Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment?

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Abstract

Diplomatic assurances against torture and ill-treatment are increasingly used in the course of the ‘war on terror’ to effect the removal of individuals who the authorities fear to be a security threat. Once states have received such an assurance, they argue that ‘substantial grounds’ no longer exist to believe that the individual will be tortured and, thus, the rendition can be enforced. This practice is not in accordance with the absolute ban on torture and other cruel, inhuman and degrading treatment in international law. A diplomatic assurance does not exonerate a state from its obligations under human rights law and cannot be interpreted as to establish a presumption per se that the individual does not run a real risk of being subjected to torture and ill-treatment. However, they can be deemed suitable and reliable in a concrete case when they fulfil certain criteria and the rendition proceedings provide for minimum procedural safeguards. In contrast thereto, the use of diplomatic assurances is a completely unsuitable and unreliable means to prevent torture and ill-treatment in the context of extraordinary renditions and removals to countries which are known to violate human rights and use torture and ill-treatment systematically.

1. Introduction

Mr Arar, a Canadian-Syrian national, was detained at Kennedy airport in the United States (US) on transit from Tunisia to Canada, interrogated for hours without access to a lawyer about his involvement in terrorist activities, then rendered to Syria, a country where torture is systematically practised,¹ although he claimed that he would be tortured upon return. In Syria, he was held in incommunicado detention for a certain period and allegedly subjected to torture. He was finally handed over to Canadian authorities over two years after his initial detention. The US holds that it received diplomatic assurances before the rendition that Arar would not be tortured.² Two Egyptian asylum-seekers, Mr El-Zari and Mr Agiza, both members of a radical Islamist group, were detained only a few hours by Swedish authorities after their asylum claim had been dismissed, transferred to Central Intelligence Agency (CIA) custody in the airport in Sweden, flown to Egypt and allegedly suffered torture and ill-

treatment in Egyptian detention. Sweden claims to have received diplomatic assurances that both men would not be subjected to torture or ill-treatment before the deportation was enforced. The cases of Mr Arar, Mr El-Zari and Mr Agiza are not unique. Mr Arar’s case is an example of a practice better known as ‘extraordinary rendition’. In a nutshell, this is the action of obtaining custody over a person, which does not follow existing legal procedures, and sending him/her to his/her country of origin or another state in order to gain intelligence information through interrogation techniques in violation of international human rights law. Like the fore-mentioned cases show, these ‘removals’ affect individuals who the authorities fear to be a security threat to the state where that person is situated. Extraordinary renditions have been practiced before 9/11 but in the course of the ‘war on terror’ the policy especially of the US is said to have reached new dimensions. Former CIA agent Scheuer speaks of ‘hundreds, but not thousands’ renditions which have been carried out in this respect and have been described as ‘one of the principle strategies’ employed against the threat of terrorism. The US Secretary of State, Condoleezza Rice, stressed the use of diplomatic assurances in the context of these extralegal renditions: ‘Where appropriate, the United States seeks assurances that transferred persons will not be tortured.’ According to this policy, once the US has received such an assurance, it is argued that ‘substantial grounds’ no longer exist to believe the individual will be tortured and, thus, the renditions can be enforced in full accordance with international law, even to countries which are known to practice torture systematically. Besides their use in the extraordinary rendition context, diplomatic assurances are also sought in normal deportation and extradition cases, concerning in particular asylum seekers or recognised refugees like in the case of El-Zari and Agiza. This fig leaf-mentality of Western states has been criticised heavily by human rights NGOs, international organisations and UN officials. Louise Arbour, the UN High Commissioner for Human Rights, depicted the practice of seeking diplomatic assurances as one of the two main activities that directly oppose the Convention Against Torture (CAT). The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, went even further when he expressed his concern that the use of diplomatic assurances had become a politically inspired
substitute for the principle of non-refoulement. Nowak portrayed the practice of seeking diplomatic assurances in this context as one of four challenges to the absolute nature of the prohibition of torture.

This article will examine the question of whether the current practice of seeking assurances, especially in the various contexts of extradition, deportation and extraordinary renditions, is an effective safeguard against torture and cruel, inhuman or degrading treatment or punishment or whether it does, in fact, undermine its ban. The first section outlines the international obligations of states with respect to the prohibition of torture but also the obligations to combat terrorism. Once the legal framework is outlined, the practice of diplomatic assurances in deportation, extradition and extraordinary rendition cases will be examined and specific problems inherent in their use identified. In the subsequent section, it is discussed whether this practice is compatible with the states’ obligations under international law. It will be argued that, under certain circumstances, they can be a suitable and reliable instrument in deportation and extradition cases. However, their use in an extraordinary rendition does not change its illegality and cannot be used as a justification for rendition. The conclusion will summarise the elaborated findings and try to outline a possible solution.

2. The Legal Framework: Principle of Non-Refoulement and Obligations to Combat Terrorism

States that use diplomatic assurances in their practice of removals are also states parties to various human rights instruments and are also bound by international humanitarian law.

With regards to treaties, CAT, the International Covenant on Civil and Political Rights (ICCPR), the Refugee Convention of 1951 and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) should be highlighted. The principle of non-refoulement, either explicitly included in these treaties or developed in the jurisprudence or commentaries regarding these treaties, forms part of the prohibition on torture. Additionally, obligations may stem from customary international law.

A. The Principle of Non-Refoulement

(i) CAT

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12 This article will not elaborate on international humanitarian law. For the content of the principle of non-refoulement in international humanitarian law see Venice Commission, supra n. 3 at 19ff.
14 ETS No. 5. The principle of non-refoulement is also contained in Article 2(3), Convention Governing the Specific Aspects of Refugee Problems in Africa 1974, 1001 UNTS 45; Article 2(3), African Charter on Human and Peoples’ Rights 1981, 21 ILM 59 (1981); Article 22(8), American Convention on Human Rights 1969, 1144 UNTS 123; and Article 13, Inter-American Convention to Prevent and Punish Torture 1985, 25 ILM 519 (1986). These provisions will not be examined because this article mainly focuses on the practice of the US, Canadian and European governments. The US and Canada have neither ratified the American Convention on Human Rights nor the Inter-American Convention to Prevent and Punish Torture.
The principle of non-refoulement is explicitly enshrined in Article 3 of the CAT. Unlike the 1951 Refugee Convention, CAT was intended to apply to every individual and to all possible transfers. Article 3 prohibits the refoulement of individuals to states where there is a ‘substantial likelihood’ that they ‘may be in danger of’ torture. It is to be noted that refoulement of individuals to the risk of cruel, inhuman or degrading treatment is not prohibited. The ‘substantial grounds for belief’ test requires an objective and a subjective assessment. The objective test assesses the conditions of the state to which an individual is to be transferred, especially whether there is evidence for a ‘consistent pattern of gross, flagrant or mass violations of human rights.’ The subjective test assesses the particular risk of an individual to be subjected to torture upon return. However, the risk does not have to be highly probable. The prohibition of refoulement is absolute and no derogation is permitted from it under Article 2. CAT also requires a state party to prevent, investigate and criminalise direct, complicit or other participation in torture as per Article 4(1). With regards to removal decisions, Article 3 requires an opportunity for effective, independent and impartial review of the decision when there is a plausible allegation. According to Article 14, victims must have access to redress.

(ii) ICCPR

The Covenant prohibits torture and cruel, inhuman or degrading treatment and punishment but does not contain an explicit statement of the principle of non-refoulement. In its General Comment 20, the Human Rights Committee (HRC) interpreted the prohibition of torture and cruel, inhuman or degrading treatment as to encompass the principle of non-refoulement. Article 2 is also interpreted in this respect. The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment is also provided for aliens. The HRC

15 Article 3(1) provides: ‘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.’
16 The original draft, which only referred to expulsion and refoulement, was amended to use the term extradition to ‘cover all measures by which a person is physically transferred to another State.’ See Burgers and Danelius, The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dordrecht/Boston/London: Martinus Nijhoff, 1988) at 126.
17 CAT’s definition of torture makes it clear that this includes conduct undertaken for the purposes of obtaining information by state actors, or by other persons acting with the consent or acquiescence of a state actor.
18 Burgers and Danelius, supra n. 16 at 70.
19 CAT Committee, General Comment No. 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture, 21 November 1997, A/53/44, annex IX at para. 8.
20 To assess a particular individual’s risk, the CAT Committee will look to whether the individual has engaged in activity ‘within or outside the State concerned which would make him/her particularly vulnerable to the risk of being placed in danger of torture where he/she to be expelled, returned or extradited to the State in question’, CAT General Comment No. 1, ibid. at para. 8.
21 The US, when ratifying CAT, added that their understanding of Article 3 is that the test is: ‘it is more likely than not that he would be tortured.’ CAT Declarations and Reservations as of 23 April 2004, 1465 UNTS 85. This represents, compared to the interpretation of the CAT Committee, a higher threshold.
22 Burgers and Danelius, supra n. 16 at 129.
24 Article 7 reads: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’
25 HRC General Comment No. 20, Replaces General Comment No. 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7), 10 March 1992, HR/GEN/1/Rev.6 at 151 at para. 9.
27 HRC General Comment No. 15, The Position of Aliens under the Covenant, 11 April 1986, HR/GEN/1/Rev.1 at para. 1.
requires a ‘real risk’ standard to trigger the principle of non-refoulement. Factors to be taken into account are the intent of the country of origin and the pattern of conduct shown by the country in similar cases. Article 4 provides that the prohibition on torture is absolute and no derogation is permitted from it. According to the HRC, Articles 7 and 2 of the ICCPR require states parties to prevent, investigate, punish or remedy any violations.

(iii) Article 33 of the 1951 Refugee Convention

According to Article 33 of the Refugee Convention, all persons qualifying for protection under Article 1A(2) are protected by the principle of non-refoulement. Thus, excluded persons cannot claim protection against refoulement under Article 33(1). The personal applicability does not depend on the formal recognition as refugee. The purpose of Article 33 is to prohibit any act (independent of its formal description) of removal or retraction that would pose a risk to the person concerned. In addition to the guarantees of non-refoulement, Article 33(1) requires a review of individual circumstances prior to the denial of protection. In accordance with the terminology of the HRC and the European Court of Human Rights (ECtHR), the standard of proof has to be whether it can be established that there is a ‘real risk’ of persecution for the individual. Article 33(2) provides for an exception to the prohibition of refoulement in the case of a risk to the national security and a danger to the community. The assessment needs to be made in the light of the principle of proportionality.

