 A similar provision is contained in the IACHR Article 22(8).
23 See for example Allain, 2002, at 533.
torture. Such a risk must rise beyond mere theory or suspicion, but does not have to be highly probable.”

2.3 International Law of Detainee Transfers by Troops Abroad

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

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25 Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 10: “[...] a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”.
26 In Öcalan v. Turkey application no. 46221/99, 12 March 2003, the Court finds the Convention to be applicable outside the territory of the state due to the effective control of the state officials over the persons concerned.
27 Al-Skeini and Others v. Secretary of State Defence, House of Lords, 13 June 2007.
28 Compare Human Rights Committee, General Comment No. 31, op cit, para. 10 with the ECtHR cases of Behrami v. France, application no. 71412/01, and Saramati v. France, Germany and Norway, application no. 78166/01, decided on May 31, 2007 and the analysis by Prof. Greenwood in relation to the pending case on detainee transfers by Canadian troops in Afghanistan, available online at http://www.bccla.org/antiterrorissue/afghan.htm (consulted February 3, 2008).
29 See for example, Security Council resolution 1776 (2007) adopted at its 5744th meeting on 19 September 2007, that in fact states that the aim of the mission is to promote human rights, and The UN Charter article 1.3 that establishes the promotion of human rights as a core object of the organization. A working group within the UN DPKO is currently developing a directive containing specific rules for detention by UN peacekeeping troops according to colleagues at the UN OHCHR (February 2, 2008).
Furthermore, if there is an armed conflict ongoing in the country in which the troops act, one or more of the Geneva Conventions of humanitarian law might apply. It may, therefore, be noted that also they contain rules of non-refoulement: prisoners of war may not be transferred where they will be treated inhumanely, and civilians may not be removed to a country where they have reason to fear persecution for political or religious reasons.

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

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

In the case *Chahal v. The United Kingdom* under ECHR, the UK Government argued:

“[…] that the guarantees afforded by Article 3 (art. 3) [are] not absolute in cases where a Contracting State proposed to remove an individual

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30 It has been argued that when humanitarian law applies, human rights law does not. This claim has, however, been refuted by the International Court of Justice, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106, and Human Rights Committee, see *General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004), para. 11. The international Committee of the Red Cross has written extensively on the relationship between the two, see [www.icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_and_human_rights](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_and_human_rights) (consulted January 31, 2008).


34 Ibidem, para 3(g).


36 Ibidem, para 14.5.
from its territory. Instead, in such cases, which require [...] an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there is an implied limitation to Article 3 (art. 3) entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment exist[s], if such removal is required on national security grounds."37

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

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

The court, thus, upheld the ban in Chahal v. United Kingdom in 1996. The 9-11 attacks, however, set off the ‘War on Terrorism’, and with that the proponents of compromising human rights in the name of security have turned louder. Former UK Prime Minister Tony Blair declared that “the rules of the game are changing”40, and former UK Home Secretary Charles Clarke stated (in response to criticism of suggestions withdrawing the prohibition on non-refoulement for terror suspects):

“The human rights of those people who were blown up on the Tube in London on July

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38 Ibid.
39 Ibidem, para. 80.
7 are, to be quite frank, more important than the human rights of the people who committed those acts...I wish the UN would look at human rights in the round rather than simply focusing all the time on the terrorist”.

Furthermore, in the ‘War on Terrorism’, the desire of states to remove persons deemed ‘security threats’ from their territory has increased. Persons exempted from refugee status on grounds of terrorist affiliation may be protected from *refoulement* because a risk of torture on removal, but perhaps evidence is not sufficient for a criminal prosecution. Governments, then, must find an alternative means to handle these people if they feel wary letting them out on the streets. As a consequence, some countries have instigated systems of detaining people without charge. Such systems have, however, been struck down on human rights grounds by national courts and are now a less attractive alternative to removal.

A desire to prevent practises of detention without charge was a main argument in favour of creating guidelines for the accepted use of diplomatic assurances against torture within the framework of the Council of Europe. Such guidelines would namely enable removals to places where the removed would risk torture without the use of diplomatic assurances. The arguments express a sense of urgency amongst governments in dealing with ‘security threats’ on their territory in the War on Terror. The pressured nature of the situation has also repeatedly been expressed by Government officials. The secretary of former Prime Minister Tony Blair wrote regarding the removal of certain Egyptian terror suspects: “In general, the Prime

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Minister’s priority is to see these four Islamic Jihad members returned to Egypt. We should do everything possible to achieve it”. In a similar vein, the former German Minister of Interior, claimed, after a court had struck down an attempt to remove a terrorist suspect due to risk of torture, that “the right of a state to expel a foreigner in order to protect national security” should be the priority.

Several states have defended removals to risk of torture referring to the post 9-11 Security Council Resolution 1373, mentioned above, encouraging states to deny safe havens for terrorists. These arguments have, so far, won no sympathy with committees. It has, inter alia, been highlighted as a counter-argument that subsequent resolutions regarding terrorism contain express references to compliance with human rights norms in any measures to combat terrorism. To this could be added that, provided we accept the claim that the principle of non-refoulement to torture holds status of ius cogens, it owns priority in cases of conflicting directives emanating from a Security Council Resolution.

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

Within Europe, the ban on removal to torture remains challenged. The Commission of the European Communities recommended, in a 2001 document on the relationship

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48 See, for example, Security Council resolution 1456 (2003), adopted on 20 January 2003, at its 4688 meeting, at para 6: “States must ensure that any measure taken to combat terrorism complies 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, “, available online at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement (consulted December 22, 2007).
between internal security and human rights, that the ECtHR jurisprudence banning removal to torture should be revisited.\(^{50}\) Also, the United Kingdom Special Immigration Appeals Commission expressed criticism of the *Chahal* judgement stating an absolute ban on *refoulement* in a decision of April 2007.\(^{51}\) In a case currently pending in the ECtHR, *Ramzy v. The Netherlands*\(^{52}\), regarding removal proceedings of an Islamist extremist, several European states have intervened, arguing for an exception to the rule of *non-refoulement* to torture.\(^{53}\)

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

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


\(^{54}\) The ambience of a pressing need to solve the problem is expressed by former UK Prime Minister Tony Blair, when asked how he would react if the practice of using diplomatic assurances was struck down in court: “*s*hould legal obstacles arise we will legislate further, including if necessary amending the Human Rights Act” Wintour Patrick, “*Blair vows to root out extremism: Lawyers and Muslim groups alarmed*”, The Guardian (London), August 6, 2005, para. 1.
Diplomatic Assurances – Qualities and State Practice

3.1 The Practice of Demanding Diplomatic Assurances

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

Diplomatic assurances in order to protect against torture have, to some extent, been sought since the introduction of the obligation of non-refoulement to torture.\(^59\) However, several sources witness of a major increase in their use the last few years, following the ‘War on Terror’ and their new usage in detainee transfers of peacekeeping troops.\(^60\) The extent to which such assurances are employed is difficult to establish, since the procedure of obtaining the assurances often is kept secret.\(^61\) The CAT committee has started requesting information from states regarding their use of diplomatic assurances against torture.\(^62\) Thus, we might expect to have a clearer view

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\(^{57}\) See for example the extradition agreement between the EU and the US of 2003, Article 13.


