

# The End of the Road on Diplomatic Assurances: The Removal of Suspected Terrorists under International Law

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## Abstract

Diplomatic assurances are State promises not to mistreat the transferred individual upon his or her return and are generally sought from governments known to commit human rights violations. A number of governments continue to use diplomatic assurances to send individuals to countries known for violations of human rights. WikiLeaks recently revealed that US Government officials concluded that the end of the road on diplomatic assurances has been reached. The human rights community, however, still struggles to convince States to abstain from diplomatic guarantees. How can the human rights community produce arguments that work? Current approaches often weakly articulate the link between legal arguments and empirical evidence on the practical effects of assurances. Factual accounts of the effects stemming from diplomatic assurances, coupled with the most compelling legal arguments, can strengthen the human rights community's stance against the use of diplomatic promises. Meeting the requirements of international law with respect to the use of diplomatic assurances in the context of State efforts in countering terrorism is inherently elusive. A decade after September 11, there is abundant evidence to demonstrate that diplomatic assurances, in practice, do not minimise the human rights violations that occur during and after the transfer of an individual at risk. By systematically explaining the legal requirements for diplomatic assurances, this article provides a framework for evaluating diplomatic assurances in individual cases should governments continue to use them.

Keywords: diplomatic assurances, non-refoulement, protection against torture, terrorism, treaty-law

## 1. Introduction

In December 2010, WikiLeaks revealed that the US Government no longer believed that diplomatic assurances provide adequate safeguards against torture and mistreatment, at least not with the recently overthrown Ben Ali Government of Tunisia. Diplomatic assurances are promises made by the receiving State to ensure the individual to be transferred to its territory

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is treated in accordance with conditions set by the sending State or, more generally, in keeping with human rights obligations under international law.<sup>1</sup> Diplomatic assurances are typically sought from governments known for human rights abuses. Cables released by WikiLeaks document that in November 2008, the US Embassy in Tunis reported to Washington that it did not believe that diplomatic assurances from the Tunisian Government, whatever their content, would offer significant protection to the detainees. The Tunisian authorities ‘have denied reports [of NGOs] that one of the detainees transferred in 2007 was mistreated. The Embassy believes, however, the reports are credible. [...] [Future transferees] are likely to face similar treatment. We do not believe further assurances [...] will change this. [...] Our conclusion: we are at the end of the road regarding assurances from the [Government of Tunisia]’.<sup>2</sup>

Despite this forewarning, the United States and numerous European governments have continued to rely on diplomatic assurances. In July 2010, US authorities transferred an Algerian national detained in Guantánamo back to Algeria, explaining that the Algerian Government had promised not to torture Mr. Naji upon his return.<sup>3</sup> Mr. Naji was part of a group of Guantánamo detainees who fear returning to their home countries to the extent that they have begged authorities to allow them to remain in prison, despite never having been charged. A bill signed by President Obama on 7 January 2011 forbids the use of military funds to transfer Guantánamo inmates to the United States, where they could face trial.<sup>4</sup> This recent development makes it even more likely that the debate on diplomatic assurances will intensify, as efforts to transfer inmates cleared for release continue and most of these detainees come from States with poor human rights records.

International law does not generally outlaw the use of diplomatic assurances, but establishes legal requirements for the use of such assurances in the context of terrorism. While human rights lawyers and government officials may agree on the legal requirements outlined in this article, their analysis of the effect of the practice of diplomatic assurances is fundamentally different. Whereas human rights lawyers draw from previous cases to supplement their legal arguments with empirical knowledge on diplomatic assurances, governments generally assert that diplomatic assurances aid in preventing torture and ill-treatment, with few exceptions. Through either lens, State reliance on diplomatic assurances cannot be effectively countered by recourse to legal arguments alone.

Due attention must be paid to the interlocutory nature of legal arguments and the factual assumptions which condition the persuasiveness of international law arguments against the use of diplomatic promises. The US diplomats’ loss of faith in the efficacy of diplomatic assurances necessitates reconsideration of the legal arguments against the practice of such assurances. By identifying the available legal arguments, a framework for evaluating the value of diplomatic assurances in individual cases is provided. Legal arguments against the use of diplomatic assurances will be most convincing if they incorporate the empirical

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<sup>1</sup> United Nations High Commissioner for Refugees, Note on Diplomatic Assurances and International Refugee Protection, August 2006, para. 1. Available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=44dc81164>. Last accessed 7 July 2011.

<sup>2</sup> US Embassy in Tunis, Cable 001137, Tunisian Guantanamo Detainees: What next?, 4 November 2008. Available at <https://tunileaks.appspot.com/?p=19001>. Last accessed 7 July 2011.

<sup>3</sup> Office of the High Commissioner for Human Rights, UN rights experts on torture and counter-terrorism concerned about fate of Guantánamo detainees, 21 July 2010. Available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10224&LangID=E>. Last accessed 7 July 2011.

<sup>4</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law No. 111-383, House of Representatives 6523, Sec. 1032.

knowledge about the misuse and inadequacy of such promises. It is hoped that the identification of available legal lines of reasoning will make it easier to convincingly link the legal arguments with the factual information on the effects of diplomatic assurances. Systematically connecting the legal arguments with the available empirical knowledge about the cases in which the use of diplomatic assurances has been documented suggests that States should not rely on diplomatic assurances.

Section 1 introduces the conflicting views on diplomatic assurances. Section 2 deals with the rationale for diplomatic assurances, namely the principle of *non-refoulement* which prohibits transferring an individual to places where his or her fundamental rights would be threatened. Section 3 analyses the risk posed to individuals by State practice of diplomatic assurances based on the *non-refoulement* test. Section 4 outlines the tension between diplomatic assurances and the broader multilateral framework of human rights protection and explores treaty law as a tool for arguing against the use of diplomatic assurances that threaten to erode the regional and international protection against *refoulement*.

## 2. Why Diplomatic Assurances? Two Conflicting Narratives

Reliance on diplomatic assurances is not a novel phenomenon. In practice, early diplomatic assurances have centred on extradition agreements between States, particularly in death penalty cases or if the requested State had concerns about the fairness of judicial proceedings.<sup>5</sup> In the aftermath of attempts to counter terrorism following 9/11, authorities have increasingly relied on assurances in contexts such as expulsion, deportation and extraordinary renditions.<sup>6</sup>

State reliance on diplomatic assurances against the use of torture is affected by two simultaneous trends. On the one hand, the position of the individual in international law has undoubtedly been strengthened since World War II and States would not rely on diplomatic assurances if they were not at least rhetorically concerned about international law. At the same time, post 9/11 developments prove States' increased 'securitisation' of migration issues, i.e. in viewing migrants as potential threats to national security.<sup>7</sup>

According to States, it is unacceptable to allow 'dangerous individuals' to remain within their territory or jurisdiction.<sup>8</sup> States often argue that a conviction before a criminal court would be illusive, either because of a lack of evidence or because the authorities' determination of the persons 'dangerousness' is based on secret intelligence information that cannot be presented in court. Terrorist suspects are often nationals of States with poor human rights records, giving rise to concerns about torture.<sup>9</sup> Denouncing the *non-refoulement* principle or the prohibition of torture does not seem to be an attractive option for most States, although some

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<sup>5</sup> UNHCR, para. 3. See fn. 1.