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30 HRC General Comment No. 20, supra n. 25 at para. 2; and HRC General Comment No. 31, supra n. 26 at para. 8.
31 Article 33 provides: ‘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.’
34 According to a broad reading, ‘where his life or freedom would be threatened’ must be construed so as to encompass circumstances in which a refugee or asylum seeker (a) has a well-founded fear of being persecuted; (b) faces a real risk of torture or CID treatment or punishment; or (c) faces other threats to life, physical integrity, or liberty. See Lauterpacht and Bethlehem, ibid. at 124.
35 Lauterpacht and Bethlehem, ibid. at 126.
36 Article 33(2), Refugee Convention: ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’
37 For the ‘national security’ exception, the danger must exist for the country where the individual in question is present. This interpretation was contested by the Canadian Supreme Court in Suresh v The Minister of Citizenship and Immigration and the Attorney General of Canada [2002] 1 SCR 3 (‘Suresh’) at paras 87 and 90 that argued that the security of one state is now dependent on the security of other states and, thus, also a danger to other states suffices. This was highly criticised; see, for example, Bruin and Wouters, supra n. 32 at 17.
38 The ‘danger to the community’ exception requires the conviction by a final judgment of a particularly serious crime and a future, very serious danger to the community of the country of refuge. Past conduct, that can include conduct outside the country of refuge, is only relevant to the assessment of the future risk. See Hathaway and Harvey, ‘Framing Refugee Protection in the New World Disorder’, (2002) 43 Cornell International Law Journal 257 at 292.
and adequate procedural safeguards must be in place.\footnote{Lauterpacht and Bethlehem, supra n. 33 at 137; and UNHCR, ‘Note on Diplomatic Assurances and International Refugee Protection’, August 2006 at 6, available at: \url{http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=44dc81164}.} However, Article 33(2) of the Refugee Convention needs to be interpreted in light of other non-refoulement obligations. Thus, there is a bar to the refoulement to torture and ill-treatment.\footnote{See Executive Committee Conclusion No. 79 (XLVII) 1996, General Conclusion on International Protection at para. j; Clark and Crépeau, ‘Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law’, (1999) 17 Netherlands Quarterly on Human Rights 389 at 390; and Bruin and Wouters, supra n. 32 at 24.}

Alleged terrorists might be dealt with both through Article 1F (in particular (b))\footnote{Article 1F, Refugee Convention provides: ‘… this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’} as well as Article 33(2) of the Refugee Convention. Article 1 applies to an individual applying for asylum, whereas Article 33(2) deals with already recognised refugees.\footnote{The relationship between both provisions is complicated but most scholars argue that Article 1F only applies to those persons who have committed certain offences before their asylum claim and outside the country of refuge; and that Article 33(2) applies to those who have committed certain offences or are planning to commit offences within the country of refuge. See Bruin and Wouters, supra n. 32 at 16.} The Security Council has called on states to ensure that alleged terrorists are dealt with when they apply for refugee status – i.e. the application stage.\footnote{UN SC Res. 1373, 28 October 2001, S/RES/1373 (2001) at paras (f) and (g) calls upon member states to: ‘(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts; (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists…’}. The current practice of the European Union, Canada and the US has led to the question of whether mere membership of an indicated terrorist organisation might suffice to exclude an individual from refugee status or from the protection against refoulement.\footnote{The Supreme Court of Canada seems to have followed this approach in \textit{Suresh}, where, apart from commenting on his behaviour as member and fundraiser of the LTTE, there was no actual inquiry as to whether this behaviour could be deemed criminal under international terrorist conventions. See Bruin and Wouters, supra n. 32 at 15. This could prove dangerous, in particular if one considers that the authorities would not have to prove an actual involvement in a terrorist act.}

(iv) Article 3 of the ECHR\footnote{Article 3, ECHR provides: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’}

The ECHR does not contain an explicit prohibition against refoulement but the ECHR has interpreted Article 3 to encompass such a principle.\footnote{See \textit{Soering v United Kingdom} (1989) 11 EHRR 439; \textit{Cruz Varas v Sweden} (1992) 14 EHRR 1; \textit{Vilvarajah and Others v United Kingdom} (1992) 14 EHRR 248; and \textit{Chahal v United Kingdom} (1996) 23 EHRR 413.} The Court has also extended this rule to include any kind of forced removal or transfer of an individual where there were substantial grounds to believe the person would face torture or ill-treatment.\footnote{\textit{Cruz Varas v Sweden}, ibid. at paras 69-70; and \textit{Vilvarajah and Others v United Kingdom}, ibid. at para. 103.} The risk of torture or ill-treatment is to be assessed in light of all the material submitted to the ECHR which the state party knew or ought to have known at the time of the removal. However, subsequent information may be relevant with regards to confirming or refuting a state party’s
assessment. The ECtHR indicated in *Chahal v United Kingdom* that it will require a high level of proof of risk if the circumstances are not evident. Article 3 is guaranteed in absolute terms and no derogations are permitted. The ECtHR ruled in *Chahal* that the conduct of the individual was not a relevant factor although the British government had argued that the guarantee of Article 3 could not be absolute where there is a threat to the national security.

The ECtHR made clear that there is no room for balancing the risk of ill-treatment against the reasons for expulsion. However, the current case of *Ramzy v the Netherlands* raises this question again. The Court has also established extensive positive obligations arising from Article 3 (and/or Article 13), *inter alia*, to provide effective protection and to carry out a thorough and effective investigation into substantiated allegations of torture.

(v) Customary International Law

Lauterpacht and Bethlehem distinguish two features of the principle of non-refoulement under customary law. In a refugee context, the customary rule largely corresponds to the content of Article 33 of the Refugee Convention. In the context of human rights more generally, they propose a phrasing as follows:

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

B. Obligations to Combat Terrorism

States involved in removal decisions against diplomatic assurances generally argue that this is a measure necessary in order to combat terrorism. Concrete obligations in this regard arise from various sectoral international treaties like the International Convention for the Suppression of Terrorist Bombings 1997. Apart from international treaties, one of the most

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50 *Chahal v United Kingdom*, supra n. 46 at para. 80.
51 Ibid. at para. 81. This does not mean to introduce an explicit limitation but rather to alter the definition on the stage of the scope of application. See Nowak, *Introduction to the Human Rights Regime* (Leiden: Martinus Nijhoff, 2003) at 56.
53 *Z and Others v United Kingdom* (2001) 34 EHR 97 at para. 73.
54 *Aksoy v Turkey* (1996) 23 EHR 553 at para. 98.
55 Lauterpacht and Bethlehem, supra n. 33 at 163.
57 37 ILM 249 (1998). An overview of the various universal and regional terrorism conventions is available at: [http://untreaty.un.org/English/Terrorism.asp](http://untreaty.un.org/English/Terrorism.asp). The General Assembly’s Ad Hoc Committee on Terrorism is
cited sources of legal obligations concerning this matter is the United Nations Security Council Resolution 1373.58

C. A Clash of Obligations?

Under international law there are two types of laws: *jus cogens* and *jus dispositivum*. The violation of a norm with *jus dispositivum* character can be justified under certain circumstances. In contrast, there are no legal possibilities to deviate from a norm of *jus cogens*. These norms are thought to be so essential that their breach would undermine the whole system of international law.59 However, a breach could theoretically be justified if two norms of the same character collided.60 There is a broad consensus that the prohibition against torture is a *jus cogens* rule.61 Many scholars also agree that the principle of non-refoulement is also a *jus cogens* norm.62 Thus, it is arguable that the principle of non-refoulement is supreme when it collides with the obligation to combat terrorism.63 Subsequent resolutions of the UN Security Council also stress that any measure taken to combat terrorism has to comply with international law, in particular human rights law.64

D. Conclusion

The various guarantees of non-refoulement as set out in various treaties and customary international law, cannot be assessed separately. There is a mutual influence of the different obligations.65 Apart from the context of international or regional refugee protection,66 the concept is also relevant as part of the prohibition of torture or cruel, inhuman or degrading current drafting a comprehensive anti-terrorism convention whose purpose is to fill in the gaps left by the 13 sectoral treaties and which will provide for a broadly accepted definition of terrorism.

However, it is disputed how far reaching the obligation of states to implement para. 3, Resolution 1373 is. Allain, ‘The Jus Cogens Nature of Non-Refoulement’ (2002) 13 *International Journal of Refugee Law* 533 at 546, argues that it follows from the language of the resolution that states have an obligation to deny safe haven but each state may decide how it will comply with this obligation.58 Allain, ibid. at 535.


61 HRC, General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, 2 November 1994, HRI/GEN/1/Rev.6 at 161 at para. 8; and *Tapia Paez v Sweden* (39/1996), CAT/C/18/D/39/1996 (1997) at para. 14 (5).

62 See Nowak, supra n. 11 at 674; Goodwin-Gill, *The Refugee in International Law*, 2nd edn (Oxford: Oxford University Press 1996) at 167; Allain, supra n. 58 at 538; and EXCOM Conclusion No. 79, supra n. 40 at para. 1.

63 This is partly disputed when the imminent risk would just amount to cruel, inhuman and degrading treatment or punishment. However, even if one does not agree upon the *jus cogens* character of the prohibition of cruel inhuman and degrading treatment, one can argue that these human rights obligations override obligations not deriving their legally binding force from the UN Charter. See Kapferer, *The Interface between Extradition and Asylum*, Legal and Protection Policy Research Series, UNHCR, November 2003, PPLA/2003/05 at 45, available at: http://www.unhcr.org/cgi-bin/lexis/vtx/protect/opendoc.pdf?tbl=PROTECTION &id=3fe84fad4.


65 Clark and Crépeau, supra n. 40 at 389-90; and Stenberg, *Non-Expulsion and Non-Refoulement. The Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Uppsala: IUSTUS Förlag, 1989) at 245.

66 Article 33, Refugee Convention; Article 3(III)(3), Principles Concerning Treatment of Refugees 1966; Article 3, Declaration on Territorial Asylum 1967, GA Res. 2312 (XXII), 14 December 1967, A/6716; Article II(3), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, 1001 UNTS 45; and Article 22(8) of the 1969 ACHR.
treatment or punishment. Whereas the principle of non-refoulement under refugee law only applies to refugees as defined by the Refugee Convention, its equivalent in general human rights law applies without regard to the status of the individual concerned. It is noteworthy that the principle is the same with regards to its character and object despite differences in formulation. Thus, the principle of non-refoulement is guaranteed in absolute terms and is non-derogable. Some states are currently seeking to alter the absolute interpretation of that norm. Whether such a development will be successful remains to be seen. As to now, one can conclude that the principle of non-refoulement overrides concurring obligations which do not share the same jus cogens character.

3. The Use of Diplomatic Assurances

A. Introduction

Diplomatic assurances are mainly used in an asylum and rendition context when an individual is viewed as posing a security threat, and particularly a terrorist threat, to the state in which he or she is located. The term ‘diplomatic assurances’ denotes formal guarantees from the state of return to the effect that the individual concerned will be treated in accordance with conditions set by the returning state. In the context dealt with here, the receiving state assures that the returned person will not be subjected to torture or ill-treatment. In contrast to these individual assurances, more general assurances are called memoranda of understanding (MoU) and merely form the framework for individual diplomatic assurances. They are not intended to apply to an individual case but to establish the general pattern of cooperation for similar cases. The formulation of a diplomatic assurance may vary from case to case: it may take the form of a brief statement that the receiving state will adhere to its international obligations or assurances set out in great detail which provide for concise monitoring procedures and individual safeguards.