\(^{59}\) Chesney 2006, at 694f.


\(^{61}\) Jones 2006, at 12. For example, US officials have reported that diplomatic assurances are sought in cases of removal to risk of torture, but in which cases, are to a large extent kept secret.

\(^{62}\) See for example Committee against Torture, “Conclusions and Recommendations: Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland”, CAT/C/CR/33/3, December 10,
in a few years time. Some light has been shed on the extent of the application by an inquiry performed by the Council of Europe Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER). Furthermore, NGOs such as Human Rights Watch and Amnesty International have reported extensively on the issue. The reports reveal that diplomatic assurances against torture are resorted to widely in the US and Canada, in several European countries and have also been employed by certain states in Central Asia and Russia. A review of the known instances of sought assurances, reveal that they are sought when a removal or transfer of the person would otherwise be excluded due to risk of torture. Often, the assurances are sought from countries where the practise of torture is a serious problem. Breaches of diplomatic assurances against torture have been credibly alleged in a number of cases, for example in the cases of Agiza and Arar, described below, and in cases discussed in a number of reports from human rights NGOs.

3.2 A ‘Grey Area of International Law’

Whereas the use of diplomatic assurances against the death penalty, as mentioned, often is regulated, there exists no such regulation regarding assurances against torture. On the national level, only the US has any regulation regarding the use of diplomatic assurances against torture. Such assurances are not mentioned in international human rights treaties, and have not been contained in extradition- or other treaties

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63 Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), “Compilation of the Replies to the Questionnaire on the Practice of States in the Use of Diplomatic Assurances,” op cit., p. 43.
66 8 C.F.R. § 208.18(c)(1) (2005); id. § 1208.18(c)(1). For further discussion on the US regulation, see Chesney 2006, at 691ff. An initiative to regulate the use of diplomatic assurances against torture is currently discussed in Georgia, see Human Rights Watch, “Georgia, Do Not Develop Guidelines for Diplomatic Assurances...”.
concerning transfers of persons. Their use, thus, largely remains a ‘grey area of international law’. 67

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

3.3 Form and Content of the Assurances

The UNHCR explains how: “The term ‘diplomatic assurances’ as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.”70 The form and content of the assurances vary significantly. As to the form, the diplomatic assurances usually consist of formal

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written promises from one government official to another.\textsuperscript{71} However, the guarantees have also been merely verbal.\textsuperscript{72}

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

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

\textsuperscript{71} See for example the assurances issued by Egypt and Turkey described below.
\textsuperscript{73} See for example, Amnesty International, “\textit{United Kingdom, Human Rights: a broken promise}”, \textit{op cit}, Section 3.1.
\textsuperscript{75} Human Rights Watch, “\textit{Still at risk...}”, \textit{op cit.}, footnote 177.
\textsuperscript{76} Ibid. Noll, rightly, points out that the referral to domestic law limits the scope of the promise, and the peculiarity in the Swedish government accepting the disclaimer, considering that reservations referring to national laws are routinely objected to by Sweden within the area of human rights law. See Noll, “\textit{Diplomatic assurances and the silence of International Human Rights Law}”, at 7.
the removed. The removed is guaranteed “prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities [...] at least once a fortnight [...] and will include the opportunity for private interviews with the returned person”. The monitoring body shall, according to the memoranda, give a report of its visits to the authorities of the sending state. The memorandums have also been complemented by agreements containing further details regarding the monitoring.

3.4 Legal Character

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

The UN High Commissioner for Human Rights, Louise Arbour, as well as the UN Special Rapporteur on Torture, Manfred Nowak, both argue that diplomatic assurances are non-binding. They draw this conclusion primarily from the fact that

77 See para. 4 of the Memoranda, on file with author.
78 See the case of Omar Othman below, section 5.4.3.
82 Larsaeus 2006, at 10.
the assurances generally contain no mechanism for their enforcement or remedy for their breach. The lack of enforcement mechanisms or remedies can certainly indicate the intent of the negotiating states. For example, the presence of such mechanisms would be a strong indicator of an intention to form a binding agreement. However, such features are mere indicators and do not reveal the actual intent of the state – e.g. whether the agreement is binding.

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

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

There seems to be scope to question this conclusion. Certainly, the conclusion is correct if the alternative to a legally binding agreement would be a mere expression of intent to work towards a certain goal. There is, however, little to suggest that diplomatic assurances against torture generally constitute such expressions of intent. The language of those assurances publicly available, indicate that they are promises meant to be kept. However, certain states have clearly expressed that they do not view the agreements as legally binding – they have no intent of creating a treaty under

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Noll 2006, section III.

Larsaeus 2006, at 9ff.

Noll 2006, section III.

The assurances I have studied are all expressed in absolute terms, see for example, the memorandums signed by the UK with various states assert that the parties “will” comply with human rights obligations, Memoranda with Jordan on file with author, and the assurances issued by Turkey in the case of Ms Kesbir (see below) that state “there shall be no doubt that”.
international law when founding these agreements. The reason being that treaties in many legal systems have to be passed through parliament, a procedure they want to avoid. Some diplomatic assurances, thus, appear to be promises meant to be kept, but not binding under international law. Certain states may, however, form the agreements with intent of creating a treaty. Most likely, there exist diplomatic assurances of both kinds.

Below, I will argue that the leverage added by the assurances is to be found essentially on a diplomatic level; the accountability mechanism that could render them effective is not primarily legal, but political. Therefore, it may be questioned what weight should be attached to the issue of whether they are legally binding. The important question is whether they are meant to be kept. If this is the case, it means that political promises can affect the legal assessment concerning risk of torture upon return. I will return to this issue in section 6 below.