<sup>6</sup> Columbia Law School Human Rights Institute, Past Projects in Counterterrorism & Human Rights, FOIA Litigation on U.S. Diplomatic Assurances. Available at <http://www.law.columbia.edu/human-rights-institute/initiatives/counterterrorism/pastclinicprojects>. Last accessed 7 July 2011.

<sup>7</sup> Nina Larsaeus, 'The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment' (2006) 32 *Refugee Studies Working Paper*, p. 5.

<sup>8</sup> John Bellinger, Diplomatic Assurances: Statement Before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight, 10 June 2008. Available at <http://foreignaffairs.house.gov/110/bel061008.htm>. Last accessed 7 July 2011.

<sup>9</sup> *Ibid.*

authorities have made statements that draw this conclusion into question.<sup>10</sup> When eliminating the risk of torture is not viewed as a priority over accepting diplomatic assurances from States with a marred human rights record, diplomatic assurances can be perceived as the best available ‘quick fix’.

A number of governments, including Austria, Canada, Great Britain, Italy, the Netherlands, Russia, Slovakia, Sweden, Switzerland, Turkey and the US have resorted to diplomatic assurances, maintaining that assurances were a legitimate tool to ‘address both the risk of terrorist action and the risk of the men being mistreated’.<sup>11</sup> The British Government, for instance, has exerted considerable effort in requesting the European Court of Human Rights (ECtHR) to overturn its previous case-law with regard to ‘foreign nationals in the United Kingdom who pose a grave threat to national security but whom the government is unable to deport’.<sup>12</sup> In the *Chahal* case in 1996, the ECtHR held that diplomatic assurances are insufficient in eliminating the risk of prohibited treatment in all cases, and that the ‘activities of the individual, however undesirable or dangerous, cannot be a material consideration’ in determining whether or not the person may be exposed to a risk of persecution, torture or ill-treatment.<sup>13</sup> According to the British Government at the time, this case-law seriously endangers the right to life of inhabitants in Britain since States are prevented from removing foreign terrorist suspects. The UK Government framed its arguments through a human rights lens and made extensive use of a right to life argument in its attack on the jurisprudence of the ECtHR.<sup>14</sup> In a similar vein, at least one academic commentator has recently argued that States’ obligation to protect the public from aliens suspected of terrorism implied that the *non-refoulement* principle should no longer be considered an absolute rule.<sup>15</sup>

Critics of diplomatic assurances tell a very different story. Human rights organisations and refugee agencies have underscored that past assurances have been unreliable in protecting the concerned individuals.<sup>16</sup> In addition, they emphasise the threats that the use of diplomatic assurances pose to the multilateral protection system and the absolute ban on torture.<sup>17</sup> According to this view, using diplomatic assurances comes with serious risks of eroding the framework of human rights protection and fails to address the underlying problem that the receiving State does not uphold existing obligations under international law.

The two conflictive narratives both make use of human rights language and argue to serve the interests of human rights protection. Against this background, it is urgent to not only identify

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<sup>10</sup> The Canadian Supreme Court did not ‘exclude the possibility that in exceptional circumstances, deportation to face torture might be justified.’ *Suresh v. Canada*, Canadian Supreme Court, 2002 SCC 1, 1 S.C.R. 3, para. 78.

<sup>11</sup> For instance: Barbro Holmberg, Swedish Minister for Migration, cited and translated in Gregor Noll, ‘Diplomatic Assurances and the Silence of Human Rights Law’ (2006) 7 *Melbourne Journal of International Law*, p. 104. See fn. 14.

<sup>12</sup> Kate Jones, ‘Deportations with Assurances: Addressing Key Criticisms’ (2008) 57 *International and Comparative Law Quarterly*, p. 184.

<sup>13</sup> *Chahal v. The United Kingdom*, application no. 22414/93, (1997) ECtHR, para. 79.

<sup>14</sup> *Saadi v. Italy*, application no. 37201/06, (2008) ECtHR, paras. 119-122.

<sup>15</sup> Vijay M. Padmanabhan, ‘To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement’ (2010) *Cardozo Legal Studies Research Paper* No 319. Judge Myjer replied forcefully to those who attempt to frame the issue in terms of protection of the right to life of the general population, see *Saadi v. Italy (Concurring Opinion of Judge Myjer)*, application no. 37201/06, (2008) ECtHR.

<sup>16</sup> The two most recent reports are Columbia Law School Human Rights Institute, *Promises to Keep: Diplomatic Assurances against Torture in US Terrorism Transfers*, 20 December 2010; and Amnesty International, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' against Torture*, EUR 01/012/2010, April 2010.

<sup>17</sup> For an early voice, see Alvaro Gil-Robles, Report on His Visit to Sweden, CommDH(2004)13, 8 July 2004. Available at

<https://wcd.coe.int/ViewDoc.jsp?id=758789&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864>. Last accessed 7 July 2011.

the requirements of international law in relation to the use of diplomatic assurances, but also to assess whether these requirements are likely to be met in practice.

## 2.1. *The International Prohibition against Refoulement*

Diplomatic assurances are only relevant where there are concerns about the *non-refoulement* principle. This principle means that a person must not be returned if there are substantial grounds for believing that he or she would be in danger of being subjected to prohibited treatment upon return.<sup>18</sup> The principle is grounded in three branches of international law, with slight nuances.

### 2.1.1. *Non-refoulement in Refugee Law*

Under the 1951 Convention Relating to the Status of Refugees (as amended by the 1967 Protocol Relating to the Status of Refugees) and customary international law, refugees are protected from being expelled or returned to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.<sup>19</sup>

The 1951 Convention provides for some exceptions to the principle of *non-refoulement*: Article 33 stipulates that the benefit of the *non-refoulement* provision may not 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’, and ‘a refugee having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’ Article 1F of the Refugee Convention excludes applicants from refugee status (and therefore from the *non-refoulement* provision of the 1951 Convention) if there are serious reasons for considering that he or she has committed certain serious crimes prior to the arrival in the host country.<sup>20</sup> Individuals falling under the exceptions of the Refugee Convention have no protection against *refoulement* under refugee law, but this finding does not automatically imply that a person may be returned as State obligations under human rights law remain applicable.<sup>21</sup>

### 2.1.2. *Non-refoulement in Human Rights Law*

Human rights law contains broader *non-refoulement* rules than refugee law. The most well-known *non-refoulement* provision at the international level is Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). It is widely accepted that this provision reflects customary international law.<sup>22</sup> The International Covenant on Civil and Political Rights (ICCPR) and the European Convention

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<sup>18</sup> OSCE-ODIHR, Expert Workshop on Human Rights and International Cooperation in Counter-Terrorism, ODIHR.GAL/14/07, 21 February 2007, para. 16. Available at <http://www.icj.org/IMG/OSCE-ODIHRReport07.pdf>. Last accessed 7 July 2011.