Giving or receiving diplomatic assurances with regards to transferring a person from one jurisdiction to another has been a longstanding practice in extradition proceedings. They

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67 Lauterpacht and Bethlehem, supra n. 33 at 90.
68 Ibid. at 118.
69 The Canadian Supreme Court considered, explicitly referring to the events of 9/11, a fair balance between the protection needs of the individual and the security interest of Canada not to be in violation of the obligation of non-refoulement. Thus, it considered the prohibition less than ‘absolute’. See also the efforts of the British Government and the European Commission, supra n. 52.
70 UNHCR, supra n. 39 at 2.
71 Joint Committee, Volume I, supra n. 8 at para. 106.
72 The terms ‘diplomatic assurances’ and MoU are often used interchangeably. However, in the present article, the term ‘diplomatic assurances’ will be used to denote an individual assurance whereas MoU describes a general document.
73 The early assurances were merely reiterating the receiving country’s treaty obligations, see HRW, *Still at Risk. Diplomatic Assurances, No Safeguard Against Torture*, April 2005, available at: http://hrw.org/reports/2005/eca0405/, at 23. The newly developed framework documents, such as those negotiated by the British government, are more concrete. The various MoU differ but seem to have the following characteristics in common: They provide for ‘adequate accommodation, nourishment, and medical treatment’ and hold that the detainees are ‘treated in a humane and proper manner, in accordance with internationally accepted standards’. They provide for prompt and regular private visits from representatives of an independent body nominated by both states and for medical examinations in order to assess any ill treatment. See Joint Committee, Volume I, supra n. 8 at para. 106.
74 UNHCR, supra n. 39 at 2. It has to be noted that the term ‘diplomatic assurances’ also has a different connotation within international law. A diplomatic assurance more generally designates the notification of one state that the other state believes a current practice violates international law and that the allegedly infringing state
were mainly sought in order to satisfy the obligations of the sending state arising from constitutional and human rights norms, when it was feared that the death penalty would be imminent or fair trial standards would not be observed. However, with the rise of the practice of extraordinary renditions or renditions in general in the 1990s (and in particular after 9/11), diplomatic assurances are increasingly sought in cases where the sending state fears that the individual will be exposed to torture and ill-treatment upon return. This procedure is not confined to one area of transfer but is increasingly used both in regular and irregular inter-state transfers of individuals.

B. Legal Transfers

Under international and human rights law, there are four situations in which a state may lawfully transfer a prisoner to another state: expulsion/deportation, extradition, transit and transfer of sentenced persons.

(i) Extradition

Extradition is a formal procedure whereby a suspected criminal detained in one state is transferred to another state for trial, or, if the suspect has already been tried and convicted, to serve his/her sentence. There is no general duty to extradite under international law (and no such right for non-nationals not to be extradited). A legal obligation may only arise from bilateral or multilateral extradition treaties or from specific instruments providing for an obligation in the case of certain offences, e.g. terrorism. Other instruments, in particular anti-
terrorism instruments, impose the obligation *aut dedere aut judicare*.80 Extradition may only be granted if the conduct in question constitutes an extraditable crime. A traditional ground for refusal is the political offence exemption.81 It should be noted that terrorist acts have increasingly been declared non-political in order to restrict the possibility of refusal.82 Another important refusal ground is the discrimination clause according to which extradition can be refused if the intent for the request is deemed to be persecutory and/or discriminatory.83 The discrimination clause also applies to offences which have been de-politicised and, thus, is seen as ‘necessary corollary’ to de-politicisation.84

As for all removal proceedings, there is no common extradition procedure under international law.85 This area is mainly regulated by national laws and the customary international law/general legal principle *tu patere legem quam ipse fecisti*.86 International human rights law is silent on specific procedural rights. It generally just requires that the rights of the concerned individual be considered during the process.87 In particular, the right to freedom from expulsion not based on a lawful decision and the right to an effective remedy (Article 13 of the ICCPR88 and Article 3 or Article 8 in connection with Article 13 of the ECHR89) as well as the right to freedom from arbitrary detention (Article 9 of the ICCPR90

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81 Kapferer, supra n. 63 at VII.
82 See, for example, Article 1 and 2, European Convention on the Suppression of Terrorism 1977, ETS No. 90.
83 This refusal ground is modelled after Article 33(1), Refugee Convention, and has been incorporated into some anti-terrorism instruments. See Kapferer, supra n. 63 at VII.
84 Kapfer, ibid. at 38.
85 Ibid. at IX.
87 Refer to the respective procedural requirements described in sections 1 and 2 of this article.
88 Article 13, ICCPR grants the right to present reasons against the expulsion (understood as all forms of removal, including extradition) to competent authorities prior to expulsion if the concerned individual is lawfully in the territory of the state party. The HRC established in its General Comment No. 15, supra n. 27 at para. 9, that the right to remedy in this regard must be effective but also that the principles can be departed from if compelling reasons of national security require so. Article 2(3)(a), ICCPR also obliges states parties to provide an effective remedy in cases of breaches of guaranteed rights. The requirements of individuals in need of protection shall be considered (HRC, General Comment No. 31, supra n. 26 at para. 15). However, this does not require that the second review has to take place while the individual is in the territory of the country concerned; see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000) at 382.
89 An alien lawfully residing in the territory of a member state of the Council of Europe benefits from the rights set out in Article 3 and Article 8 (right to respect for private and family life) in connection with Article 13 (right to an effective remedy before a national authority). Article 13 is an accessorial right and can only be invoked in connection with a material right of the Convention. According to Grabenwarter, *Europäische Menschenrechtskonvention (European Convention for Human Rights)*, 2nd edn (Munich: C.H. Beck Verlag, 2005) at 355, Article 13 does not demand an examination of the claim by a court but the deciding instance has to be independent.,
90 If the individual is detained prior to the extradition, the safeguards of Article 9, ICCPR apply; i.e. the right that the detention is in accordance with the relevant law, the right to be informed about the reasons for the detention and the right to challenge the legality of the detention before a court (*habeas corpus*). However, there are no uniform standards with regard to a legitimate duration of extradition detention. See the Report of the Working Group on Arbitrary Detention, 20 December 2000, E/CN.4/2001/14 at para. 81.
and Article 5(1) of the ECHR\textsuperscript{91} apply. Article 6 ECHR does not include a protection from forced removal proceedings.\textsuperscript{92}

(ii) Deportation

Unlike extradition, which requires formal acts of two states, expulsion and deportation are unilateral procedures of the sending state.\textsuperscript{93} The term deportation describes ‘the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial’.\textsuperscript{94} If the purpose of the transfer is criminal prosecution or the enforcement of a sentence, extradition is the right procedure and deportation/expulsion cannot be resorted to in order to circumvent this.\textsuperscript{95}

There is no common deportation procedure under international law.\textsuperscript{96} However, international human rights law provides for some minimum procedural requirements.\textsuperscript{97} According to Protocol No. 7 to the ECHR,\textsuperscript{98} an expulsion\textsuperscript{99} is only permitted on the basis of a lawful decision. Furthermore, the individual should have the possibility to submit reasons against the expulsion, have the case reviewed and be represented during such proceedings.\textsuperscript{100}

Unlike Article 13 of the ICCPR, Article 1(2) of Protocol No. 7 specifies the circumstances in which an alien may be expelled: when the expulsion necessary in the interests of public order or reasons of national security.\textsuperscript{101} Only for the exception reason ‘public order’, the principle of proportionality has to be taken into account but the person concerned should be able to exercise the rights after his or her expulsion.\textsuperscript{102} The ECtHR has held in \textit{Vilvarajah v United Kingdom}, that an effective remedy means review by a superior court and the possibility to alter the decision.\textsuperscript{103}

(iii) Special safeguards for refugees

There are three constellations to be imagined in the context of the use of diplomatic assurances when refugee status is yet to be determined. First, the individual has already

\textsuperscript{91}The right to liberty and security of person as guaranteed by Article 5(1), ECHR, can be explicitly limited for extradition purposes if the detention is in accordance with a procedure prescribed by law and does not exceed a reasonable time. According to the ECtHR, the extradition should be postponed until the legality of the detention has been examined. The acceptable length of a detention depends on the circumstances of the case. See for example \textit{Osman v United Kingdom} (1998) 29 EHRR 245.

\textsuperscript{92} \textit{Maaouia v France} (2000) 33 EHRR 1037.

\textsuperscript{93} UNHCR, supra n. 39 at 2, n. 4.

\textsuperscript{94} Venice Commission, supra n. 3 at 3.

\textsuperscript{95} See \textit{Bozano v France} (1987) 9 EHRR 297. However, the Court did not consider an atypical extradition \textit{per se} as being contrary to the ECHR if certain rights, for example, Articles 2, 3, and in some circumstances 5 and 6, are respected. See \textit{Öcalan v Turkey} (2005) 41 EHRR 45.

\textsuperscript{96} Kapferer, supra n. 63 at IX.

\textsuperscript{97} See section 2 of this article.

\textsuperscript{98} Protocol No. 7, Procedural Safeguards Relating to Expulsions of Aliens 1984, ETS No. 117.

\textsuperscript{99} Expulsion in this context means ‘any measure compelling the departure of an alien from the territory’ but does not include extradition. See Council of Europe, Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 at para. 10.

\textsuperscript{100} Article 1 (Procedural safeguards relating to expulsion of aliens): ‘1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.’

\textsuperscript{101} See Article 1(2) Protocol 7 to the ECHR, supra n. 98.

\textsuperscript{102} Explanatory Report, supra n. 99 at para. 15.