4 **Endorse, Reject or Use Only with Caution and/or Safeguards: The Debate So Far**

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

4.1 **Government Endorsements**

The defendants of assurances against torture have primarily been governments applying them to enable removals. Former British Prime Minister, Tony Blair, supported the use of diplomatic assurances against torture in order to transfer terror suspects. The framework Memorandamas of Understanding assuring against torture were initiated during his time as Prime Minister. See also *H Youssef v. The Home Office, High Court of Justice, Queen’s Bench Division*, Case No: HQ03X03052 [2004] EWHC 1884 (QB), July 30, 2004, available online at [http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm](http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm) (retrieved December 18, 2007).
Office seek assurances in order to remove a group of Egyptians in 1999. Blair also held that the assurances should be taken at face value and, thus, a simple promise with no other safeguards was sufficient. The US President, George W Bush supports the use of diplomatic assurances against torture, reiterating that assurances are sought before risky removals to honour human rights obligations. The US system expresses reliance on the face value of assurances: once a diplomatic assurance against torture has been obtained, there is no opportunity to challenge the reliability of the promise. Other proponents of applying diplomatic assurances have been the governments of Sweden and Germany. The German Government wanted to expulse a Turkish citizen despite a court ruling precluding extradition with assurances against ill-treatment, insisting that the Turkish assurances were in fact adequate. As mentioned, Sweden initiated a process for developing guidelines for their use within the Council of Europe. The states appear to find diplomatic assurances to offer an effective safeguard against torture. However, there is reason to suspect that decisions to apply diplomatic assurances are not always guided by a genuine belief in their effectiveness. The secretary of Blair wrote to relevant officials regarding the removal of the above-mentioned group of Egyptians: “He [Blair] believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts”. The note suggests that the interest of having the men deported outweighs any human rights concerns. Furthermore, a US official has stated as regards the practice of seeking diplomatic assurances: "They say they are not abusing them, and that satisfies the legal requirement, but we all know they do". Where this attitude holds true, the use of

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90 Youssef and Others, Human Rights Watch, “Still at risk…”, at 70.
91 See Human Rights Watch, "Still at Risk…", at 70.
92 See, for example, Press Conference by the President, March 16, 2005, available online: www.whitehouse.gov/news/releases/2005/03/20050316-2.html (consulted October 20, 2007).
93 The Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277) 8 C.F.R. § 208.18(c)(3).
96 Priest Dana & Gellman Barton, US Denies Abuse But Defends Interrogations, Washington Post, December 26, 2002. Regarding the removal of Maher Arar to Syria with diplomatic assurances (see section 6 below), a US official stated that "You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary", Hawkins, op cit, at 25.
assurances is just another means to push the agenda challenging the ban on refoulement for terrorist suspects.

4.2 Advocates for a Complete Rejection

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

The NGOs have been supported in their position for a complete rejection of the assurances, by authoritative institutions in the human rights community. The UN High Commissioner for Human Rights, Louise Arbour holds: “Diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement.” Furthermore, the UN Special Rapporteur on Torture, Manfred Nowak, has repeatedly condemned the practice: “[...] diplomatic assurances, which attempt to erode the absolute prohibition on torture in the context of counter-terrorism measures [...] are not legally binding and undermine existing obligations of States to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States.” The standpoint of the Rapporteur is supported by The E.U. Network of Independent Experts on Fundamental Rights, who have claimed that “this is the only acceptable position under international law.”

97 See, for example, their campaign websites: http://hrw.org/doc t=da and http://web.amnesty.org/library/index/engact400212005 (both consulted December 5, 2007).
98 See Human Rights Watch, Still at risk..., at 3.
Furthermore, the Council of Europe High Commissioner for Human Rights, Thomas Hammarberg, has forcefully rejected reliance on assurances against torture: “Diplomatic assurances, whereby receiving states promise not to torture specific individuals if returned, are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practised. Such pledges are not credible and have also turned out to be ineffective in well-documented cases. [...] the principle of nonrefoulement should not be undermined by convenient, non-binding promises of such kinds.” To summarize, the proponents of a complete rejection of diplomatic assurances against torture, include human rights NGOs and several of the most authoritative human rights institutions.

4.3 ‘Use Only With Caution and Safeguards’

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

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

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104 Ibid., para 21.
The former UN Special Rapporteur on Torture, Theo Van Boven, did not rule out the use of diplomatic assurances, however, he stated that they can not be resorted to for removals to countries where torture is systemic\textsuperscript{105}, that they must be “an unequivocal guarantee” against torture and that a post-monitoring system must be put up to ensure the adherence to the guarantees.\textsuperscript{106} Although, not wholly rejecting the use of diplomatic assurances, the Rapporteur, has in later reports questioned “whether the practise of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement, which [...] is absolute and non-derogable”.\textsuperscript{107}

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

4.4 The Contribution of Academia

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

5 Diplomatic Assurances in Courts and Committees

5.1 Some General Remarks

The use of diplomatic assurances against torture in order to enable transfers of persons, has been under review by courts and human rights committees on a few occasions. Cases are, however, still rather scarce. One reason is that the most frequent


\(^{111}\) Larsaeus, “The use of Diplomatic Assurances in the Prevention of Prohibited Treatment”.


\(^{114}\) Ibid, at 29.
The user, the US, has not ratified instruments to allow for individual complaints under the CAT, ICCPR or IACHR. Due to the scarcity of cases at the international level, I will also review some interesting cases from domestic courts. Also here, jurisprudence from the US is lacking. As mentioned, there is no scope for judicial review of diplomatic assurances within the removal proceedings. Furthermore, when the issue has arisen in civil proceedings against the state, the ‘state secrets privilege’ has been invoked, hindering trial due to the sensitive nature of information that might be revealed. Furthermore, a difficulty follows the decisions that exist; important information has been omitted from documentation due to claims of national security. Certain domestic cases, have not been analyzed due to lack of translations.

5.2 CAT and HRC: Reject Where Proper Enforcement is Lacking

The perhaps most controversial cases involving diplomatic assurances against torture in international forums, are the cases of Egyptians Agiza and Alzery. The two men applied for asylum in Sweden, but were rejected under the national security exception of the Refugee Convention. The Swedish authorities found that the men were at substantial risk of torture upon removal and decided to seek assurances against torture to enable removal. From the Swedish submissions regarding one of the cases; “[a]fter careful consideration of the option of obtaining assurances from the Egyptian authorities with respect to future treatment, the State party's government concluded it was both possible and meaningful to inquire whether guarantees could be obtained that Mr. A and his family would be treated in accordance with international law upon return to Egypt.” The written assurances contain, inter alia, promises that the men will be treated humanely upon return and receive fair trials. Later it was also agreed that the men could be visited by Swedish officials when


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

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


detained in Egypt, where they were to face detention due to allegations of illegal involvement in Islamist groups. A controversial aspect of the case, is that the removal of the two men was carried out in great haste and in a brutal manner by US CIA agents. After the removal, both men have, with supporting evidence\textsuperscript{120}, alleged being tortured by Egyptian officials.