<sup>19</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, Article 33.

<sup>20</sup> *Ibid.*, Article 1F.

<sup>21</sup> The ECtHR explained that the protection afforded by the prohibition of torture and ill-treatment in the ECHR is wider than that provided by the 1951 Convention on the Status of Refugees. *Chahal*, paras. 61, 80. See fn. 13.

<sup>22</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UNHCR, HCR/MMSP/2001/09, 16 January 2002, para. 4. Available at <http://www.unhcr.org/refworld/docid/3d60f557.html>. Last accessed 7 July 2011.

for the Protection of Human Rights and Fundamental Freedoms (ECHR) include implicit rights to *non-refoulement*.<sup>23</sup> Other explicit *non-refoulement* provisions exist at the regional level.<sup>24</sup>

The sending State has a duty to assure itself, prior to implementing any measure, that the person whom it intends to remove will not be exposed to the danger of serious human rights violations. Most court cases have dealt with *non-refoulement* in relation to violations of provisions concerning the right to life and the prohibition of torture, but *non-refoulement* in human rights law may also encompass norms protected by other provisions.<sup>25</sup>

The 1996 *Chahal* case before the ECtHR stands for the Court's conclusion that the UK could not deport Mr. Chahal to India even if the government considered his deportation necessary to protect national security.<sup>26</sup> Confirmed by other human rights bodies, the absoluteness and non-derogability of the prohibition of torture and ill-treatment mean that the *non-refoulement* rule applies to all circumstances and to all individuals equally.<sup>27</sup> The concerted attempts by some governments to change these rules and the case-law on Article 3 of the ECHR have failed.<sup>28</sup> In *Saadi v. Italy*, the UK intervened as a third-party and complained that the approach adopted in *Chahal* was too 'rigid and therefore had to be altered' in view of the terrorist threat today.<sup>29</sup> The UK argued that the benefit of the doubt should be given to a State intending to deport a person and that the threat posed by the individual should be a relevant factor weighed against the possibility of potential treatment contrary to Article 3. While the Grand Chamber acknowledged that States face difficulties in protecting their communities from violence, it unanimously and emphatically rejected the views of the Italian Government as well as those of the UK. The Grand Chamber affirmed its previous position in the *Chahal* case that the conduct or the 'dangerousness' of the person was irrelevant in the *non-refoulement* test.<sup>30</sup> The UK argued that applicants whom the State considers dangerous must be required to fulfil a higher standard of proof. In other words, terrorist suspects must adduce more evidence to prove that they would be at risk of ill-treatment in the receiving country than other applicants.<sup>31</sup> The Court held that this argument was diametrically opposed to the object and purpose of the ECHR, which is to protect individuals from the 'interests of the executive branch'.<sup>32</sup> State interests cannot override absolute rights.

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<sup>23</sup> Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 12.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222, Article 3.

<sup>24</sup> Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa, 10 September 1969, 1001 UNTS 287, Article 2(3). American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, Article 22(8).

<sup>25</sup> Maarten Den Heijer, 'Whose Rights and which Rights? The Continuing Story of *Non-refoulement* Under the European Convention on Human Rights' (2008) 10 *European Journal of Migration and Law* 277, p. 277.

<sup>26</sup> *Chahal v. UK*, paras. 79-80. See fn. 13.

<sup>27</sup> UN Human Rights Committee, General Comment 29, States of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11. Concluding Observations of the Human Rights Committee, Canada, 20/04/2006; CCPR/C/CAN/CO/5, para. 15. CAT Committee: *Ahani v. Canada*, Communication no. 1051/2002, para. 10.10. CAT Committee: *Paez v. Sweden*, Communication no. 39/1996, U.N. Doc. CAT/C/18/D/39/1996 (1997), para. 154.

<sup>28</sup> The British government intervened together with Lithuania, Portugal and Slovakia in accordance with Article 36(2) of the ECHR. See Daniel Möckli, 'Saadi v Italy: The Rules of the Game have Not Changed' (2008) 8 *Human Rights Law Review* 534, p. 538.

<sup>29</sup> *Ibid*, p. 540.

<sup>30</sup> *Saadi v. Italy*, para. 139. See fn. 14.

<sup>31</sup> *Ibid*, para. 122.

<sup>32</sup> *Ibid*, para. 141.

### 2.1.3. *Non-refoulement in International Humanitarian Law*

The laws of armed conflict also contain a *non-refoulement* provision. Applicable to situations of armed conflict or occupation, the Fourth Geneva Convention provides that a protected person may in no circumstances be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.<sup>33</sup>

## 3. Evaluating Diplomatic Assurances during the Individual Risk Assessment Stage

Although international law does not *per se* prohibit the use of diplomatic assurances, courts and human rights treaty-bodies that have not ruled out diplomatic assurances as such have also deemed them insufficient in the vast majority of cases.<sup>34</sup>

Diplomatic guarantees are only relevant for supervisory bodies if they have an impact on assessing the risk faced by the concerned individual(s). Supervisory bodies must evaluate the risk posed to the individual facing prohibited treatment. Diplomatic assurances form part of the elements to be assessed in making this determination.<sup>35</sup>

The various instruments each contain, or have been interpreted to provide, a slightly different standard of scrutiny. Before the UN Committee against Torture (CAT), the complainant must substantiate that there are ‘substantial grounds for believing that he [or she] would be in danger of being subjected to torture’.<sup>36</sup> Before the ECtHR, the applicant bears the burden to convince the Court that there are ‘substantial grounds for believing that the person in question, if expelled, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country’.<sup>37</sup> The ECtHR takes into account that the occurrence of prohibited treatment is an event that may or may not occur in the future and therefore cannot be proven before the expulsion. As Judge Zupančič eloquently pointed out, the problem with this standard is that ‘one cannot prove a future event to any degree of probability because the law of evidence is a logical rather than a prophetic exercise’.<sup>38</sup> The applicant therefore does not have to prove ‘beyond reasonable doubt’ that (s)he would suffer ill-treatment. Moreover, a ‘real risk’ is not necessarily a high or substantial probability. In *Soering*, the ECtHR found a violation even if it agreed with the government that no assumption can be made that Mr Soering would certainly or even probably be subject to solitary confinement while awaiting execution of a death sentence.<sup>39</sup> For either instrument, the decisive but difficult test is to assess the risk that would be faced by the specific individual at

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<sup>33</sup> Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Article 45.