\textsuperscript{103} \textit{Vilvarajah et al. v United Kingdom}, supra n. 46 at paras. 122.
claimed asylum and the country of refuge is seeking an assurance. Second, the individual has already claimed asylum and the country of origin is submitting an assurance in connection with an extradition request. In the third variant, the individual is already in an extradition procedure and then submits his or her asylum claim. As a general rule, an asylum-seeker may not be returned to their country of origin before the determination of the refugee status has been completed.\textsuperscript{104} The special protection needs of refugees and asylum-seekers require special safeguards in transfer procedures.\textsuperscript{105} Non-recognised asylum seekers should be given the possibility to appeal a negative decision within a reasonable time and should also be allowed to remain in the country of refuge while this appeal is pending.\textsuperscript{106} In the context of Article 13 of the ECHR, the ECtHR has interpreted that these reviews should be limited to the lawfulness of the decision and not to encompass an examination of the merits.\textsuperscript{107} However, of particular importance is the confidentiality of the asylum claim. It should not be communicated to the country of origin that an asylum claim has been made.\textsuperscript{108}

(iv) Diplomatic assurances and extradition/deportation

Diplomatic assurances against torture and unfair trial have been involved in the extradition case of \textit{Nuriye Kesbir}.\textsuperscript{109} After receiving only very general guarantees that the Turkish authorities would observe their obligations under international law and a refusal to give further guarantees, a court halted the extradition because of the unspecific nature of these assurances.\textsuperscript{110} Diplomatic assurances have also been used in the deportation cases of Muhammad Muhammad Ibrahim \textit{El-Zari} and Ahmed Hussein Mustafa Kamil \textit{Agiza}.\textsuperscript{111} El-Zari was deported together with Agiza from Sweden to Egypt only a few hours after their asylum claim had been dismissed. The Swedish authorities claimed that they had received diplomatic assurances guaranteeing that the two men would not be harmed. Both were held incomunicado for five weeks before they were visited by officials from the Swedish embassy. Both were allegedly tortured.\textsuperscript{112} \textit{Adil Charkaoui}, a Moroccan national seeking asylum in Canada, was only deported after a very basic diplomatic assurance from Morocco that he would not be subjected to torture or ill-treatment. Prior to this guarantee, the immigration authorities had concluded that he would run a real risk of torture and even death when returned. However, a ‘security review’ stated that he should not be granted protection because he allegedly constituted a security risk to Canada.\textsuperscript{113} A government official concluded that, even if the risk to Charkaoui was underestimated, the danger he constituted for the state justified his deportation.\textsuperscript{114} In the case of \textit{Hani El Sayed Sabaei Youssef and Others},\textsuperscript{115} the British government advocated that a promise from the Egyptian government not to torture the

\begin{itemize}
\item \textsuperscript{104} UNHCR; supra n. 39 at 16.
\item \textsuperscript{105} Kapferer, supra n. 63 at XI.
\item \textsuperscript{106} Executive Committee, Conclusion No. 8, Determination of Refugee Status, XXVIII, 1977 at paras 6 and 7.
\item \textsuperscript{107} Goodwin-Gill, supra n. 62 at 332.
\item \textsuperscript{108} UNHCR, supra n. 39 at 16.
\item \textsuperscript{109} Kesbir was an official of the Kurdish Workers’ Party (PKK) whose extradition was sought by Turkish authorities.
\item \textsuperscript{110} HRW, supra n. 2 at 72.
\item \textsuperscript{111} The \textit{Agiza} case has been commented upon already in the Introduction section of this article.
\item \textsuperscript{112} HRW, supra n. 2 at 3.
\item \textsuperscript{113} Ibid. at 49.
\item \textsuperscript{114} ‘Dans l’éventualité où j’aurais sous-estimé le risque auquel M. Charkaoui est confronté, je suis convaincu qu’il répond au critère établi dans l’arrêt Suresh et que le danger extraordinaire qu’il constitue pour la sécurité du Canada l’emporte sur le risque qu’il court advenants on retour au Maroc. Par conséquent, on ne doit pas lui permettre de rester au Canada.’, Décision ERAR dans le dossier de M. Charkaoui, at 20, as cited in HRW, supra n. 2 at 52.
\item \textsuperscript{115} \textit{Hani El Sayed Sabaei Youssef v Home Office} [2004] EWHC 1884 (QB) at para. 38.
\end{itemize}
men, who were suspected of membership in al-Jihad al-Islamiya and terrorist activities, was basis enough to send the appellants back to Egypt.¹¹⁶ Metin Kaplan, a radical Muslim cleric convicted of publicly calling for murder, was rendered to Turkey after the German government had sought enhanced diplomatic assurances following the suspension of extradition proceedings by a court based on human rights concerns, including the insufficiency of the initial diplomatic assurances against torture and unfair trial.¹¹⁷

The deportation cases described above illustrate the practice of diplomatic assurances in the context of determining asylum status. However, assurances are also used in this context without an alleged terrorist background. Lai Cheong Sing and his family were denied refugee protection because they were suspected of committing bribery and smuggling, prior to their asylum claim in Canada. The court did not find that enough evidence had been provided to halt the deportation on grounds of the risk of torture and ill-treatment. The decision was partly based on assurances from the Chinese authorities that the family would not be subjected to torture and the death penalty would not be imposed. The judgment was highly criticised because the court did not consider the issues of the determination of refugee status and the claims against deportation (with the issue of the diplomatic assurances) separately.¹¹⁸

(v) Summary

Summarising the above cases, one can draw the following common features in the use of diplomatic assurances in extradition/deportation cases. The cases seem to be used as a last resort when deportation and extradition would not normally be permitted due to the principle of non-refoulement. In only a few cases, were courts able to review the final deportation/extradition decision by the executive based on these assurances. The verification and assessment of the reliability of these assurances seem to lie mainly with the same authority that sought them.¹¹⁹ Thus, there is no opportunity to challenge the credibility and reliability of diplomatic assurances before an independent judicial body. This is particularly problematic with regards to the special safeguards required for asylum seekers. In most cases, there are no express legal requirements for the content of these guarantees and/or the seeking state has to be content with the guarantee given by the receiving state.¹²⁰ The proceedings are mainly secretive and sometimes not even the persons in question are informed about why and where they are returned to.¹²¹ Information, which comes to light during the process of seeking and/or giving assurances, could negatively affect the determination of the asylum claim and vice versa.¹²² There also seems to be a development that interim measures will not be complied with if a diplomatic assurance is obtained.¹²³ In addition, there may be a danger that

¹¹⁶ HRW, supra n. 2 at 69.
¹¹⁸ HRW, supra n. 2 at 55.
¹¹⁹ This is very clearly the case in the US where a law permits the use of assurances in immigration cases in which a person subject to removal raises a claim under the CAT. After the Secretary of State has sought the assurance, the Attorney General determines its ‘sufficient reliability’. Once the assurance is approved, there will not be any new risk assessment and the decision is not reviewable by a court. See HRW, supra n. 2 at 28.
¹²⁰ For example, the Canadian government seeks and secures diplomatic assurances for returns in some cases where there is an acknowledged risk of torture, including for persons subject to ‘security certificates’. Such certification authorises the executive to, inter alia, detain for an unspecified period without charge or trial, to present secret evidence, to refuse access to a lawyer and to deport the individual. See HRW, supra n. 2 at 47.
¹²¹ Ibid. at 38.
¹²³ Kapferer, supra n. 63 at X.; and HRW, supra n. 2 at 55.
¹²⁴ See Mamatkulov and Abdurasulovic v Turkey, supra n. 48. The jurisprudence of the ECtHR developed in this case holds that a failure to observe interim measures to stay extradition reduced to nothing the right to a remedy
the deportation/extradition is enforced faster when assurances are obtained, than it would be in a normal process where the asylum seeker would remain in the country and be able to have the negative decision reviewed.

C. Illegal Transfers: Extraordinary Renditions

(i) Distinction from ‘ordinary renditions’

The term ‘extraordinary rendition’ appears to be used when there is little or no doubt that obtaining custody of a person will not be in accordance with the existing legal procedures applying in the state where the person was situated at that time. However, this term has to be distinguished from the ‘normal’ renditions used in the 1970s and 1980s, where an individual is surrendered outside the normal legal processes but without the implication that the individual runs the risk of torture or ill-treatment. This type of transferral of a suspected criminal from one state to another for the purpose of investigation or trial is also referred to as ‘renditions to justice’. There exists a controversy as to its compatibility with international human rights standards. Whereas both forms of renditions share the covert means of apprehending an individual outside the framework of formal proceedings, the purpose of extraordinary renditions is not to bring the individual to justice but to obtain terrorism-related intelligence information through techniques not in accordance with international law, and to facilitate detention of suspects outside the reach of the law or to have them detained elsewhere in order to safeguard the own nation’s security. Extraordinary renditions are


125 Venice Commission, supra n. 3 at 9.


128 It is questionable as to whether such ‘renditions to justice’ violate the human rights of the abductee. In Sosa v Alvarez-Machain (03-339) 542 U.S. 692 (2004) 331 F.3d 604, the US Supreme Court held that this is not the case. See also Loan, ‘Sosa v Alvarez-Machain. Extraterritorial Abduction and the Rights of Individuals under International Law’, (2005) 12 ILSA Journal of International and Comparative Law 253 at 263-5. In Celiberti de Casartego v Uruguay (56/1979), 29 July 1981, CCPR/C/OP/1 (1984) at 92, and Almeida de Quinteros v Uruguay (107/1981), 21 July 1983, CCPR/C/OP/2 (1990) at 138, the HRC held that the act of abducting an individual into another state’s territory would violate Article 9(1), ICCPR. However, see Brown, supra n. 128 at 3, who believes that under certain circumstances it may be legal. The HRC in its General Comment No. 24, supra n. 61 at para. 9, also held that the right to be free from arbitrary arrest and detention is part of customary international law. In Bozano v France, (1979) 9 EHRR 25, the ECtHR held that any measure depriving an individual of liberty must be compatible with the purpose of Article 5, ECHR to protect an individual from arbitrary detention. In Stocké v Germany (1991) ECHR 25, the European Commission on Human Rights held that an abduction would render an arrest and detention unlawful within the meaning of Article 5(1). It should be noted, however, that the consent of the host-state rules out a violation because this renders the detention lawful (see Loan, supra n. 128 at 276). With regards to national jurisprudence on male captus bene detentus/ judicatus and the question whether such a rendition hinders a trial, see the different legal approaches described by Kapferer, supra n. 63 at 61.

129 Henderson, supra n. 127 at 189.

closely associated with secret ‘black site’ detention and ‘disappearances’. However, it should be noted that both terms are not legal terms as such but rather describe a state practice.

According to the Irish Section of Amnesty International, the state practice of extraordinary renditions can be characterised, inter alia, by following features: the method of apprehending a person; removing him/her through a rather informal surrender outside law; no possibility to file a habeas corpus; detention without limitation for a purpose other than trial; ill-treatment both during transport and during detention, in particular while interrogating the individual; and no access to a lawyer. Thus, the main feature of extraordinary renditions is the intention to circumvent any procedural safeguards, legal controls or judicial oversight mechanisms related to ordinary transfer of persons. Therefore, extraordinary renditions are characterised by their intended extra-legality.

(ii) Diplomatic assurances and ‘extraordinary renditions’

Based on the evaluation of case descriptions in reports of human rights organisations, three types of extraordinary renditions can be distinguished. First, state authorities apprehend an individual on their territory and hand him or her over to a third state (sometimes the state of origin). This variant is exemplified by the case *Maher Arar* which was already described above.

Second, state agents apprehend an individual on foreign territory with or without the direct assistance of the national authorities and transfer the individual to a third country; e.g. the case of *Abu Omar. Osama Mustafa Hassan Nasr*, an Egyptian cleric, aka Abu Omar, and recognised refugee in Italy because of his membership in a radical Islamist group, was abducted in Milan, Italy, by CIA agents and flown to Egypt via Germany. More than one year later, Abu Omar was temporarily released and spoke about his abduction and his treatment in the Egyptian prison but was re-arrested after a short time.