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

The case of Agiza himself was reviewed in a submission to the CAT Committee in May 2005. In this case, the Committee concluded that the Swedish Government had violated the ban on \textit{refoulement} to substantial risk of torture in removing Agiza. The assurances were not accepted at face value, and were not found a sufficient safeguard against torture in the case. The Committee explains the differing outcomes of the two nearly analogous cases, primarily with new facts available to them in the Agiza case.\textsuperscript{123} The Committee, inter alia, points to information withheld from them in the case of Attia, revealing how Agiza had complained of ill-treatment on the first visit from Swedish officials and the circumstances of the removal. Thus, it might have

\begin{itemize}
\item \textsuperscript{120} When Agiza was examined by a doctor after alleging torture during his re-trial in Egypt, the doctor found physical injuries, but could not establish how they occurred, see Human Rights Watch, \textit{“Still at Risk...”}. Furthermore, the mother of Agiza, when visiting him in detention, claimed that “he walked with difficulty and was supported by a prison officer. He seemed pale, weak, seemingly in shock and near breakdown. His eyes, cheeks and feet were allegedly swollen, with his nose larger than usual and bloodied”, see \textit{Attia v. Sweden}, CAT/C/31/D/199/2002, November 24, 2003, at 7.1.
\item \textsuperscript{121} \textit{Attia v. Sweden}, op cit, para. 4.4.
\item \textsuperscript{122} See \textit{Attia v. Sweden}, op. cit. at 4.11.
\item \textsuperscript{123} \textit{Agza v. Sweden}, op cit, at 13.4.
\end{itemize}
come to a different conclusion in the previous case were these circumstances disclosed then. Furthermore, the Committee points to “the progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad.” The statement seemingly indicates that, as measures such as deploying diplomatic assurances against torture are turning into a pattern, they undermine the prohibition of non-refoulement. The statement could be seen to indicate that diplomatic assurances might not henceforth be accepted as a means of mitigating risk of torture upon transfer. However, the wording of its conclusion suggests such a conclusion would be in error: “The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.” The wording suggests that the conclusion might have been different, were there a “mechanism for their enforcement”. What such mechanisms could be, we will return to below. Other facts the Committee noted that affected the outcome are: a breach of the assurances relating to a fair trial, which in their words “goes to the weight that can be attached to the assurances as a whole”, and an “unwillingness of the Egyptian authorities to conduct an independent investigation” into the allegations of torture. In summary, it seems the Committee does not rule out the use of diplomatic assurances against torture, but there has to, at least, be some form of enforcement mechanism. Since many factors are mentioned as contributing to the conclusion in the case, it is possible that, according to the Committee, there is a substantial scope for their use in different circumstances.

The case of Alzery was reviewed by the UN Human Rights Committee under the ICCPR in November 2006. The Committee found that “The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.” It noted that the state party conceded a risk of torture was at hand before the removal, and that they “relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was

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124 Ibid, at 13.5.
125 Ibid., at para. 13.4.
126 Ibid.
sufficiently reduced to avoid breaching the prohibition on refoulement.\textsuperscript{128} Furthermore, the Committee noted that “the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation.”\textsuperscript{129} It particularly pointed out that the visits by Swedish officials had started weeks after the return, and that the visits fell short of norms of good practise for such human rights monitoring. Already the focus on the enforcement mechanisms indicates that the Human Rights Committee, like the Committee Against Torture, could accept reliance on assurances against torture were they differently modelled. This position is further reinforced in their conclusion, where they write that the state party has not shown that the assurances were sufficient “in the present case”, to mitigate sufficiently the risk of torture. The Committee, suggests rather strongly that there is scope for using diplomatic assurances where proper enforcement mechanisms are included. In referring to international good practises of abuse monitoring, they hint that their approval may hinge on whether such monitoring accompanies the assurances.

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

\begin{quote}
“[T]he Azeri authorities received diplomatic assurances from Turkey going to issues of mistreatment, an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment. While a certain degree of post-expulsion monitoring of the complainant's situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise (see its approach in \textit{Agiza v Sweden}), nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant's perception, objective, impartial and
\end{quote}

\textsuperscript{128} Ibid., at para 11.4.
\textsuperscript{129} Ibid., at para 11.5.
sufficiently trustworthy. In these circumstances, and given that the State party had extradited the complainant notwithstanding that it had initially agreed to comply with the Committee's request for interim measures, the Committee considers that the manner in which the State party handled the complainant's case amounts to a breach of her rights under article 3 of the Convention."

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

5.3 ECtHR: Reject Where Torture is ‘Endemic’

The first case involving diplomatic assurances against torture in the ECtHR was Chahal v. United Kingdom in 1999, the case cited above as establishing the absolute nature of non-refoulement under ECHR. The UK wanted to remove the Sikh activist to India, relying on diplomatic assurances that he would not be tortured upon return. The court noted that torture upon those in police custody in the region at issue has been described as ‘endemic’, and, therefore, concluded: “Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the NHCR [the Indian National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.”

The decision highlights an important issue concerning the reliance on diplomatic assurances against torture: the official rendering the assurance may not sufficiently control all potential torturers and can, thus, not uphold the promise even if given in good faith. From the decision can not be established whether the rejection of reliance on assurances against torture applies only where torture is ‘endemic’ (or “a recalcitrant and enduring problem”), or if such assurances would be rejected also in other circumstances.

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131 Ibid. at para. 11.
133 Para 37.
The second case of the ECtHR involving diplomatic assurances is *Matmakulov and Askarov v. Turkey*, in February 2005. The two men were extradited by Turkey to Uzbekistan with diplomatic assurances against torture and unfair trial – in defiance of a request from the Court of an interim hold while the case was reviewed. The court noted information submitted to it regarding the extensive occurrence of torture in Uzbekistan, but found that the information did not support risk of torture in the individual cases. After noting that assurances were rendered and that medical reports were issued from doctors at the Uzbek prison where the men were held, showing no signs of mistreatment, he court held that: “*i*n light of the material before it, the Court is not able to conclude that substantial grounds existed at the aforementioned date for believing that the applicants faces a real risk of treatment proscribed by Article 3”. Instead, the Court found Turkey in breach of the Convention through its defiance of the request for an interim hold of the transfers. The diplomatic assurances, as well as the medical reports were ‘noted’ by the Court, but the reasoning suggests that these factors did not effect the outcome. The statement regarding lack of evidence as to the personal risks for the men, indicates that the risks of torture were not sufficiently substantiated in the first place. Thus, there would have been no breach of *non-refoulement* even if no assurances were sought. With this understanding, the diplomatic assurances carried no weight for the outcome of the case and, thus, the case holds little interest for further analysis here.