<sup>34</sup> In the only case in which the ECtHR dealt with diplomatic assurances and found no violation, it is unclear whether the existence of the diplomatic assurances was relevant for the conclusion that the individuals faced no risk. *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, (2005), para. 71-77. For other exceptions where supervisory bodies or tribunals decided in case of the government, see Committee against Torture, *Attia v. Sweden*, Communication No. 199/2002, U.N. Doc. CAT/C/31/D/199/2002 (2003); *Prosecutor v. Katanga and Chui*, Decision on the security situation of three detained witnesses in relation to their testimony before the Court, International Criminal Court, ICC-01/04-01/07 (22 June 2011).

<sup>35</sup> This is also the view of the CAT Committee, General Comment 1, Implementation of Article 3 of the Convention, U.N. Doc. A/53/44, Annex IX at 52 (1998), para. 7.

<sup>36</sup> UNCAT, Article 3.

<sup>37</sup> *Soering v. The United Kingdom*, application no. 14038/88 (1989), ECtHR at para. 88. *Chahal v. UK*, para. 74. See fn. 13.

<sup>38</sup> *Saadi v. Italy*, para. 1 (concurring opinion of Judge Zupančič). See fn. 14.

<sup>39</sup> *Soering v. UK*, para. 94. See fn. 37.

the time of the removal, rather than merely to ascertain the existence or absence of diplomatic assurances.<sup>40</sup> The ECtHR upheld this view in two recent cases against Italy: In *Ben Khemais v. Italy* and in *Toumi v. Italy*, the Court reiterated that diplomatic assurances did not suffice by and of themselves.<sup>41</sup> In the same vein, a trial chamber of the International Criminal Court (ICC) in June 2011 considered that diplomatic assurances cannot substitute an independent risk-analysis.<sup>42</sup>

As soon as a claimant successfully substantiates a claim that he or she faces a risk of torture or ill-treatment, the government must therefore show that the specific assurance does, at a practical level, alter the risk assessment. Three criteria emerge from the case law to assess the factual value of diplomatic assurances in the *non-refoulement* test. Courts and other supervisory organs have rejected arguments in favour of deeming that such assurances sufficiently reduce the risks based on adequacy, effective control and credibility.

### 3.1. Criteria in the Individual Risk Assessment

#### 3.1.1. Adequacy

Diplomatic assurances were deemed inadequate in altering the risk assessment in cases where they were phrased in unspecific terms, where they merely stated that the receiving State ratified human rights treaties, or where no mechanism was tasked to monitor compliance. Assurances that did not even contain a statement that the specific individual will not in fact be subjected to prohibited treatment were deemed insufficient in *Soering v. UK*.<sup>43</sup> In *Saadi v. Italy*; the ECtHR held that the risk of ill-treatment was not displaced by the Tunisian guarantees because the note merely mentioned that Tunisia had acceded to human rights instruments.<sup>44</sup> The CAT has held diplomatic assurances to be inadequate in *Agiza v. Sweden* based on the lack of any enforcement mechanisms.<sup>45</sup>

#### 3.1.2. Effective Control

In other cases, assurances were rejected on grounds that the promisor was not deemed to have effective control over the circumstances affecting the individual. In *Chahal*, the ECtHR concluded that even if the Indian Government gave the assurances in good faith, it did not have sufficient control over the security forces in Punjab.<sup>46</sup> A British court halted an extradition to Russia because the judge found it 'highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison

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<sup>40</sup> *Chahal v. UK*, para. 105 (emphasis added). See fn. 13. The statement is repeated in *Saadi v. Italy*, para. 148. See fn. 14. See also Committee against Torture, *Agiza v. Sweden*, Communication no. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005), para. 13.4.

<sup>41</sup> *Ben Khemais v. Italy*, application no. 246/07 (2009), para. 57. *Toumi v. Italy*, application no. 25716/09 (2011), para 51.

<sup>42</sup> *Prosecutor v. Katanga and Chui*, para. 40. See fn. 34.

<sup>43</sup> The earliest assurance examined by the ECtHR only promised that the foreign judge would be asked to bear the sending State's position in mind. Its value in altering the risk assessment was denied. *Soering v. UK*, para. 97. See fn. 37.

<sup>44</sup> *Saadi v. Italy*, para. 147. See fn. 14.

<sup>45</sup> *Agiza v. Sweden*, para. 13.4. See fn. 40.

<sup>46</sup> *Chahal v. UK*, para. 105. See fn. 13.



estate'.<sup>47</sup> UNHCR argues that the promisor must be in a position to ensure compliance domestically if the assurances should be given any weight.<sup>48</sup>

Although the application of this criterion may appear straightforward *prima facie*, courts and supervisory bodies should further clarify their approach on this issue. Existing case-law does not satisfactorily answer whether or under what circumstances the existence of a generally unsafe or abusive situation prevailing in the receiving country constitutes a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon return to that country. In *Attia v. Sweden*, the CAT answered in the negative.<sup>49</sup> The ECtHR considers that 'in the most extreme cases', a situation of general violence would be of sufficient intensity to pose such a risk. Most recently, the ECtHR ruled in *Sufi and Elmi v. UK* that the United Kingdom cannot deport two Somali nationals because 'the level of violence in Mogadishu is of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital.'<sup>50</sup> This position seems to automatically equate a situation of conflict with inhuman or degrading treatment in the sense of Article 3 of the ECHR. It seems reasonable to require that the applicant substantiates a certain level of 'personalised risk' and that a transfer should not be rendered unlawful because of a generally dangerous situation in the receiving country alone. At the same time, the generally insecure conditions in the receiving State provide the background against which it must be assessed whether the individual faces a 'real risk'.

Where a State has received diplomatic assurances, the real question should be whether the generally unsafe or abusive conditions in a State imply that the authorities will have no effective control over the implementation of the diplomatic guarantees and the circumstances affecting the individual after his or her return. In many cases, the answer to this question will advocate against the transfer, but a generally insecure and/or abusive situation alone does not render the transfer unlawful. This same logic applies to the evaluation of the fact that a government known for torture has provided the diplomatic assurance. Torture that is widespread in the receiving State does not automatically outlaw the transfer in all cases, and the 'real risk' faced by the individual must still be assessed. It is conceivable; at least theoretically, that an otherwise abusive State could potentially provide an assurance that eliminates the personal risk of the transferred individual, particularly when the individual remains in a situation of detention where the circumstances are more easily controlled by State authorities compared to a situation where an individual faces threats from a variety of sources. Nevertheless, this article shows that even in such hard to detect cases, the use of diplomatic assurances has corrosive effects on the multilateral system of human rights protection and should therefore be abstained from.