Third, a state detains or apprehends an individual, hand him/her over to another state’s agents on their territory and let them transfer him or her to a third country. An illustration

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132 Venice Commission, supra n. 3 at 8.
134 It has to be cautioned, however, that the facts of the respective reports like subsequently described, have not yet been examined before a court. Due to the secretive nature of extraordinary renditions, these are the most reliable case descriptions currently accessible.
135 Please see case description in the introduction of this article. This case is sometimes classified as deportation case because Arar was removed from the United States after being placed in expedited immigration proceedings. On the other hand, he was expelled without any hearing prior to the deportation (and not to Canada despite his requests), the US government failed to provide information about his whereabouts for a long period of time and also failed to inform the Canadian authorities of its intention contrary to the Vienna Convention on Consular Relations (Patten, *HRW Report To The Canadian Commission Of Inquiry Into The Actions Of Canadian Officials In Relation To Maher Arar* 7 June 2005 at 3, available at: http://hrw.org/backgrounder/eca/canada/arar/arar_testimony.pdf; see also, HRW, *Empty Promises*, supra n. 2 at 34. Because of this apparent attempt to place Arar outside the reach of law, the case is classified as extraordinary rendition.
137 However, one has to bear in mind that, in the case of being transferred to a US run facility, this last variant does not involve another state to which the concerned individual is handed over. Thus, the interest of the states
for that pattern is the case el-Masri. Khaled el-Masri, a German national of Lebanese origin, was abducted while seeking to enter Macedonia. He was allegedly detained, interrogated and ill-treated for several days by uniformed, apparently Macedonian, men at an unknown facility. Access to the German ambassador or other authorities was refused. At an airport, he was handed over to US officials, mistreated on the flight, flown via Iraq to Afghanistan where he was detained in a US prison in Kabul, interrogated and mistreated. Finally he was flown back to the Balkans and the Albanian authorities arranged his flight back to Germany. The American Civil Liberties Union filed a complaint in a US District Court on behalf of el-Masri against, inter alia, former CIA Director George Tenet. This was dismissed in May 2006 on grounds of state secrecy. The US government followed this same policy when it tried to invoke the state secrets privilege in the suit Maher Arar filed.

(iii) Summary

Despite the fact that in only one extradition case, the Arar case, did the US authorities confirmed that they had secured diplomatic assurances, the extraordinary renditions programme has been repeatedly defended by US officials relying on the fact that diplomatic assurances were sought prior to the renditions. Due to the secrecy surrounding these renditions, even if there was the legal possibility to challenge the decision, the lack of information would make this impossible. Further to this, the US State Department and CIA seem to be solely competent to secure and evaluate assurances. Due to the secrecy of the procedure, a judicial review is very unlikely. If transfer is finally challenged in a US court, the US government’s policy seems to be to invoke the state secrets privilege.

4. Compatibility of Diplomatic Assurances with International Law

This section will discuss how diplomatic assurances theoretically can influence a removal decision. First, the legal nature of diplomatic assurances will be examined. Second, the international jurisprudence on this matter will be described and criteria summarised which seem to have influenced international human rights bodies in their decisions. These criteria will be used to discuss the arguments put forward for and against diplomatic assurances. Having examined the alleged weaknesses and strengths, it will be discussed whether or not an argument can be made for the illegality of diplomatic assurances against torture and ill-treatment under international law.

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138 Amnesty International, supra n. 136 at 27.
139 Ibid. at 2.
140 Ibid. at 29.
141 The US government claimed that the disclosure of classified information in the Arar case ‘reasonably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States’ and to its diplomatic relations; see HRW, supra n. 2 at 36.
142 Ibid. at 29.
143 See, for example, the transfers out of Guantánamo Bay where no information about the negotiations, the suitability or reliability of the assurances should be made public and no judicial review was intended in order not to ‘chill’ the important source of information and jeopardise the cooperation with other countries in the ‘war on terror’ in Mahmood Abdah et al. v George W. Bush, et al., Respondents’ Memorandum at 15-16, available at: http://www.dcd.uscourts.gov/opinions/2005/Kennedy/2004-CV-1254–6.51.53–3-30-2005-a.pdf.
144 HRW, supra n. 2 at 39.
A. The Legal Nature of Diplomatic Assurances

Whether diplomatic assurances are legally binding is an important question with regards to the international obligation of non-refoulement. From one point of view, it could be argued that the more ‘binding’ the assurance (from mere political motivations to a legally binding nature), the bigger the impact on the risk assessment carried out by the removing state. However, whether or not an assurance is given in order to effect a reciprocal undertaking by the other state (do ut des) is not important in this context because even unilateral acts can create legal obligations which the other state can invoke in light of the principle of good faith or by virtue of customary international law. Thus, the decisive question as to the legal nature of diplomatic assurances is whether the diplomatic assurance is intended to create obligations under international law.

Noll distinguishes three possible interpretations in this regard. First, the diplomatic assurance was intended to create political obligations. The language generally used in these instruments can be put forward to support this view. Second, the assurance confirms the general international law obligations of the state concerned but does not create new obligations. Third, the diplomatic assurances are intended to create new or additional legal obligations and, as such, the assurances are the *conditio sine qua non* for the transfer of the person. Noll puts forward the Egyptian assurance in the *Agiza* case as an example of this, where, according to his interpretation, the guarantee altered the pre-existing obligations of Egypt.

In contrast to Noll, most commentators see diplomatic assurances as merely political and, therefore, non-binding. These arguments are mainly based on the fact that assurances normally neither contain specific mechanisms for their enforcement nor provisions for remedies in case of the breach of the guarantee. It is also argued that the motivation for

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147 As a unilateral act, a diplomatic assurance could be classified as a ‘promise’ to treat the individual according to the terms of the assurance. Under general public international law, a promise is a ‘unilateral declaration by which a State undertakes to behave in a certain manner’, see Cassese, supra n. 146 at 185. It creates proper legal obligations but only if the state has had the clear intention of being legally bound and has done so publicly; see the judgment of the International Court Justice in *Nuclear Tests Case (Australia v France)*, ICJ Rep 1974, 253 at para. 267. Against such a classification of diplomatic assurances can be said that they are normally given in confidentiality. Noll, supra n. 145 at 119, classifies them as treaties without really arguing on this point.
148 States avoid using terms associated with legal obligation and prefer rather vague diplomatic vocabulary. For example, ‘We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above’, *Chahal v United Kingdom*, supra n. 46 at para. 37.
149 See, for example, the assurance given in *Mamatkulov v Turkey*, supra n. 48 at para. 28: ‘The applicants’ property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital punishment. The Republic of Uzbekistan is a party to the United Nations Convention Against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole.’
150 ‘With reference to your aide-memoire dated 12 December 2001, concerning repatriation of the following Egyptian citizens: ... We, herewith, assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution, and law stipulates’, as cited in Noll, supra n. 145 at 109.
151 Noll, ibid. at 114.
152 See UNHCHR, supra n. 39 at 3; and Joint Committee, *Volume I*, supra n. 8 at para. 115.
153 UNHCHR, ibid. at 3.
diplomats to use such instruments is not to create obligations but to leverage diplomatic relations and reflect common interests. The intention not to create legal obligations is further backed by the evaluation of the current UK negotiator for MoU, who stated that the system of diplomatic assurances depends on the mutual good faith of the two involved governments. Furthermore, current state practice is moving away from seeking individual diplomatic assurances to establish a whole framework in the form of MoU. MoU, generally speaking, are legal documents expressing a common plan of action which lies in the interests of both parties. Generally there is no expression of intention to be legally bound by its terms. Even though MoU can have legal effects under the international law principle of good faith or under customary international law, they are often used by states because of their confidentiality (which is naturally an important feature in the field of national security and the combat of terrorism), their lack of formality, ease of possible amendment or alteration and the possibility to solve disputes by negotiation. Thus, one can conclude that there is no presumption of a legally binding nature when it comes to diplomatic assurances or MoU. Therefore, their impact on the risk assessment of sending someone to another state is not certain. This finding is supported by the view of the dissenting minority in Mamatkulov who noted that the ‘weight to be attached to assurances emanating from a receiving state must in every case depend on the situation prevailing in that state at the material time’.

B. International Jurisprudence on the Subject

As described above, there is a long tradition of using diplomatic assurances to ensure guarantees regarding the death penalties or fair trial standards. Courts are used to assessing the ‘real risk’ or ‘substantial risk’ of torture and ill-treatment with view to this kind of assurance. Subsequently, the jurisprudence of the ECtHR and communications to the CAT Committee relating to diplomatic assurances against torture and ill-treatment will be examined to develop criteria under which diplomatic assurances can be assessed.

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154 Sullivan, supra n. 74 at 283.
155 Joint Committee, Volume I, supra n. 8 at 37.
156 This development is highly criticised by human rights experts because they view it as a way of trying to avoid the criticism of the non-binding character of an assurance and make it look like a binding treaty, which, in fact, it is not, Statement of Mr Ward, Great Britain Parliamentary Joint Committee on Human Rights, The UN Convention Against Torture (UNCAT), 19th Report of Session 2005-06, Volume II, Oral and Written Evidence at 15.
158 Ibid. at 35-8.
159 Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan in Mamatkulov, supra n. 48 at paras 10-1.
160 See the case of Soering v United Kingdom, supra n. 46 at paras 93-6, where the ECtHR dealt with the diplomatic assurance on the death penalty under the heading of risk assessment.
161 National jurisprudence on this subject is not dealt with here. For an overview see Jones, supra n. 122 at 25.
162 The HRC has also dealt with the issue of diplomatic assurances in state reports. Its approach can be exemplified by its concluding observations on the report of the United States of America: ‘The Committee does not rule out the use of diplomatic assurances against torture and ill-treatment as such but requires that the procedures should be clear and transparent, adequate judicial review should be provided before the transfer of the individual takes place and effective monitoring mechanisms have to be established.’ Additionally, the HRC held that ‘the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be.’ See Concluding Observations, United States of America, Advanced unedited version, 87th session, 10-28 July 2006 at para. 16. Also with regard to Sweden, the HRC found that, if an individual is expelled on the basis of such guarantees, credible mechanisms for ensuring compliance with these guarantees must be instituted; see Concluding Observations Sweden, 24 April 2002, CCP/CO/74/SWE at para. 12(b).
The CAT Committee has had to deal with diplomatic assurances against torture and ill-treatment involving terrorist suspects in two communications so far: 163 Hanan Attia v Sweden where it did not find a violation of Article 3 of CAT and Agiza v Sweden where it did find a violation of Article 3. Summarising these two decisions, one can describe the CAT Committee’s approach to the issue of diplomatic assurances as follows. First, the use of diplomatic assurances against torture and ill-treatment is not ruled out completely. In Hanan Attia, the submission by the Swedish government that diplomatic assurances can be accepted when the guaranteeing authority is assumed to control the situation has not been challenged. 164 Second, the Committee seems to have certain requirements which assurances need to fulfil. In Hanan Attia, the Committee accepted the submission by the Swedish state that a credible assurance was regarded essential for the extradition. The guarantee was allegedly very embracing and clear. 165 In Agiza, the CAT Committee noted that the assurance did not provide any mechanism for its enforcement. 166 Thus, one can conclude that the Committee demands an effective system of monitoring, the framework for which is set out in the assurance. Note, however, the partly dissenting opinion of Mr Alexander Yakovlev in Agiza, who regarded the assurance and especially the Swedish follow-up efforts as sufficient as to establish the good faith of the Swedish government. 167 Effective monitoring in related or similar cases over a certain time is deemed in favour of the credibility of the assurance in question. 168 Another relevant factor in Agiza was the lack of opportunity for review of the removal decision because the case was decided solely by the government on the basis of national security interests. 169 Also, the Committee took the circumstances in which the removal took place into consideration, i.e. the mistreatment of the complainant by agents of a foreign intelligence service on Swedish territory with the acquiescence of the Swedish police and the general development in state practice with regards to such extralegal renditions. 170 The authority issuing the assurance was referred to in both cases by the parties’ submissions.