Two months later, the Court reviewed a similar case, the extraditions of *Shamayev and 12 Others* from Georgia to Russia. Also in this case, the men were removed in defiance of a request by the Court for an interim halt while the case was pending review. The Russian authorities offered assurances, which *inter alia* guaranteed

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135 Ibid. at paras. 72-73. A personal risk must be establish for the principle of *non-refoulement* to apply, see for example section 1 of general principles in the case at hand.
136 *Matmakulov and Askarov v. Turkey*, op cit, at para. 77.
137 Regarding the medical reports, further aspects support this conclusion: firstly, the point in time on which to determine the risk is the time of removal (even though subsequent events may be given certain consideration) and secondly, their credibility can be questioned since they were not issued by independent doctors. These aspects can hardly have been disregarded by the Court.
138 In the UK domestic case of Oman Othman, see below, at para. 494, the case is cited as indicating that diplomatic assurances can be relied on as a guarantee against torture. According to this analysis, I disagree with this conclusion.
139 *Shamayev and 12 Others v. Georgia and Russia*, application No. 36378/02, April 12, 2005.
against the death penalty, against torture and that they would have access to the ECtHR. When the ECtHR had found the application admissible and wanted to carry out a fact finding mission to Russia, its officials were denied access to the detainees.\textsuperscript{140} That part of the assurances was, thus, breached. In its decision, the Court emphasizes that the assurances were rendered by the Prosecutor general, of high authority and in charge of prosecutions, and states: “\textit{In fact, the Court finds nothing in the evidence submitted by the parties and obtained by its delegation in Tbilisi which could reasonably have given the Georgian authorities grounds to doubt the credibility of the guarantees provided}”.\textsuperscript{141} Unfortunately, the Court makes no separate analysis regarding the assurances granted against the death penalty and regarding torture.\textsuperscript{142} Clearly, the fact that the official giving the promises was the Prosecutor General is of substantially more relevance in relation to the credibility of the assurances against the death penalty. Subsequently, the Court states that it has received no complaints of ill-treatment.\textsuperscript{143} In conclusion, the Court finds that “\textit{the representatives of the men have failed to submit sufficient information}” for them to establish that a sufficient risk of torture was at hand.\textsuperscript{144} The emphasis on the ‘representatives failing to submit sufficient information’ regarding risk of torture, indicates that a sufficient risk of torture was not substantiated in the first place. Thus, the assurances were seemingly of no importance for the decision of the Court as to risk of torture, but only in relation to the death penalty, thus this case brings little to my analysis of the position of the Court in relation to diplomatic assurances against torture. What the cases show is that the assurances are ‘noted’, thus, considered as one factor amongst many in the risk assessment of the Court. Also in this case, the Court found the removing country in breach of its obligations under the Convention due to the defiance of the interim request. A possible understanding of the outcomes is, consequently, that where a removal already has been carried out, the Court finds it difficult to assess the risk at

\textsuperscript{140} Registrar of the European Court of Human Rights, \textit{Shamayev and 12 Others v. Georgia and Russia}, (application no. 36378/02), Press Release No. 528, October 24, 2003, available online http://www.echr.coe.int/Press/Eng/query.idq?CiRestriction=528&CiScope=E%3A%5Cdata%5Cinternet%5Cechr%5CEng%5CPress&CiMaxRecordsPerPage=10&TemplateName=query&CiSort=rank%5BD%5D&HTMLQueryForm=query.htm (retrieved December 15, 2007).

\textsuperscript{141} \textit{Shamayev and 12 Others v. Georgia and Russia}, op cit, at para. 343.

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

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

\textsuperscript{144} \textit{Shamayev and 12 Others v. Georgia and Russia}, op cit, at para 350.
point of removal and, instead, chooses to find a breach of the Convention in this regard.

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

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

5.4.1 Canada

Some of the most interesting cases evaluating diplomatic assurances against torture, come out of Canadian courts. The Canadian Supreme Court dealt with diplomatic assurances against torture in the above-mentioned case of Suresh145. Mr Suresh had been granted refugee status in Canada but was, according to a decision by a Minister delegate, to be deported on security grounds due to his involvement with a Tamil organization labelled as terrorist. The Supreme Court of Canada set aside the decision on the ground that he had not been offered sufficient procedural safeguards.146 The Government had accepted a diplomatic assurance from Sri Lanka assuring that he would not be tortured upon his return there. The Supreme Court established that, where diplomatic assurances were used by the Government, the person to be removed must be given the opportunity to challenge the reliability of these.147 Furthermore, the Court commented in obiter:

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

146 Ibid.
147 Ibid, at para. 123.
The court does not exclude reliance on diplomatic assurances against torture, but expresses certain reservations in relation to their use. Firstly, it expresses hesitation regarding reliance on such assurances from a state that “has engaged in illegal torture” before. The review of state practice of employing diplomatic assurances showed that they are used when there would otherwise be a risk of torture, and almost exclusively for removal to countries where torture is a serious problem. Were diplomatic assurances not to be employed for such situations, there would be little scope for their use. Furthermore, the statement emphasizes the difference between assurances against the death penalty and against torture, a discussion to which we will return below. The court also highlights the crucial issue in Chahal v. United Kingdom: the difficulty of controlling all officials. This problem was also decisive for the Courts in two European domestic cases involving diplomatic assurances: the case of Mr Kaplan, to be extradited from Germany to Turkey, and the case of Mr. Zakaev, regarding extradition from United Kingdom to Russia.

In Suresh, the Canadian Supreme court expressed hesitation regarding reliance on diplomatic assurances against torture. Subsequently, the strong reliance on diplomatic assurances against torture has been struck down by three lower courts in Canada which deemed removal decisions on that basis ‘patently unreasonable’. The basis were that too much reliance were put on assurances from countries where torture has been practiced before, that the issuing state ‘failed to explain’ why the case at hand would be different, and, in the third case, that the assurances lacked ‘essential requirements’ to secure their effectiveness. The courts indicate that assurances should not be taken at face value, but that there might be scope for their use, if their protection value is assessed with regard to previous torture practice of the country,

149 Oberlandesgericht Duesseldorf, in the case of Metin Kaplan, 4Ausl (a) 308/02-147.203-204.03III, May 27, 2003.
152 Mohammad Zeki Mahjoub v. Minister of Citizenship and Immigration, op cit.
154 Lai Cheong Sing et al v. the Minister of Citizenship and Immigration, op cit, at para 139.
they contain an ‘explanation’ for its upholding and/or contain enforcement mechanisms.

5.4.2 The Netherlands, Austria, Germany

Another case of interest, in which a removal decision was struck down due to faltering reliability of assurances against torture, is the Dutch case of Ms Kesbir who was to be extradited to Turkey. The assurances obtained contained a guarantee that Ms Kesbir would “enjoy the full rights” emanating from the ECHR. In the case, the substantial problems of torture in Turkey were highlighted. The High Court concluded, in a decision upheld by the Supreme Court:

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

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

So far, the cases referred to have all struck down assurances as not offering sufficient protection against torture, while not rejecting altogether the use of diplomatic

156 Ibid, at 74.
157 Ibid, at 75.
assurances against torture. There are, however, cases in which assurances have been
deemed sufficiently effective to enable a transfer.