### 3.1.3. Credibility

The credibility of the receiving State is another reason why diplomatic guarantees were not deemed to alter the risk assessment to a sufficient degree. Assurances have been rejected on

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<sup>47</sup> *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, 13 November 2003. Available at [http://www.haguejusticeportal.net/Docs/NLP/UK/Zakaev\\_Judgement\\_13-11-2003.pdf](http://www.haguejusticeportal.net/Docs/NLP/UK/Zakaev_Judgement_13-11-2003.pdf). Last accessed 7 July 2011.

<sup>48</sup> UNHCR, para. 21. See fn. 1. Considerations of effective control are particularly relevant if the threat emanates from a non-state actor. See: Committee against Torture, *Elmi v. Australia*, Communication no. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (1999).

<sup>49</sup> *Attia v. Sweden*, para. 12.2. See fn. 34.

<sup>50</sup> *Sufi and Elmi v. United Kingdom*, application nos. 8319/07 and 11449/07 (2011), ECtHR, para. 218, 248.

the basis that the promisor had previously breached similar undertakings. In *Agiza v. Sweden*, the CAT concluded that because Egypt had already breached a clause in the assurance relating to fair trial, the sending State could not rely on the diplomatic assurance.<sup>51</sup> Similarly, the ECtHR did not deem credible the diplomatic assurances provided by the Tunisian authorities in the case of *Ben Khemais v. Italy*, concluding that simply because the applicant had not suffered ill-treatment immediately after his deportation, this was no credible prediction of the applicant's future fate.<sup>52</sup> In the most recent decision of the ECtHR on diplomatic assurances in *Toumi v. Italy*, the Court found that an assurance for a Tunisian national was not credible because the authorities consistently failed to investigate allegations of ill-treatment against other detainees. The Court therefore found incredible that the Tunisian justice system could guarantee respect of the diplomatic assurance.<sup>53</sup> The ICC Trial Chamber II, on the other hand, accepted diplomatic assurances from the Democratic Republic of Congo (DRC) and found them to be credible because they were given within the general legal framework for cooperation between the ICC and the DRC.<sup>54</sup>

These three considerations provide avenues to strengthen the legal arguments that diplomatic assurances fail to automatically eliminate the risk of prohibited treatment and why they do not sufficiently reduce this risk in many cases. At the same time, the normative quality, i.e. the legal bindingness of the diplomatic assurance, is not the decisive question in determining whether a specific assurance eliminates the risk of prohibited treatment.

### 3.2. 'To Bind or Not to Bind?' Is the Wrong Question

Most literature on diplomatic assurances focuses on their normative quality. A number of authors argue that only if the assurance is 'unequivocally binding', the risk assessment will be impacted at all.<sup>55</sup> In other words, if the assurance was non-binding, one would not even have to examine the above mentioned three criteria. This view seems overly simplistic. Assessing the normative quality of the diplomatic promises is not particularly helpful in determining whether or not the risk faced by the individual is in practice eliminated. Indeed, supervisory bodies have not concentrated their analysis on a determination of the normative nature of specific assurances, but rather on the aforementioned criteria mentioned above.

Whether or not diplomatic assurances are binding is important in discussing the relationship between assurances and the multilateral treaty instruments, such as the ICCPR or the ECHR (detailed further in section 4). However, as far as the individual *non-refoulement* test is

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<sup>51</sup> *Agiza v. Sweden*, para. 11.7. See fn. 40.

<sup>52</sup> *Ben Khemais v. Italy*, para. 64. See fn. 41.

<sup>53</sup> *Toumi v. Italy*, para. 53. See fn. 41.

<sup>54</sup> *Prosecutor v. Katanga and Chui*, para. 40. See fn. 34. 40. Note however that the trial chamber conditioned its approval of the transfer to the fulfilment of a range of additional measures and entrusted the ICC Victims and Witnesses Unit to oversee compliance.

<sup>55</sup> Larsaeus, p. 12. See fn. 7. Noll, p. 114. See fn. 11, writing that 'either the guarantee is legally binding and may, therefore, alter the risk assessment undertaken by a removing state, or it is not binding, and will not affect the risk assessment, in which case removal will constitute a violation of pertinent human rights norms.' Constanze Schimmel, 'Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment?' (2007) 3 *Human Rights Law Commentary*, p. 19. See also, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Manfred Nowak), A/60/316, 30 August 2005, para. 51, stating that 'diplomatic assurances are not legally binding, therefore they carry no legal effect'. For an excellent in-depth discussion of the debate about the normative quality of diplomatic assurances, see Vassilis Pergantis, 'Soft Law, Diplomatic Assurances and the Instrumentalisation of Normativity: Wither A Liberal Promise?' (2009) 56 *Netherlands International Law Review*, p. 137.

concerned, the relevant question is whether compliance is likely to result from the assurances and whether such compliance would eliminate the risk faced by the individual. Noll argues that if assurances were non-binding, they were ‘quite meaningless’.<sup>56</sup> This finding holds true only under the assumption that the absence of legal bindingness *per se* has no effect on the risk assessment. *Vice versa*, even a legally binding diplomatic assurance does not imply that the person to be removed no longer faces a risk of prohibited treatment. After all, the idea that bindingness would be more likely to result in compliance is doubtful, given that the States providing diplomatic assurances have already proven their non-compliance with binding multilateral treaties; otherwise, no State would have to engage in seeking assurances.

Theories outside the law may provide more clarity on whether compliance is likely to result from a diplomatic assurance, and whether such compliance eliminates the risk faced by the individual. Compliance theories ‘borrowed’ from international relations literature contribute a level of understanding in assessing the value of diplomatic assurances.<sup>57</sup> State practice suggests that considerations of compliance theories indeed form part of the thinking on diplomatic assurances. Switzerland, for instance, argues that assurances are only appropriate in cases of extradition, and not in cases of return, because the requesting State only has a crucial interest in respecting the assurance in cases of extradition.<sup>58</sup> British authorities have indicated that their assurances were significantly different from others because there would be ‘serious bilateral consequences if things go wrong’.<sup>59</sup> However, compliance theories inspired from international relations literature also indicate that by elevating an individual case to the diplomatic level, the individual becomes vulnerable to the exigencies of foreign relations.<sup>60</sup> Incentives will be strong for the sending State (or the individual diplomat tasked to visit the detainee) to turn a blind eye on non-compliance as detecting non-compliance would confirm critics’ suspicion that the removal was unlawful.<sup>61</sup> Nor will the receiving State have an interest in detecting and reporting abuses and portray itself as an unreliable diplomatic partner. Compliance theories also caution that externalising monitoring is no panacea, *inter alia* because any detainee who reports abuse knows that the information is going to be transmitted back to the government of the detention facility.

In sum, the risk assessment in the *non-refoulement* test is not primarily concerned with the normative nature of the diplomatic assurance, but its approximated effect in eliminating the risk faced by the individual. It follows that it cannot be excluded *a priori* that diplomatic assurances could result in a State’s legal removal of a person in a case where it would otherwise be prohibited. Such assurances would have to effectively eliminate the risk of prohibited treatment. Given that diplomatic assurances are issued by States known for human rights abuses, meeting the three criteria of adequacy, effective control and credibility is challenging. The use of diplomatic assurances is also problematic in respect of the effects on the multilateral human rights framework.