163 Apart from these communications, the CAT Committee has dealt with this issue in state reports. It has generally either requested states parties to submit further information on their use of this instrument or it has expressed its concern about this practice. See, for example, the Concluding observations of the Committee Against Torture regarding Canada, 7 July 2005, CAT/C/CR/34/CAN at para. 4(b) (asking for information about the involvement of Canadian authorities in the expulsion of Maher Arar) and para. 5(e) (stressing the absolute nature of the prohibition on torture and asking for further information regarding the number of cases in which assurances were used, the minimum requirements, the measures of subsequent monitoring and the legal enforceability of these assurances); and the Concluding observations of the Committee Against Torture regarding the United Kingdom, 10 December 2004, CAT/C/CR/33/3 at para. 4(d) (criticising the state report concerning the information on the use of assurances) and at para. (i) (asking for more information on the practice of assurances); and Concluding Observations of the Committee Against Torture regarding the United States of America, ibid. at para. 21 (criticising especially the secrecy of the practice of diplomatic assurances, the absence of judicial oversight and the lack of monitoring mechanisms and recommending that diplomatic assurances should only be considered with regards to countries which do not violate CAT systematically).

164 Hanan Attia v Sweden, supra n. 56 at para. 4.12.

165 Ibid. at paras. 4.13–4.1

166 Agiza v Sweden, supra n. 23 at para. 13.4.

167 Separate Opinion of Committee Member Mr. Alexander Yakovlev in Agiza v Sweden, ibid.

168 Hanan Attia, supra n. 56 at para. 12.3, based her claim to prevent her removal to Egypt mainly on her family link with her husband who had been extradited two years before and whose conditions had been monitored by the Swedish embassy and found to be in accordance with the guarantee. The CAT Committee was satisfied with the diplomatic assurance, especially considering the time already passed by and the regular monitoring, and did not find a substantial personal risk of torture.

169 Agiza v Sweden, supra n. 23 at para. 13.5.

170 Ibid. at para. 13.5.
Whereas in *Hanan Attia* the argument of the Swedish government with regards to the issuing authority was in a whole accepted, a similar argument in *Agiza* (that the assurance was obtained by the Egyptian security police itself, which, in Sweden’s view, made the assurance even more reliable)\(^{171}\) was not considered at all in the reasoning.

(ii) European Court of Human Rights

The ECtHR established its general test for diplomatic assurances in *Soering*:\(^ {172}\) ‘the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out’\(^ {173}\) In that case, the ECtHR also generally accepted the practice of seeking and receiving diplomatic assurances, in particular if prescribed by an extradition treaty.\(^ {174}\)

The approach of the Court on diplomatic assurances against torture and ill-treatment, exemplified by the cases *Chahal v United Kingdom*,\(^ {175}\) *Mamatkulov and Askarov v Turkey*\(^ {176}\) and *Shamayev and 12 others v Georgia and Russia*,\(^ {177}\) can be summarised as follows. The ECtHR places a great weight on which authority has issued the assurance and whether this authority is able to realistically ensure the non-infliction of torture or ill-treatment. In *Soering*, the ECtHR discussed the fact that the assurance was given by the prosecuting attorney of Virginia and not by federal authorities and concluded that this was one reason to conclude that the assurance did not eliminate the risk of the death penalty being imposed.\(^ {178}\) In *Chahal*, the ECtHR held that given the security situation in Punjab at that time and the fact that the central government did not have sufficient control over certain members of the security forces there, the assurance would not provide for an adequate guarantee of safety. They acknowledged the good faith of the Indian government in providing the assurances but this did not alter their assessment.\(^ {179}\) In *Shamayev*, a special emphasis was placed on the fact that the assurances were obtained from the Russian General Prosecutor who was deemed to perform sufficient control over all Russian prosecutors.\(^ {180}\)

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\(^{171}\) Ibid. at para. 12.24.

\(^{172}\) In the extradition case of *Soering*, supra n. 46, the Court considered the reliability of the assurance given by the prosecuting attorney in Virginia that if the accused was convicted of capital murder he would make a representation to the sentencing judge with the wish of the UK government that the death penalty would not be imposed.

\(^{173}\) Ibid. at para. 93.

\(^{174}\) Ibid. at paras 93-9. It should be noted, however, that *Soering* is a case of a diplomatic assurance against the imposition of the death penalty and not against torture or ill-treatment. Thus, it cannot be completely relied upon to establish the relevant jurisprudence for the above mentioned reasons.

\(^{175}\) In the deportation case of *Chahal*, supra n. 46, the British government received assurances from India that the applicant would not be subjected to any form of ill-treatment prohibited by Article 3, ECHR. The ECtHR concluded that there existed a real risk of ill-treatment contrary to Article 3 (ibid. at para. 107). In a Joint Partly Dissenting Opinion, seven judges argued to the contrary with regards to the risk assessment (Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levit at para. 9).

\(^{176}\) In the extradition case of *Mamatkulov and Askarov*, supra n. 48, the Turkish authorities received a diplomatic assurance against the infliction of ill-treatment contrary to Article 3, ECHR from the Uzbek authorities with regards to the two applicants who were wanted on the suspicion of having committed terrorist acts.

\(^{177}\) In the extradition case of *Shamayev and 12 Others*, Judgment of 12 April 2005, Application No. 36378/02, the Georgian authorities obtained assurances to the effect that the applicants who were prosecuted in Russia for several offences, *inter alia*, would not be sentenced to death, their security and health would be protected, medical access and treatment and access to a lawyer would be guaranteed.

\(^{178}\) *Soering*, supra n. 46 at paras 98-9.

\(^{179}\) *Chahal*, supra n. 46 at para. 105.

\(^{180}\) *Shamayev and 12 Others*, supra n. 177 at paras 344-5.
Another factor taken into consideration seems to be the general situation in the country of destination and its negative repercussion for the credibility of the assurance. In *Chahal*, the general situation in Punjab, in particular with regards to the risk to high profile Sikh leaders by security force members, was a major factor in the reasoning of the ECtHR.181 In their joint partly dissenting opinion in *Mamatkulov*, the minority of the ECtHR placed particular importance on the systematic nature of torture and cruel, inhuman or degrading treatment in Uzbekistan and held this was sufficient to leave the assurances without any credibility.182 The ECtHR seems to take into account the political consequences of a possible breach of the assurance.183 Whereas in *Chahal*, the assurance was clearly of particular importance in the consideration, in the other cases the assurance is simply one factor amongst others.184

(iii) Conclusion

The threshold test established by the ECtHR is that the diplomatic assurance must ‘at very least significantly reduce the risk’ to be able to change its general assessment of the situation.185 The requirements of the CAT Committee cannot be so easily determined. Comparing *Hanan Attia* to *Agiza*, it gets harder to meet the demands of the Committee.

Both bodies seem to distinguish between the suitability to eliminate the risk for the individual concerned and the reliability of the diplomatic assurance.186 The CAT Committee and the ECtHR generally accept the suitability of assurances.187 However, in some cases the assessment of factors such as the issuing authority and its factual control over the situation,

181 *Chahal*, supra n. 46 at para. 106.

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Moreover, an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation […] . The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time. The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants’ surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety. The same applies to the majority’s reliance on the fact that Uzbekistan was a Party to the Convention against Torture. In this regard we note, in particular, […] widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants’ arrest and surrender.


183 *Soering*, supra n. 46 at para. 97.

184 In *Mamatkulov*, supra n. 48, the ECtHR concluded that no real risk was established. Its decision was mainly based on the diplomatic assurances, the fact that the ECtHR had no substantiated evidence whether the individuals had actually been tortured and the existence of a follow-up procedure. In *Shamayev*, supra n. 177, the ECtHR considered that the evidence submitted was not sufficient to establish that a real risk of torture and ill-treatment existed. In addition to the missing evidence, the assurance to this extent was cited in the reasoning (ibid. at paras 348-53).

185 *Soering* supra n. 46 at para. 93.

186 The UNHCR, supra n. 39 at 9, proposes this distinction. A similar reasoning can be seen in the following passage of the Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov*, supra n. 48 at paras 10-1:

Moreover, an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation … . The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time.

187 However, the remark of the CAT Committee in *Agiza*, supra n. 23 at para 13.5, as to the consideration of the ‘scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad’ seems to indicate an increasing caution.
the general human rights situation, the possibility of challenging the removal decision and the lack of an enforcement regime may lead to the conclusion that the assurance in the specific case is not suitable. Factors which can affirm the suitability of the assurance seem to be the provision of a rather extensive monitoring mechanism\footnote{Although the monitoring mechanism in Mamakulov, supra n. 48 was not very extensive and cannot be deemed to be effective, the conclusion of the ECtHR has to be read against the background that not enough evidence for a specific risk had been established. See Venice Commission, supra n. 3 at 17. Thus, one should not interpret this judgement as simply requiring the mere existence of a monitoring mechanism.} and, in particular, monitoring in similar or related cases over a long period of time.\footnote{The former Special Rapporteur for Torture, Theo van Boven, Report submitted pursuant to General Assembly resolution 58/164, 1 September 2004, A/59/324 at para. 41, has proposed additional criteria to make an assurance suitable: the terms of the assurance should be ‘unequivocal’; effective monitoring, including, in particular, prompt, regular and private interviews by private persons or organisations; prompt access to a lawyer, recording of all interrogations and identification of the persons present, prompt and independent medical examination, no incomunicado detention or detention at undisclosed facilities. Diplomatic assurances should not be resorted to concerning countries with a systematic practice of torture (ibid. at 37). For a definition of ‘systematic’ practice of torture see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 44, Addendum 1, 18 February 1994, A/48/44/Add.1 at para. 39. HRW, supra n. 73 at 25, adds the criteria of specially trained monitors and the unhindered access to the detainee without advance notice.} The question of reliability or good faith is also discussed by both bodies. In Agiza, the violent circumstances in which the removal took place were emphasised in this context and used as evidence to rebut the submission of good faith.\footnote{Agiza, supra n. 23 at para. 13.4.} In Chahal, the ECtHR accepted the good faith of both governments to negotiate the diplomatic assurance but made clear that this will not alter its assessment of the case.\footnote{See Joint Committee, Volume I, supra n. 8 at para. 127.} Thus, both elements are required together and the argument of good faith cannot balance out an unsuitable assurance.