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

5.4.3 The United Kingdom

In the United Kingdom, the question of whether the framework diplomatic assurances
offer sufficient protection against torture came under review in 2007. The two cases
hitherto are of particular interest for further analysis regarding the protection that can
be granted by diplomatic assurances, since the assurances are more developed than
others and different aspects of their protection value is discussed at great length by the
Courts. In February, an immigration appellate court, found that the assurances offered
sufficient protection in order to remove Mr Omar Othman (also known as Abu
Qatada) to Jordan.\(^{161}\) The court found that: “His deportation is necessary in the
interests of national security, by which we mean here that it is necessary as a measure
of defence for the rights of those who live here”\(^{162}\), and that the legality of the
removal depended on the obligation of non-refoulement as contained in the ECHR.\(^{163}\)

\(^{158}\) Unfortunately, I have not been able to find a translation of the case, and have, therefore, not been
able to analyze the rulings further. Bernstein Richard, “Germany Deports Radical Long Sought by
http://www.nytimes.com/2004/10/13/international/europe/13turkey.html (consulted December 17,
2007), Oberlandesgericht Düsseldorf, in the case of Metin Kaplan, 4Ausl (a) 308/02-147.203-

\(^{159}\) See Human Rights Watch, “Still at Risk...”, at 76.

\(^{160}\) See Human Rights Watch, “Empty Promises...”, at 32.

\(^{161}\) Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement, Appeal No:
SC/15/2005, 26 February 2007, available online at www.siac.tribunals.gov.uk/Documents/QATADA-

\(^{162}\) Ibid., at para. 88.

\(^{163}\) The Court did, however, express scepticism as to whether this obligation actually was contained in
the treaty, see paras 111-112.
There was no doubt that a risk of torture would hinder removal, but for the assurances obtained. As mentioned above, the memoranda contained a provision of monitoring, to be carried out by an independent human rights organization. The forms for the monitoring were agreed by the Governments: *inter alia*, that visits would be unannounced, in private with the detained, by experts to detect signs of ill-treatment and medical examination should be arranged if deemed necessary. The capacities of the chosen human rights organization to carry out the monitoring were discussed at great length. The Government officials admitted that the organization chosen had no relevant experience. To remedy this, the British Government provided the centre with funding for relevant training. Other issues raised were, for example, that the organization could be put under great government pressure in a country like Jordan. The UK Government won the sympathy of the Court with their arguments emphasizing, *inter alia*, the good diplomatic relations between the two states, the preventive effect following the notoriety of the case and the effectiveness of the monitoring provided. Some of the main arguments will be further examined below.

The second case reviewing the British framework assurances, *DD and AS v. The Secretary of State for the Home Department*¹⁶⁷, concerning removal to Libya, was decided in April 2007. In this case, the Government also argued that the importance of diplomatic relations would prevent the Libyans from violating their promise. The Court held in this case that, even though it was not probable that the assurances would be breached, there remained a “genuine risk” and, therefore: “There is too much scope for something to go wrong, and too little in place to deter ill-treatment or to bring breaches of the MOU to the UK’s attention”.¹⁶⁸ The Court found it sufficient that there was a genuine risk that the promise would be breached, even though it was not probable. Factors contributing to the finding of a genuine risk was a lack of depth in diplomatic relations between the two states and the risk that a breach could remain undetected, i.e. the effectiveness of monitoring was deemed insufficient, something

¹⁶⁴ Ibid., Annex II.
¹⁶⁵ Ibid., at paras. 186ff.
¹⁶⁶ Ibid., at para 196.
¹⁶⁸ *DD and AS v. The Secretary of State for the Home Department*, op cit, at paras. 371 and 428.
¹⁶⁹ Ibid., at para. 330.
that was found to diminish incentives to uphold the promise. Both British cases are currently in appeal.

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

6 An Examination of the Arguments

6.1 The Context of the Assurances: “Promises of Torturers”

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

6.2 Protection Over and Above Human Rights Law

In one of the Canadian domestic cases cited above, the Judge asks: “If a country is not prepared to respect a higher legal instrument that it has signed and ratified [...], why would it respect a lower-level instrument such as a diplomatic note?” The question is justified: often the diplomatic assurances simply reiterate obligations of human rights law to which the assuring state is already bound, but regularly flouts. It

170 Ibid., at para. 365.
172 Lai Cheong Sing et al v. the Minister of Citizenship and Immigration, IMM-2669-06 2007 FC 361, at para. 147.
may be questioned, then, why a diplomatic assurance on top of the human rights convention would affect how the state behaves. This is a main argument forwarded against reliance on diplomatic assurances against torture. Human Rights Watch states that “It defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case.”

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

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

Opponents of diplomatic assurances against torture often claim that they add nothing beyond human rights norms. An examination of available assurances so far applied reveals that in practice this is often true in regard to their material content: the assurances usually merely reiterate obligations under human rights law. However, they certainly can contain extra protective imperatives beyond those already in force. In the case of Kesbir, cited above, the Dutch Court indicated that the assurances should contain something to remedy the situation of general risk of torture, an explanation of how the promise would be implemented. When there exists an identified risk of torture in a specific case, human rights law already requires the state to actively take measures to prevent the risk from materializing. However, which of those measures should be taken and the extent to which they are required is often not clear for a specific case. An assurance could represent an agreement on the content of human rights law as regards what protective measures are needed in the particular

Furthermore, the assurances can contain promises of preventive measures beyond those required in law. Many international bodies have rendered advice on how to prevent torture by state officials. For example, the Human Rights Committee has, in a General Comment, recommended video recording of all interrogations, that interrogations take place in the presence of a lawyer, and that records are kept of all interrogators. Furthermore, torture preventive training can be given to officials of relevant detention centres. These are examples of what a diplomatic assurance against torture can contain to render it more effective and perhaps bring protection beyond what human rights norms require in the case.

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

6.4 Lifting the Issue to the Level of Diplomacy

Concern for ‘international reputation’ is proposed in many of the cases reviewed as an incentive for the receiving states to uphold their promise not to torture. If the argument refers to the general reputation of respect for international human rights law, it is flawed: the states concerned regularly flout their human rights commitments and do not seemed bothered enough about the consequences for them to change their practice. Regarding their reputations as a bilateral collaborators, however, the stakes may differ. As mentioned, in several cases, the importance of diplomatic relations is forwarded as the strongest incentive for a state to uphold its promise contained in diplomatic assurances. The representative of the British Government in the case of Omar Othman cited above, argues that the questioning of what a non-legal commitment can add beyond a legal human rights one, “involves a misunderstanding

of how an MOU [memoranda of understanding] works in practice. States look not only to the legal status of international documents when deciding their behaviour but to the whole political context. [...] This MOU, while imposing less than a legal obligation, was made with respect to one state only, with an exceptionally strong political commitment on the part of both governments”. The promise is more ‘personal’, being one between two states only, rendering a breach more of an insult to the particular promised state. Furthermore, the assurance brings the issue to the level of diplomacy and high politics. A breach, therefore, risks harming diplomatic relations between the two states, as well as the reputation of the state as a bilateral partner. A negative impact on diplomatic relations, in turn, may bring economic and political consequences beyond those of a poor human rights record, and this threat is what can bring leverage to diplomatic assurances.