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<sup>56</sup> Noll, p. 124. See fn. 11.

<sup>57</sup> On the relationship between international relations theory and international law, see: S. Ratner & A. Slaughter, *The Methods of International Law* (Washington, D.C.: ASIL, 2004).

<sup>58</sup> Swiss Federal Council, Letter to the Executive Director of Human Rights Watch Europe and Central Asia Division, 4 April 2007. Available at [http://www.humanrights.ch/home/upload/pdf/070629\\_bundesrat\\_antwort.pdf](http://www.humanrights.ch/home/upload/pdf/070629_bundesrat_antwort.pdf). Last accessed 7 July 2011.

<sup>59</sup> Jones, p. 187. See fn. 12.

<sup>60</sup> Larsaeus, p. 2. See fn. 7.

<sup>61</sup> Noll’s article contains an excellent description of the power and loyalty dynamics at play between the diplomat, her government, the detainee and the receiving government. Noll, pp. 122-123. See fn.11.

#### 4. Evaluating Diplomatic Assurances in Relation to the Multilateral Framework of Human Rights Protection

What happens if States establish bilateral arrangements alongside human rights obligations *erga omnes*? While it was not urgent to resolve the question of the bindingness of assurances for the individual risk assessment, the normative quality of assurances is relevant to examine their effect on the multilateral treaty instruments. Should diplomatic assurances be considered legally binding undertakings (such as treaty modifications or unilateral declarations) or simply pieces of paper with political promises? This section identifies the legal arguments explaining why it is more likely than not that diplomatic assurances have a corrosive effect on the international human rights system. These legal arguments do not, however, conclusively resolve whether the giving and receiving of guarantees decreases the scope of the multilateral treaty, or on the other hand, whether it enhances protection. Hence, sound empirical analyses must be combined with the identified legal arguments in order to persuade governments to address the root causes of the problem, rather than resorting to the dangerous quick fix approach of diplomatic assurances.

Divergent views have been expressed on the normative quality of diplomatic assurances. Diplomatic assurances vary considerably in form and content. They were granted for a particular individual or group of individuals in exchanges of *notes verbales*,<sup>62</sup> while in other cases, governments have tried to systematise the use of assurances in memoranda of understanding (MoU) or by including general clauses in agreements governing the deportation of persons.<sup>63</sup> Even if each assurance has to be assessed individually, some general remarks are possible. According to the Vienna Convention on the Law of Treaties (VCLT),<sup>64</sup> the Permanent Court of International Justice,<sup>65</sup> and the International Court of Justice (ICJ),<sup>66</sup> the designation of an instrument is irrelevant. The decisive factor is the intention of the parties to create legally binding rights and obligations.<sup>67</sup>

In practice, determining the normative quality of diplomatic assurances is not clear-cut. Most human rights organisations have tended to downplay the normative quality of assurances and concluded that assurances do not normally constitute legally binding undertakings. Governments expressed divergent views. While the British Government argued that the assurances it obtained were non-binding understandings,<sup>68</sup> Switzerland expressed the view that it negotiated legally binding assurances.<sup>69</sup> The language used in many of the known examples of diplomatic assurances indicates that the intention may not have been to create legal obligations.<sup>70</sup> Aust convincingly argued that governments may prefer the non-binding

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<sup>62</sup> Moeckli, p. 537. See fn. 28.

<sup>63</sup> The UK negotiated such memoranda with several States, including Jordan, Libya, Lebanon, and Algeria.

<sup>64</sup> VCLT, May 23, 1969, 1155 U.N.T.S. 331, Article 2a.

<sup>65</sup> *Customs Regime between Germany and Austria: Advisory Opinion*, Permanent Court of International Justice, Series A/B., Fascicule no. 41 (1931), p. 47.

<sup>66</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Advisory Opinion*, International Court of Justice (ICJ), 1950 ICJ Reports at 280; *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ, 1976 ICJ Report, para. 107; *Qatar v. Bahrain (Jurisdiction and Admissibility)*, ICJ, 1994 ICJ Reports, paras. 23-25.

<sup>67</sup> Lassa Oppenheim & Hersch Lauterpacht, *International Law: A Treatise* (London: Longmans, 1995), p. 900.

<sup>68</sup> Foreign and Commonwealth Office, 'Treaties and MOUs: Guidance on Practice and Procedures' (2005) 76 *British Yearbook of International Law*, p. 703.

<sup>69</sup> Swiss Federal Council, see fn.58.

<sup>70</sup> The language used in the British MoUs for instance uses terms such as 'understanding', or 'commitments'. Registration in accordance with Article 102 of the UN Charter would indicate binding status, but no diplomatic assurances have been registered.

format for diplomatic assurances, because it offers procedural advantages such as confidentiality, flexibility and speed.<sup>71</sup>

On the other hand, viewing diplomatic assurances as unbinding understandings cannot explain why governments have considered such guarantees as the condition for the legality of the removal from the onset.<sup>72</sup> If authorities determined that without such an assurance, the removal would be illegal, they must have intended that the diplomatic assurance produces legal effects.<sup>73</sup> In response to the question of whether assurances are binding or not will thus be confusing in most cases. The conundrum surrounding the legal nature of diplomatic assurances can best be described as a reflection of the unresolved tension between the relevance of international human rights law and the power of the State to limit certain freedoms when countering terrorism. States publicly announce how important they consider compliance with the *non-refoulement* principle. At the same time, they devise a tool with chameleon characteristics: depending on the audience and purpose, States either stress the legal effects of diplomatic assurances or emphasise the confidentiality and flexibility of ‘understandings’ with their diplomatic peers. The following sub-sections outline the relationship between the assurance and the multilateral human rights framework from a treaty-law perspective assuming that a particular diplomatic assurance is legally binding.<sup>74</sup>

#### 4.1 *Unlawful Treaty Modifications Inter Se?*

Legally binding diplomatic assurances could constitute modifications to existing multilateral treaties. Diplomatic assurances as bilateral modifications of treaty obligations require the notification of all parties to the said treaty,<sup>75</sup> which may be far lengthier and more public than governments prefer. States are free to modify their treaty arrangements only if such modifications comply with the conditions in Article 41(1)b of the VCLT. The first condition stipulates that no modifications can be made if they affect the enjoyment by the other parties of their rights under the treaty.<sup>76</sup> Since the prohibition of torture is an *erga omnes* obligation,<sup>77</sup> any assurances that provide a lower level of protection than the multilateral treaty are unlawful and would breach an existing legal obligation.<sup>78</sup> Moreover, Article 41(1)b(ii) of the VCLT prohibits modifications which relate to ‘provisions, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole’. Derogating from the torture prohibition is incompatible with treaties such as the UNCAT, the ICCPR or regional instruments such as the ECHR or the American Convention on Human Rights.