It is important to note, however, that both bodies do not limit themselves to an examination of the reliability or suitability of the assurance but examine the ‘substantial’ or ‘real risk’ to the individual and include the assurance in their arguments to either support or rebut these arguments.

C. Suitability, Reliability and Compatibility with Object and Purpose of the Principle of Non-Refoulement?

As pointed out above, there are different criteria proposed for assessing the suitability or reliability of diplomatic assurances. However, one could question the approach taken by the ECtHR and the CAT Committee and argue that these assurances are unsuitable, unreliable and against the purpose and object of the principle of non-refoulement.

(i) Suitability to considerably reduce or eliminate the risk

The argument for the suitability of diplomatic assurances goes as follows. Diplomatic assurances against torture and ill-treatment are a means of securing the human rights of the concerned person. The assurance-seeking government demonstrates the importance of adhering to human rights standards in its decision to remove the requested individual. Thus, assurances provide an additional level of protection.\footnote{See the British government’s argument before the Joint Committee, Volume I, supra n. 8 at para. 119.} In order to make those assurances especially effective, a monitoring mechanism should be set up. This is based on two assumptions. First, no breach will occur because the assuring state fears detection of the
breach; And, second, in the event of abuse, the sending government may hold the guaranteeing government accountable by chilling diplomatic relations.

A first criticism of this argument is the assessment of the former Special Rapporteur on Torture, Theo van Boven, who was at first in favour of the use of diplomatic assurances, but later claimed that such guarantees are not respected in most cases. The current Special Rapporteur on Torture, Manfred Nowak, takes a much harsher stance on the issue asserting that these assurances are completely 'ineffective'. The preventive effect of monitoring is disputed with reference to the experiences of international monitoring bodies and experts. And even if the assurance provides for the monitoring by an independent body or organisation, it is to be doubted that such an independent organisation will assume this task because a number of respected organisations, including the International Committee for the Red Cross, Amnesty International and Human Rights Watch, have already refused to serve in this function. Another proposal, to appoint diplomats to perform the monitoring function, can also be criticised as to its effectiveness. The possibility of using national human rights bodies should also be seen in a very critical light, given the fact that they already operate in difficult surroundings where human rights are often violated. It could be seen as a strengthening of their status but, on the other hand, there is little or no reason for them to take on this task just to relieve the sending state of its non-refoulement obligations. In addition, it could expose them to the critics of their government to make common cause with ‘terrorists’ and, thus, endanger their work in the very end.

Apart from the mere effectiveness of monitoring, the dynamics of torture make it rather implausible that a detainee will talk about torture or ill-treatment if he/she fears punishment once the monitors have left. Also, the practicability of remedies is questioned if it has been found that a breach has occurred. Finally, it is doubted whether diplomatic assurances are worth striving for–bearing in mind that torture can occur after a conviction in a fair trial or after a certain period of monitoring time. Although the risk of torture is generally higher at the

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193 HRW, supra n. 74 at 24.
194 See his recommendation to use diplomatic assurances if ‘unequivocal’ in addition to the installation of a monitoring system: Van Boven, Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002, A/57/173 at para. 34.
196 Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the General Assembly, 30 August 2005, A/60/316 at para. 46.
198 Noll, supra n. 145 at 18, cautious that a diplomat would act as an agent of human rights protection at the same time as he/she could pass on information derived from the violation of human rights or generally has the interest that no information about human rights violation in which his or her state is involved comes to light.
199 The use of national human rights institutions has been proposed by the British government, see Joint Committee, Volume I, supra n. 8 at para. 116.
201 For example, the apparent powerlessness of Sweden after having received credible allegations of torture and ill-treatment in the face of the blanket denial of the Egyptian authorities that this had occurred; see HRW, supra n. 2 at 22.
beginning of detention, it is questioned whether it is possible to assume a ‘life-long’ responsibility for people removed to another country on the basis of an assurance. To conclude, there is a multitude of arguments which question the very suitability of diplomatic assurance to eliminate or reduce the risk of ill-treatment.

(ii) Reliability

It could be said that assurances are reliable because they are given as a sign of good faith and mutual trust. The assuring state does not want to endanger its relations and the seeking state wants to comply with its obligations under international law.

Human Rights Watch disputes the reliability of diplomatic assurances from states that systematically use torture and ill-treatment. In this case, the guaranteeing governments are not trustworthy when it comes to their human rights record. Why should they respect a non-legally binding promise if they do not observe a multilateral binding human rights treaty? The UN High Commissioner for Human Rights adds that countries, which have not accepted independent monitoring of detention facilities under the CAT Optional Protocol, cannot give a credible assurance as such. Also the good faith of the sending government is disputed. It has no motivation to find out about a violation of the assurance because that would imply that it has violated its non-refoulement obligation. In addition, both states may share the common interest of gaining intelligence information. Both sending and receiving states will not place any good faith in the assurance because in any case, they are not interested in compliance at all. Thus, the function of assurances is restricted to assuring the states involved that none of them is violating human rights.

(iii) Unsuitable and unreliable?

The arguments for and against the suitability and reliability of diplomatic assurances have drawn a mixed picture. On the one hand, it is not completely inconceivable that a state wants to ensure that the human rights of the person in question are really ensured and will only enforce the removal if it is satisfied that the conditions in the assurance, objectively, offer an effective safeguard. On the other hand, one can never totally exclude the possibility that the assurance is solely used as a legal formality to circumvent the principle of non-refoulement. Thus, it is hard to argue that diplomatic assurances are generally unsuitable and unreliable if the assurance fulfils the fore-mentioned criteria. Determination in a specific case will depend on the circumstances. However, in the case of countries systematically violating human rights and using torture and ill-treatment it defies common sense to accept their legally unbinding promise to treat an individual according to the wishes of the other government. Diplomatic assurances issued by countries fulfilling these criteria can definitely not be deemed reliable.

(iv) Compatible with the object and purpose of the prohibition of torture?

202 Venice Commission, supra n. 3 at 32; and Jones, supra n. 122 at 36.
203 See Venice Commission, supra n. 3 at 32
204 HRW, supra n. 2 at 4.
205 Joint Statement, supra n. 197 at 2.
206 UN High Commissioner for Human Rights, Statement, supra n. 197.
207 HRW, supra n. 73 at 27; and Joint Statement, supra n. 197 at 3.
208 HRW, supra n. 73 at 27.
209 Noll, supra n. 145 at 123.
210 Compare for an enumeration of criteria which could satisfy this test, supra n. 189.
It could also be argued that the use of diplomatic assurances against torture and ill-treatment is contrary to the purpose and object of the principle of non-refoulement; i.e. to prevent exposure of individuals to torture and ill-treatment. As an argument for using diplomatic assurances against torture, one could hold that such assurances avoid the introduction of a balancing act and the absolute nature of the ban on torture and ill-treatment will be safeguarded. However, this presupposes that assurances are the only way out of the dilemma of the obligation to combat terrorism and the absolute ban on torture. Given the possibility of exercising criminal jurisdiction under international terrorism conventions, like the International Convention for the Suppression of the Financing of Terrorism, this legal tension can be resolved by holding persons criminally accountable. The principle of non-refoulement was never meant to serve as a possibility to avoid prosecution. In addition, one could argue that negotiating with a country about human rights standards can be used as an opportunity to engage in a human rights dialogue and to promote the importance of human rights more generally in another state. Accepting that human rights dialogues with countries which are systematically violating human rights is promoting the purpose and object of human rights treaties, one may have difficulty accepting this reasoning given the fact that the possibly positive dialogue will be restricted to the negotiating phase and after that communication will mainly revolve around the issue of whether a breach has occurred or not. One should also bear in mind that negotiating these assurances could constitute tacit acquiescence to the state of human rights protection in the receiving state and, thus, could be seen as implying that the absolute nature of the prohibition on torture cannot be taken seriously in view of the threats terrorism currently poses. It might even encourage the receiving state to carry on with its policy of torture. It was reported that the partners of the CIA in its extraordinary renditions programme clearly understood the carelessness of the US with regards to the use of torture and ill-treatment. Thus, this apprehension is not a mere invention but is grounded on real effects of this policy. However, one could avoid this criticism by stating the motivation to safeguard human rights in the request for the guarantee, pointing out the shortcomings in the other country’s human rights practices and (in order not to be a mere formality) combining this with the above mentioned criteria to make the assurance more suitable. Whether this is politically practicable is another story. Also, one could make sure by negotiating longer lasting frameworks, like a MoU, to ensure the continuation of the dialogue. But in this case, the MoU should explicitly refer to such a purpose of the monitoring framework. It was highlighted how important the possibility of challenging the deportation/extradition decision, particularly in situations where a diplomatic assurance is being used, is to effectively prevent torture and ill-treatment. This was especially emphasised in the refugee context. The profound lack of transparency and the lack of possible judicial review of the decision and the assurance put the individual at a serious disadvantage compared to other removal proceedings which take place without reliance on assurances. Not only must the individual be in the position to rebut any submissions that he is not in a ‘real’ or ‘substantial’ risk upon removal but also that the national security of the state demands such an expedited action. The ECtHR stated in Chahal that even when the national security of a state is at stake, national authorities cannot be free from effective judicial

211 Bruin and Wouters, supra n. 32 at 27.
212 Ibid. at 29.
213 Joint Committee, Volume I, supra n. 8 at para. 125
214 Ibid. at para. 123; Joint Statement, supra n. 197 at 2; and HRW, supra n. 2 at 19.
216 HRW, supra n. 2 at 19.
control. Therefore, the possibility to have the decision reviewed, including the chance to refute the suitability and reliability of the diplomatic assurance, are essential safeguards to effectively prevent torture and ill-treatment. It has to be noted that this is relatively easy to ensure in ordinary deportation and extradition proceedings. However, in an extraordinary rendition, if an assurance is actually sought (and provided that judicial review is available), one could argue that a chance to refute the assurance could provide the only possibility to legally challenge the decision or the informal removal. Apart from government officials of involved states, almost every legal commentator or human rights expert agrees upon the illegality of extraordinary renditions. Of course, every case has to be determined as to its special circumstances but one can argue that the practice of extraordinary renditions generally implies violations of international human rights law, international humanitarian law, provisions of other public international law treaties and provisions of national laws and constitutions. Bearing this in mind, it is highly questionable whether such a review would ever be provided for by law or could even be effective in these circumstances. The clear purpose of extraordinary renditions is to circumvent the such legal systems. Therefore, whereas in ordinary deportation and extradition cases providing a chance to legally review the deportation decision can remedy the alleged systematic weakness, this cannot be deemed possible in the context of extraordinary renditions. In addition to that, one could argue that diplomacy cannot constitute the necessary effective remedy that states are under an obligation to provide. Human rights are but only one factor in the tactful management of inter-state relations. Diplomacy cannot be a reliable means for protecting human rights. Legally speaking, the removing state has only a limited ability to enforce such an assurance. This criticism can be evaded by making the assurance legally binding and setting up a commission which can, in the case of a breach of the assurance, make a legally binding decision on the removal of the individual. This decision must also be enforceable against the detaining state. However, there does not seem to be a development to make assurances or MoU legally binding to this regard.