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

### 6.5 Control Over Possible Rogue Officials

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

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175 Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement, op cit. at para. 295.
176 Larsaeus argues that moving the case up to the level of diplomatic significance can bring an added value in the risk assessment., Larsaeus, supra, at page 8.
177 See above sections 6.3 and 6.4.1.
of detection of a breach, applies to all contexts, i.e. also where the risk of torture emanates from high level officials.

6.6 The Problem of Detection

Arguments based on reputation or diplomatic relations as an incentive for respecting the promise not to torture only applies if the abuse risks being detected, not if it may go on in secret and news of it never reach the state receiving the assurance. The weight of these arguments is, therefore, substantially diminished by the difficulty of detecting any breach of assurances against torture. The ban on torture is, as mentioned, perhaps the most established norm of international law. Torture is illegal and the ban is universally accepted. Consequently, where torture occurs, it is practised in secret and not admitted. If the assurance against torture is breached, the torturing state is very unlikely to talk about it. The victim of torture is also not very likely to speak of the abuse: they might be held incommunicado, or threatened to silence. Arar, who was sent to Syria by the US, allegedly with an assurance against torture and Agiza, sent to Egypt by Sweden under similar conditions, claim that they were threatened into keeping quiet about their abuses.\(^\text{178}\) In spite of credible claims to the contrary, both receiving countries deny abuses, and Egypt has refused to thoroughly investigate the claims in spite of international pressure.\(^\text{179}\) This problem of any breach coming to the attention of the sending state is the reason why we must separate the practise of accepting assurances against the death penalty and assurances against torture.

6.7 Diplomatic Assurances against Torture v. Death Penalty

The wide acceptance of assurances against the death penalty recurs in several cases as an argument in favour of deploying similar promises against torture.\(^\text{180}\) The clandestine nature of torture and the problem of detecting a breach, however, constitute a substantial difference between the use of diplomatic assurances against

\(^\text{179}\) Ibid.
\(^\text{180}\) See for example in \textit{Chahal v. United Kingdom, op cit}, where the British Government refers to the practise of the Court with regards to diplomatic assurances against the death penalty.
torture and such assurances against the death penalty. As mentioned, the described qualities of torture dramatically mitigate the arguments forwarded in favour of assurances against torture. These qualities are not shared with the death penalty. The death penalty, when applied, is a legal punishment handed down openly by a court of law after a trial. The practise is not secret and a breach is in most cases very easy to detect. In a study conducted by Massarch\textsuperscript{181}, she encountered no known breaches of assurances against the death penalty, whereas breaches of assurances against torture, as mentioned, have been credibly alleged on several occasions. As the nature of torture is so different from that of the death penalty, it is important to separate any analysis of them in relation to the use of diplomatic assurances.\textsuperscript{182}

6.8 Remediing the Problem of Detection: Post-Return Monitoring

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

As pointed out by the Human Rights Committee in Alzery, the manner in which the monitoring is carried out carries substantial weight as to its efficiency. The Human Rights Committee\textsuperscript{183} and the Committee Against Torture\textsuperscript{184}, for example, have issued recommendations as to what safeguards might be taken in monitoring compliance with the ban on torture. There also exists an international instrument on the issue, the


\textsuperscript{182} As mentioned above, not all courts have diligently separated the two in cases where assurances guarantee against both. For further reading on the differences between the two, see Massarch, \textit{op cit.}.

\textsuperscript{183} Human Rights Committee, \textit{General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7),} 10/03/1992, available online at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument (consulted January 23, 2008).

\textsuperscript{184} See for example rules contained in the optional protocol, many of which are derived from committee recommendations http://www.ohchr.org/english/law/cat-one.htm
Istanbul Protocol. The good practice recommendations include that the monitoring must be performed by experts at detecting abuse, that they must meet the detained in private, that they must visit regularly, that they must turn up unannounced and that the visits cannot be discontinued until the risk has entirely passed. The recommendations entail rather substantial commitments for the sending state and, what might be regarded as intrusive measures for the receiving state. However, monitoring in accordance with these recommendations could potentially increase the level of protection rendered by the assurances.

Even if good practices are applied, there are limits to how effective post-return monitoring can be at detecting torture. Since torture is illegal, any torturer will do their best to hide their practise and rather sophisticated methods have been developed for torturing in an undetectable way. Using electricity, sleep deprivation, waterboarding and mock killings are merely examples. Furthermore, post-return monitoring of single individuals cannot remove the risk that a torture victim keeps quiet in fear of retribution. Arar stated about the visits from Canadian officials while in custody in Syria: “After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there.” NGOs such as Amnesty International have emphasized how monitoring needs to be universal in order for any testimony to remain anonymous. However, to fulfil such requirements, the sending state would have to negotiate assurances for all prisoners of the facility to which the person is to be transferred, something that requires a whole new commitment from the two states.

Another difficulty involved with post-return monitoring is the question of who should carry out the monitoring. In the cases of Agiza and Alzery, a Swedish diplomat performed the monitoring. However, a representative of the sending state, has little

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186 This is highlighted by the Special Rapporteur on Torture, Manfred Nowak in Report of the Special Rapporteur on the question of torture, Manfred Nowak, Commission on Human Rights Sixty-second session, E/CN.4/2006/6, 23 December 2005. At para. 31 (e).
incentive to reveal a breach or to further investigate any suspicion of a breach. A detection of abuse means that the sending state presumably breached their commitment of *non-refoulement* to torture when removing the individual. There are, therefore, incentives to choose not to take notice of any signs of torture.\textsuperscript{188} Events following the two above-mentioned cases of Agiza and Arar hint at the impact of such ‘reversed’ incentives. The US hastily accepted the reassurance of Syria that the allegations of torture were false.\textsuperscript{189} The Swedish Government, when brought before the Committee against Torture, went so far as to hide evidence that they were aware of allegations of abuse.\textsuperscript{190}

The above-mentioned cases suggest that the monitoring may be best carried out by an expert independent body. However, it may be difficult to locate a body that is willing to indirectly assist in the removal of persons to a country where they are at risk of torture. Major human rights organizations are unwilling to accept such missions.\textsuperscript{191} The UK Government has, as mentioned, had to settle with organizations without expertise in the area for carrying out the task in relation to their MOUs, providing the training themselves. To enable the organizations to carry out the mission, they have also funded them. With funding from the sending state, the independence of the organization from that state can be questioned.\textsuperscript{192} Furthermore, as discussed in the case of Othman\textsuperscript{193}, there may be reason to doubt the independence of the organization in relation to the receiving state when active in a regime known for flouting human rights. This context can bring disincentives for such bodies to reveal any abuse as well. This fact seemingly carried substantial weight for the rejection of the assurances in the case of D.D and A.S. above.