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<sup>71</sup> Anthony Aust, ‘The Theory and Practice of Informal International Instruments’ (1986) 35 *The International and Comparative Law Quarterly*, p. 789.

<sup>72</sup> Noll, p. 115. See fn. 11.

<sup>73</sup> The same analysis applies to determine if assurances constitute binding unilateral declarations. A unilateral declaration is binding if the State making it has the clear intention to be legally bound by it and if the undertaking was given publicly. *Nuclear Tests (New Zealand v. France)*, ICJ, 1974 ICJ Reports, pp. 253-457.

<sup>74</sup> It is important to note that even if a diplomatic assurance is not binding in law, it might affect the multilateral framework as a ‘subsequent practice in the application of a treaty’. VCLT, Article 31(2)(b). See fn. 64.

<sup>75</sup> VCLT, Article 41(2). See fn. 64.

<sup>76</sup> *Ibid*, Article 41(b)(i).

<sup>77</sup> The prohibition of torture is part of what the ICJ termed the ‘principles and rules concerning the basic rights of the human person’. *Barcelona Traction (Belgium v. Spain)*, ICJ, 1970 ICJ Reports, para. 34. See also section 0 on the relationship with *jus cogens*.

<sup>78</sup> On this argument, see also Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden: Nijhoff, 2003), p. 83.

Hence, if empirical evidence points to a detrimental effect either to the ‘enjoyment by the other parties of their rights under the treaty’ or the ‘object and purpose of the treaty as a whole’, diplomatic assurances are unlawful. Human rights organisations or lawyers countering the use of a specific diplomatic assurance should try to show that a specific assurance protects a lower standard than the torture provision in the multilateral instrument and is thus incompatible with a non-derogable provision. For instance, any assurance that refers to physical torture rather than mental torture and ill-treatment is one that protects a lower standard than the torture provisions in the multilateral instruments.

#### 4.2 *The Object and Purpose of Human Rights Treaties*

The International Law Commission (ILC) suggests that there is a broader ‘object and purpose’ argument related to systemic interests. Even if the ordinary meaning of a treaty does not preclude a conduct, such conduct is still unlawful if it undermines the object and purpose of a convention.<sup>79</sup> In other words, even if the ordinary meaning of the multilateral human rights treaties nowhere specifically bars the use of diplomatic assurances, their use must not undermine the object and purpose of the instruments.

Does the use of assurances, even if not explicitly prohibited, defy the object and purpose of multilateral conventions and is therefore unlawful? Taking the UNCAT as an example, the object and purpose of the Convention is undoubtedly the prevention of torture and ill-treatment.<sup>80</sup> At first sight, it seems a stretch to argue that assurances are *per se* inconsistent with the prevention of torture. Does the establishment of a bilateral system next to another one defy the object and purpose of the treaties? As mentioned, governments argue that they are reinforcing the protection against torture by directly confronting the country in question.<sup>81</sup>

Both sides of the controversy can legitimately use the same legal arguments to express their (preconceived) answer. Noll explains that the ‘outcome of treaty law arguments depends entirely on a *prior* decision as to whether a specific diplomatic assurance constitutes an agreement to legalise certain forms of torture *inter se*, or an agreement to enhance protection from torture’.<sup>82</sup> It follows from this observation that only empirical evidence can support the claim that a specific diplomatic assurance is unlawful because it indeed defies the object and purpose of the legal instruments prohibiting torture. Care must thus be taken to argue why, in practice, diplomatic assurances uphold and condone, rather than eliminate torture. This leads to the remaining three available legal arguments that counter the legitimacy of issuing or accepting diplomatic assurances: non-discrimination, State obligations to end gross or systematic torture and *jus cogens*.

#### 4.3 *Non-discrimination*

Diplomatic assurances are highly problematic because they create a two tiered system among detainees. According to the multilateral framework of human rights, all detainees are entitled

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<sup>79</sup> Yearbook of the ILC 1972, Vol. II, A/CN.4/SER.A/1972/Add.1 at 292. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, ICJ Report 1986, General List No 70, paras. 270-282.

<sup>80</sup> AHCene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (The Hague: Nijhoff, 1999).

<sup>81</sup> Bellinger, see fn. 8.

<sup>82</sup> Noll, p. 116. See fn. 11.

to the equal protection of existing instruments.<sup>83</sup> All detainees – and not only those transferred from another State with assurances – must be treated in accordance with international law. Out of concern for discrimination, the International Committee of the Red Cross and other agencies refuse to undertake monitoring in detention facilities unless they have global access to all individuals in that facility.<sup>84</sup> Similarly, the establishment of guidelines on the use of diplomatic assurances was refused out of a fear of discrimination.<sup>85</sup>

#### 4.4. *State Obligations to Bring to an End to Serious Breaches of International Law*

Moreover, the ILC's draft articles on State responsibility suggest that the existence of gross or systematic torture in one country entails a positive obligation *erga omnes* to act against that violation and not to recognise or render aid in maintaining the unlawful situation.<sup>86</sup> As an important caveat, these obligations only arise in the case of 'gross or systematic failure' and only in relation to peremptory norms of general international law.<sup>87</sup>

Diplomatic assurances against torture are only sought when governments implicitly acknowledge that prohibited treatment takes place in the receiving country. No State seeks diplomatic assurances against torture if it does not at least implicitly recognise the reasonable probability that the receiving State violates the prohibition against torture, which is a peremptory norm of general international law.<sup>88</sup>

If torture is committed at a gross or systematic scale, States must not render aid or assistance in maintaining the situation and they must see to it that the violation is brought to an end.<sup>89</sup> If sending States seek assurances from States that torture systematically in order to spare one specific individual from torture, they essentially escape the two alternatives that they have themselves foreseen by agreeing to the *non-refoulement* principle: namely to either keep the individual within their jurisdiction or to cooperate to act against torture in the receiving country so that the individuals to be transferred no longer face a risk of prohibited treatment. Governments counter that they do not avoid their legal obligations, but that their diplomatic assurances enhance the rule of law. Legal advisors for the British Government claimed that they engage with NGOs on the ground, and provide capacity building and training on detection and reporting, which would from their perspective, 'bring about change'.<sup>90</sup> These arguments must be engaged with. As with the previous arguments, only sound empirical observations of past cases is able to provide convincing support for the legal argument that the

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<sup>83</sup> On this point, see also Louise Arbour, Human Rights Day Statement 2005. Available at [http://pacific.ohchr.org/arbour\\_07122005.htm](http://pacific.ohchr.org/arbour_07122005.htm). Last accessed 7 July 2011.