So far, the arguments for and against diplomatic assurances strongly question their compatibility with the international prohibition against torture. However, apart from the context of extraordinary renditions where they are not effectively preventing torture, they can be organised and drafted as not to violate the purpose and object of the ban. However, there are still arguments to be discussed which purport that negotiating diplomatic assurances is a systematic contradiction to the human rights system.

(v) Systematic argument

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217 *Chahal*, supra n. 46 at para. 131. This was reiterated in *Al-Nashif v Bulgaria* (2002) 36 EHRR 655 at para. 123, where the ECtHR held, ‘even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.’

218 For example in the United Kingdom. According to an internal memorandum, the British government wants to deem extraordinary renditions generally illegal but assurances provided by the US relating to these renditions should be given complete confidence. See Marty, *Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II, Report to the Committee on Legal Affairs and Human Rights 2 January 2006* at 6, available at: [http://assembly.coe.int/CommitteeDocs/2006/20060124_Ioc032006_E.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060124_Ioc032006_E.pdf).

219 For a comprehensive assessment of the illegality of extraordinary renditions, see Weissbrodt/Hörtreitere, supra n. 28 at 142.

220 For example, the Chicago Convention on International Aviation 1944, 15 UNTS 295.

221 HRW, supra n. 2 at 19.

222 For example, for the possibility to appeal to the ICJ; see Jones, supra n. 122 at 30.
One could claim that these ad-hoc agreements threaten the established human rights system by creating a two-tier system. Whereas ‘ordinary’ human rights safeguards apply to all the other detainees, ‘enhanced’ human rights protection is sought for particular individuals.223 This could violate the idea of the universality of human rights and the principle of non-discrimination in human rights law per se. But, on the other hand, one could argue that this would not attack the claim that all human beings are entitled to the same level of human rights protection, but rather that, in reality, there is a difference in the level of enjoyment of these human rights.224 Besides this, diplomatic assurances can be read under certain circumstances as to reduce the ambit of human rights protection. Noll holds that the torture definition in the MoU concluded between Sweden and Egypt in the Agiza case falls short of Article 1 of the CAT.225 Thus, there may be a risk that the human rights standards established by human rights treaties are decreased through these assurances. Although one can hold that the purpose of the MoU was not to define torture but to agree on a monitoring mechanism and therefore Article 41(1)(b) Vienna Convention on the Law of Treaties (VCLT), on the incompatibility of a modification if contrary to the object and purpose of a treaty, would not prohibit this purpose, one could object that such an agreement would violate a jus cogens norm and therefore be null and void (see Article 53 of the VCLT).226 However, Noll cautions that the acceptance of a non-specified assurance can lead to the situation where the sending state practically defers the reading of the human rights norm to the receiving state, and, therefore, legal ambiguity can be created and international human rights standards are made relative.227 Apart from these considerations, one can criticise the negotiation of these assurances as a step back in the development of human rights norms. The role of an individual in the extradition process was traditionally restricted as to being the object of this process. Extradition was regarded as solely concerned with state interests.228 With the development of human rights standards, the individual gained standing in this process. Diplomatic assurances against torture do not give standing to the individual in this process at all. Their purpose is to make sure that the sending state’s interest to not violate its obligation of non-refoulement is respected and the receiving state’s interest of exercising its jurisdiction over its national or gaining information. If the assurance is infringed upon, the focus is not laid on the violation of the rights of the individual, but on the violation of the good faith of the other state party. Thus, it is a step back regarding the recently enhanced standing of individuals in public international law. However, as the assurances do not abrogate the human rights of the individuals but rather concentrate on the safeguard of the states’ interests, this step cannot be deemed per se as a systematic violation of the human rights system.

(vi) Conclusion

223 UN High Commissioner for Human Rights, Statement, supra n. 197.
225 Noll, supra n. 144 at 112. For details of the assurance see supra n. 150; there is a considerable gap between the Egyptian legislation and the ambit of Article 1, CAT.
226 Noll, ibid. at 118, does not apply Article 53, VCLT because, in his view, there is a problem between the subsequent practice which differs from the international human rights standard. He concludes that diplomatic assurances can create legal ambiguity by contract and that, by accepting assurances without specifying what treatment should be regarded as prohibited, the sending state practically defers the interpretation of the human rights norm to the receiving state.
227 Noll, ibid. at 117.
228 Kapferer, supra n. 63 at VIII. Even the development of the political offence-exception can be explained as securing that granting asylum would not be taken as an unfriendly act towards the country of origin.
Having considered the above arguments, it is not surprising that there is a strong controversy as to the (il)legality of the use of diplomatic assurances against torture or ill-treatment. One stance argues that the use of diplomatic assurances against torture and ill-treatment is generally contrary to the absolute nature of the prohibition of torture and ill-treatment, including the non-refoulement obligation.\textsuperscript{229} On the other hand, the US government in particular seems to be convinced that the use of such diplomatic assurances is in full compliance with international law.\textsuperscript{230} Others argue that the use of diplomatic assurances may, under certain circumstances, be in accordance with international law.\textsuperscript{231} Bearing in mind the discussion above, one can conclude that as troublesome as the development of seeking and receiving diplomatic assurances against torture and ill-treatment might be, they cannot be deemed unsuitable, unreliable or contrary to international human rights law \textit{per se}, particularly if they are used in the ordinary transfer proceedings and are not sought from countries which systematically practice torture and ill-treatment. It is rather the actual use of these assurances which makes them a danger to the system of human rights. But these dangers can be balanced by fulfilling certain criteria and introducing safeguards, like the possibility to legally challenge the final removal decision in reasonable time and the suitability and reliability of diplomatic assurances or the establishment of independent monitoring system which can issue binding decisions if a violation has occurred. However, with regards to extraordinary renditions they cannot provide an effective safeguard against torture and ill-treatment or make the practice even legal. In this context, they are completely unsuitable, unreliable and contrary to international human rights law.

5. Conclusion

Summarising the elaborated findings, one cannot find a general answer to the question of whether the discussed diplomatic assurances are an effective safeguard or whether they undermine the ban on torture and ill-treatment. Assurances are only sought if the state fears that a real risk exists, i.e. they are mainly used in cases where the other state is known for its systematic use of torture and ill-treatment.\textsuperscript{232} Thus, the mere act of seeking an assurance can be seen as the acknowledgement and the proof that such a risk exists for the particular individual.\textsuperscript{233} Bearing this in mind, two scenarios seem to be rather easy to assess. Guarantees against torture and ill-treatment have to be deemed unsuitable and especially unreliable when the country in question is systematically violating human rights (this also includes violations of other than human rights to physical and mental integrity).\textsuperscript{234} In the context of extraordinary renditions, the role diplomatic assurances play is still dubious and unclear. Whatever their function is, they cannot be deemed a suitable and reliable means in preventing torture and ill-

\textsuperscript{229} Joint Statement, supra n. 197; and Nowak Report 2005, supra n. 11 at para. 32: ‘In the situation that there’s a country where there’s a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law’. He advised against developing minimum requirements for such guarantees.

\textsuperscript{230} BBC News, supra n. 5.

\textsuperscript{231} Noll, supra n. 144; and Jones, supra n. 122.

\textsuperscript{232} This leads to the astonishing situation that one part of the government can condemn a state for systematically violating human rights and another arm of the government may claim good faith in relying on an assurance against torture by even that state, e.g. in the US with regard to Syria in the \textit{Arar} case.

\textsuperscript{233} See the position of the UK government which holds that the transferral of individuals to countries where torture and ill-treatment is widespread without diplomatic assurances would amount to a breach of their obligation under Article 3, ECHR. See Joint Committee, Volume I, supra n. 8 at para. 98).

\textsuperscript{234} Jones, supra n. 122 at 3.
treatment in this extralegal context. In both variants, a removal primarily based on the assurance is in clear violation of international law.

Concerning ordinary proceedings, it has to be ensured that the process provides for adequate and effective safeguards against violations of the principle of non-refoulement. The respective proceedings must be regulated by law, the concerned individuals must have access to an independent authority to review the decision and must be able to submit evidence to challenge the earlier assessment.\(^\text{235}\) The assurance should just be one factor among all the other relevant ones; it cannot, however, exonerate the state from its obligations under human rights law or qualitatively alter the risk.\(^\text{236}\) In addition to that, the use of diplomatic assurances should not restrict the substantive examination of an asylum claim. Special considerations should be given to other factors of persecution not covered by the assurance.\(^\text{237}\) Only if the diplomatic assurance has been deemed to be a suitable and reliable means to eliminate the risk, can it form the basis for the rejection of the asylum claim and for a removal decision. Judicial review should take place before the person is removed. The monitoring mechanism should be already specified in the agreement and, if an independent body is still to be nominated, set up before the removal is enforced. Demanding that an assurance has to fulfil certain criteria should not hide the fact, that, so far, there is no reliable data as to whether it is more likely that these more detailed assurances are observed. But it can at least be supposed that they are less likely to be just ‘legal niceties’.\(^\text{238}\) The development towards concluding MoU has to be seen as twofold. On one side, they provide for a broader, more stable monitoring system than mere individual assurances. On the other hand, there is the risk that their existence might lead to a more superficial assessment of the imminent risk – detached from the individual circumstances of the case.

However, the bigger picture shows further future problems connected with the question of the practice of diplomatic assurances, including lengthy periods of detention while negotiating assurances\(^\text{239}\) and reliance on information by Western states gained through torture in the countries where the person was removed to.\(^\text{240}\) Thus, the question of the use of diplomatic assurances does not only raise issues regarding non-refoulement but the rule of law as well.

\(^{235}\) Venice Commission, supra n. 3 at 31.
\(^{236}\) Kapferer, supra n. 63 at VIII.
\(^{237}\) UNHCR, supra n. 39 at 19.
\(^{238}\) Jones, supra n. 122 at 34.
\(^{239}\) See the situation in the UK (Joint Committee, supra n. 8 at para. 132).
\(^{240}\) See A & Others v Secretary of State for State for the Home Department (2005) UKHL 56.