Another issue is who the monitoring body should report to. The British MOUs contain reporting obligations either to both states or just to the sending state – e.g. the parties

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\textsuperscript{188} This argument for a complete ban on diplomatic assurances against torture, is discussed in length by Human Rights Watch in *Still at Risk*, at 27.

\textsuperscript{189} Hawkins, *The Promises of Torturers* at 216.

\textsuperscript{190} *Agiza v. Sweden* at 13.4ff. See also Jones, *Lies, Damned Lies and Diplomatic Assurances*, at 22.


\textsuperscript{192} This is discussed at length in the Othman case, *Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement*, op cit, at para 194.

\textsuperscript{193} Ibid, at paras. 194ff.
lacking incentives to reveal information of abuse. Noll suggests that all reports be publicized – a better alternative for ensuring that disincentives do not hamper the publication of any abuse, but such an arrangement may be difficult to negotiate with the receiving state (and may not be very popular with the sending one either).

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

### 6.9 Remedies for an Alleged Breach

One problem often highlighted by Human Rights NGOs, remains largely undiscussed in the reviewed cases: the issue of remedies for situations where a violation of the assurance is claimed. In the case of Agiza, the complaint of abuse to the Swedish ambassador did not lead to any measures being taken. No mechanism for complaints was set up in the agreement between the states and no remedies were agreed upon. Such mechanisms are equally missing in the assurances obtained in the other reviewed cases. When Sweden eventually asked Egypt to make an independent investigation into the allegations, it refused.194 Sweden had no means of enforcing remedies for the alleged breach. As US officials have admitted regarding the use of diplomatic assurances, once a person is removed from a country what transpires is out of their hands.195 The sending state has no direct power in the occasion that breaches are disclosed or alleged. This problem can be somewhat mitigated by adding rules regarding investigation of alleged breaches in the assurances196 and automatic remedies on established abuse. As with most international agreements, it may be difficult to enforce, but an agreement provides a basis for pressuring the state to comply. However, as pointed out by the representative of the British Government in the Othman case, there are diplomatic responses available to the state: “[…] if there

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194 Human Rights Watch, *Still at Risk*., at 58.
were a major problem of delay in responding to a serious concern, the UK Government had levers which it could use, [...] from its bilateral relationship with Jordan across a very wide range of military, economic, cultural, tourist and similar forms of cooperation.”

The problem with reliance on diplomatic responses is that, as human rights NGOs have pointed out, human rights is but one of many concerns in these relations.

6.10 The Nature of Diplomacy

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

Showing distrust in removal situations is diplomatically sensitive. For example, reports suggest that one of the discussed cases, in which a Canadian court refused extradition of a Chinese man, have damaged Canadian-Chinese relations. The sensitivity of these issues suggests that asking for assurances with extensive monitoring and remedies for breaches might be very difficult in practice. Similarly, as

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197 Omar Othman (aka Abu Qatada) and Secretary of State for the Home Departement, at para. 284.
198 Human Rights Watch, Still at Risk..., at 70f and Cases Involving Diplomatic Assurances... at 2.
199 Agiza v. Sweden at 12.5.
201 McDonald, China says man fighting extradition from Canada to be treated fairly.
an advisor of Human Rights Watch has pointed out\textsuperscript{202}, these concerns may hamper the strength with which a state wants to push for investigations of alleged breaches or remedies of established violations. Within the sphere of diplomatic relations, there are other concerns that may be considered to outweigh the security of the person in the particular case. These are concerns to be attended to in the consideration of diplomatic assurances as a means to mitigate risks of torture for \textit{refoulement}.

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

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

\subsection*{6.11 Conclusion and Discussion}

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


\textsuperscript{204} In \textit{Agiza v Sweden, op cit}, the government is criticized for not sharing with the Committee substantial information about the circumstances due to them being classified. Similarly, the US have prevented Maher Arar to challenge his rendition in Court on grounds that it would challenge national security if information had to be revealed, Human Rights Watch, \textit{Still at risk}, at 34.
This has led (and probably will lead more) governments to continue with the practice of deploying diplomatic assurances to transfer persons at risk of torture, but adding extra safeguards to the assurances sought. However, my examination of the expected benefit from such endeavours, reveal that even modelling the assurances to render maximum protection (something that takes much effort from the sending state), they can only render unreliable protection against torture. In certain cases, the protection granted might mitigate the risk of torture enough for it no longer to be ‘substantial’, thus rendering the transfer in accordance with the principle of non-refoulement. However, the risk assessment will be most insecure, and given the dramatic consequences of post-return torture, a safety margin ought reasonably be applied in favour of the transferred person.

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

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

Another concern has been raised by the human rights community, including the High Commissioner for Human Rights205 and NGOs206: diplomatic assurances against torture or ill-treatment, Index Number: ACT 40/021/2005, available online

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206 See Amnesty International, Campaign Factsheet – Diplomatic Assurances: no protection against torture or ill-treatment, Index Number: ACT 40/021/2005, available online
torture may serve to undermine human rights law. The first argument is that negotiating for extra protective safeguards for one individual in the context of a country that is known to torture is a discriminatory practice, creating double standards for detainees in the country of return. This consequence is particularly disturbing considering the general human rights principle contained in the very first article (and the title) of the *Universal Declaration of Human Rights*: human rights are to be universal. The second argument presented is that asking a state known to flout its human rights obligations, to make an exception in a particular case, comes dangerously close to accepting the general situation in the country. While I certainly agree that the practice, in this view, is rather contradictory, the transferring state can mitigate or avoid this effect by emphasizing their discontent with the general situation in negotiations with the receiving state. However, the argument highlights the fact that seeking diplomatic assurances for single cases does little to remedy the general situation in the country. Conversely, a refusal to transfer due to risk of torture, may have the effect to put pressure on the government to enhance the general situation. This would particularly be the case in extradition proceedings, where the state at hand has an explicit interest of gaining custody of the person. A recent example in this direction is how Rwanda recently banned capital punishment, presumably as a result of refused extraditions for prosecution in their war crimes tribunal.

In summary, diplomatic assurances against torture may, in certain cases fill their expected function, namely to render a transfer to be in accordance with the principle of *non-refoulement*. However, the tool is unreliable, takes substantial effort and may be hard to negotiate with the receiving state. Furthermore, considering the general consequences in terms of security and respect for human rights, it seems more in line with state obligations (such as, for example, that in the UN Charter article 2.4 – to not act inconsistently with the purposes of the UN, of which promoting human rights is one (article 1.3)), to abstain from deploying them and instead focus attention on remedying the general situations in the countries of return. I, accordingly, find that the approach taken by the courts and committees, pointing towards a development of the assurances, is dangerous: it will lead governments to continue to deploy this

unreliable tool of protection, consequently sending persons to face torture, while challenging general concerns of human rights and security.

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