<sup>84</sup> International Committee of the Red Cross, Visiting Detainees, available at <http://www.icrc.org/eng/what-we-do/visiting-detainees/overview-visiting-detainees.htm>. Last accessed 7 July 2011.

<sup>85</sup> Steering Committee for Human Rights Report of the First Meeting 7 – 9 December 2005, paras. 3-5. Available at [http://www.icj.org/IMG/Annex9\\_CDDH\\_.pdf](http://www.icj.org/IMG/Annex9_CDDH_.pdf). Last accessed 7 July 2011.

<sup>86</sup> *Barcelona Traction Case*, see fn.77 at 32; ILC Draft Articles on State Responsibility, annexed to General Resolution A/RES/56/83, 28 January 2002, Article 40(1); *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, 1997 ICJ Reports, para. 7.

<sup>87</sup> ILC Draft Articles on State Responsibility, Article 40. See fn. 86.

<sup>88</sup> That the prohibition of torture is part of *jus cogens*: *Prosecutor v. Anto Furundzija (Trial Judgment)*, ICTY, Case no IT-95-17/1-PT, para. 151.

<sup>89</sup> This flows by analogy from the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, ICJ, 2004 ICJ Report, para. 159. The ICJ insisted that all States must see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

<sup>90</sup> Bellinger, see fn. 8.

use of a specific diplomatic assurance amounts to recognition of a gross or systematic violation of a peremptory norm of international law.

#### 4.5. *Jus Cogens*

Another treaty law argument is based on the observation that diplomatic assurances and treaties such as the UNCAT relate to the same subject matter. If the rule of *lex posteriori derogat legi priori* (the principle that a recent treaty rule prevails over a previous one when both treaties relate to the same subject matter) would apply, this would imply that the use of diplomatic assurances would prevail over other norms in the multilateral treaty. However, the *jus cogens* nature of torture prohibits such an application of the *lex posteriori* rule. Because the prohibition of torture is a peremptory norm, a diplomatic assurance which assures lower standards of protection than the international norms will be void and cannot render a transfer lawful.<sup>91</sup>

Indeed, there have been cases where sending governments sought assurances against torture, but failed to insist that the receiving State guaranteed protection for the full scope of the prohibition of torture. The assurances sought by the Swedish Government, for instance, did not correspond to the international standards against torture. The Swedish Government accepted a ‘domestic law reservation’ by Egypt, notwithstanding the well-known objections of Sweden to such reservations: The Egyptian assurance ended by a confirmation that the treatment of returned individuals ‘will be done according to what the Egyptian constitution and law stipulate’.<sup>92</sup> The CAT stressed that there was a considerable gap between the Egyptian legislation and the scope of the UNCAT.<sup>93</sup> Because the international norms against torture extend significantly further than Egyptian legislation, and because the relevant international norms are part of *jus cogens*, it is not surprising that the diplomatic assurances sought by Sweden were held to be insufficient by the UN supervisory Committee.<sup>94</sup> Bilaterally diluting commitments against torture is incompatible with the *jus cogens* nature of the international norms and certainly inadequate to legalise an otherwise unlawful transfer.

## 5. Conclusion

To conclude, legal arguments advocating against diplomatic assurances exist at two levels of analysis: the protection of human rights of the specifically concerned individual and the effects on the multilateral human rights framework. Diplomatic assurances could be considered lawful only if they cumulatively fulfilled the following two sets of requirements: First, relating to the concerned individual, the assurances must effectively reduce the risk of prohibited treatment below the standard of scrutiny of the relevant treaty and of customary international law – independent of whether the diplomatic assurance is legally binding or not. In this respect, the WikiLeaks cables cast further serious doubt on the reliability of diplomatic promises to diminish the risk of abuse in countries that routinely torture. Second, in relation to the effects of assurances on the broader multilateral level, diplomatic guarantees are only acceptable if they do not diminish the multilateral framework of human rights protection.

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<sup>91</sup> VCLT, Article 53. See fn. 64.

<sup>92</sup> Aide Mémoire of the Arab Republic of Egypt (12 December 2001), cited in Noll, p. 111. See fn. 11.

<sup>93</sup> Concluding Observations of the Committee against Torture, 23/12/2002; CAT/C/CR/29/4, paras. 5-6. The Egyptian penal code does not include mental torture and restricts the definition of torture to persons who are under formal accusation.

<sup>94</sup> *Agiza v. Sweden*, para. 13.4. See fn. 40.



The analysis of the legal arguments has revealed that the final assessment of diplomatic assurances depends on factual assumptions made with regard to whether assurances diminish or enhance protection. The interpretation of many international norms depends on an assessment largely based on an interpretation of factual elements, probabilities and alternatives. The underlying problem is therefore not unique to diplomatic assurances, and has proven to be particularly acute in the context of States exercise of counter-terrorist measures. Rather than surrendering in the face of States' attempts to use human rights discourse to defend procedures which they control themselves, human rights activists should continue to scrutinise governments' arguments that assurances would enhance the system of protection.

The legal arguments outlined above are most useful when coupled with factual evidence showing that governments' assumptions on the positive effects of assurances are, more often than not, inaccurate. The framework presented here should therefore facilitate meeting the main challenge faced by the human rights movement: successfully pairing the legal arguments with the empirical evidence confronting governments' rhetoric on the supposedly benevolent effects of such assurances against torture. This debate will continue to be particularly relevant in the near future. The closure of the Guantánamo detention facility (and others) is still outstanding and a solution has not been found for many of the remaining detainees. Human rights activists will need to state very clearly that closing the facility is not enough, but that the individuals must not be sent to places where they risk torture and other abuses. Most of those still at Guantánamo but cleared for release are nationals of abusive States. While the new military appropriations bill of 2011 further restricts options to transfer detainees to US soil for trial,<sup>95</sup> third States have only partially been forthcoming in accepting to host the most vulnerable of them. It is therefore predictable that the debate on diplomatic assurances will re-emerge as an important issue to monitor for the human rights movement.

Diplomatic assurances – as the term implies – are subject to the limits of diplomacy.<sup>96</sup> Are there alternatives? States have interpreted provisions within human rights instruments to mean that they must either keep these individuals within their jurisdiction or, alternatively, work towards the eradication of torture in receiving States. Notwithstanding disagreement on the true effects of diplomatic guarantees, States must be urged to withstand the temptation of relying on diplomatic assurances. Although efforts towards the eradication of torture and ill-treatment are not a short term endeavour, such efforts correspond to the object and purpose of the obligations that States have voluntarily accepted by negotiating, ratifying and by abstaining from amending a range of human rights instruments carefully elaborated in the aftermath of World War II.

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<sup>95</sup> Ike Skelton National Defense Act. See fn. 4.

<sup>96</sup> B. Ward, 'A fig-leaf for torture: The use of diplomatic assurances in the OSCE region' in OSCE, *Yearbook 2005* (Baden-Baden: Nomos, 2006), p. 183.