

Expelling Undesirable Foreigners: The Challenge of Human Rights

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1. Introduction

This paper analyses the instruments States use to transfer excluded asylum-seekers and other migrants who are suspected of serious criminality but cannot be removed from the territory of the host country under human rights law. The focus is on diplomatic assurances - whether framed or not within Memoranda of Understanding (MoUs) – and their reliability in the removal of the risk of ill-treatment in the receiving country. More specifically, this paper aims to investigate whether diplomatic assurances are able in principle to reduce the risk of *refoulement*, and whether they are effective in practice in preventing torture and ill-treatment. In addressing this question, the case law of international human rights bodies, such as the UN Human Rights Committee (HRC), the Committee against Torture, and the European Court of Human Rights (ECtHR) will be analysed in light of Article 3 of the Convention against Torture (CAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and Article 3 of the European Convention on Human Rights (ECHR), which either explicitly or implicitly endorse the prohibition of *refoulement*.

Over the last decade, a number of Western countries, *in primis* the United States, Canada, the United Kingdom, Sweden, Austria, Germany, Italy, Spain, the Netherlands, and Russia relied on diplomatic assurances before sending a notable number of individuals, considered threats to the public safety of the host country, to undergo interrogation and trials abroad.¹ Particularly interesting, for the purpose of this paper, is the case of the UK. Indeed, the idiosyncratic response of the UK to terrorism has resulted in the negotiation with third countries of *Memoranda of Understanding* (MoUs), standardized written accords that enumerate a long list of assurances on the fair and humane treatment to be afforded to the returnees. MoUs stand, therefore, as framework agreements reflecting a mutual understanding on respect of human rights in every case of removal.

Diplomatic Assurances can take a variety of forms. In the context of the transfer of a person from one State to another, this shorthand term

Refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.²

¹ For a survey of developments on the use of diplomatic assurances by European governments and domestic jurisprudence, see, Amnesty International (AI), *Dangerous Deals: Assurances in Europe* (Report 2010) 18. On the practice of the US and Canada, see, e.g., Ashley Deeks, *Promises not to Torture: Diplomatic Assurances in US Courts* (American Society of International Law 2008) <<http://www.asil.org/files/ASIL-08-DiscussionPaper.pdf>>; John Cook (ed), 'State Department Legal Advisor Testifies regarding Diplomatic Assurance (2008) 102(4) AJIL 882-884; Aristoteles Constantinides, 'Transjudicial Dialogue and Consistency in Human Rights Jurisprudence: a Case Study on Diplomatic Assurances against Torture' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 289-91.

² UNHCR, 'Note on Diplomatic Assurances and International Refugee Protection' (Geneva, August 2006) 2.

After the September 11th attacks, migration control has been framed as a national security objective, thus stressing the commitment of governments to protect their citizens' safety from foreigners often suspected of exploiting the Geneva Convention to obtain residence abroad.³ The scope *ratione personae* of this paper comprises individuals whose refugee status has been outright denied under Article 1(f) of the Geneva Convention and people removed under Article 33(2) of the same treaty after a successful status determination procedure. Indeed, diplomatic assurances have been applied to refugees who are considered a threat to the security of the host country and removed under Article 33(2) of the Geneva Convention, according to which the benefits of *non-refoulement*:

May not [...] be claimed by a refugee for 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.

Another category of individuals subject to deportation with assurances includes those persons *ab initio* excluded from refugee status under Article 1(f) whereby:

The provisions of 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.⁴

Failing to qualify for refugee status, but sheltered from removal under international human rights law due to the risk of undergoing inhuman treatment in their country of origin,⁵ they end up to be trapped in a legal and 'status' limbo. Diplomatic assurances have, thus, been used to facilitate their transfer to third countries in a legally sustainable fashion.

Although States have mainly relied on diplomatic assurances in the field of extradition, their potential application is broader.⁶ They may be utilized also in the context of

³ See, Elspeth Guild, *Security and Migration in the 21st Century* (Polity Press 2009).

⁴ Burgeoning literature has been produced on exclusion from refugee status. See, *inter alia*, James C Simeon, 'Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11' (2010) RSQ 29(4) 104; Elspeth Guild and Madeline Garlick, 'Refugee Protection, Counter-Terrorism, and Exclusion in the European Union' (2010) RSQ 29(4) 63; Thomas Straub, 'The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law' (2012) IJRL 24(4) 892; Jennifer Bond, 'Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and 'Guilty' Asylum Seekers' (2012) IJRL 24(1) 37; Satvinder Singh Juss, 'Complicity, Exclusion, and the "Unworthy" in Refugee Law' (2012) RSQ 31(3) 1; Satvinder Singh Juss 'Terrorism and the Exclusion of Refugee Status in the UK' (2012) *Journal of Conflict and Security Law* 17(3) 465; Geoff Gilbert, 'Human Rights, Refugees, and Other Displaced Persons in International Law' in Erika de Wet and Jure Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 196-205; Geoff Gilbert, 'Exclusion and Evidentiary Assessment' in Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005).

⁵ Pursuant to Article 3(1) of the CAT, '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.' The UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have implicitly derived the prohibition of *refoulement* from the prohibition of torture enshrined in Article 7 and Article 3 of the relevant treaties, respectively.

⁶ Pursuant to Article 1 of the European Convention on Extradition, 'The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against

deportation/expulsion and ‘extraordinary rendition’ to undergo interrogation elsewhere.⁷ Unlike extradition, which requires formal acts of two States, expulsion or deportation occur on the basis of unilateral decisions of the sending State, in principle consistently with international human rights and refugee law.⁸ However, in many cases, ‘asylum, immigration, and extradition removal proceedings overlap.’⁹ For example, in a number of cases, persons whose extradition is requested by the country of origin are asylum seekers or individuals excluded from refugee status on grounds of terrorism. In these circumstances, the existence of diplomatic assurances is seen as part of the factual evidence in determining the *non-refoulement* test.¹⁰

2. Diplomatic assurances and non-refoulement

Diplomatic assurances are not explicitly mentioned in international human rights treaties. Nonetheless, States regularly use them as a means to demonstrate compliance with their *non-refoulement* obligations, and as a consequence, relevant human rights treaty monitoring bodies rely on assurances in the pre-removal risk assessment. In December 2004, the House of Lords held indefinite detention of foreign national terrorist suspects under Part 4 of the ATCSA 2001 to be incompatible with the ECHR.¹¹ This decision forced the UK to increasingly rely on diplomatic assurances in order to allow British courts to authorize smooth

whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.’ Often regulated through bilateral agreements, *extradition* can also be defined as ‘the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which being competent to try and to punish him, demands the surrender.’ See, *Terlindem v Adams*, 184 US 270 (1902) 289.

⁷*Expulsion* concerns an ‘administrative or judicial act, which terminates the legality of a previous lawful residence.’ See, COM(2002) 175 final, Annex I ‘Proposed Definitions’ <http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0175en01.pdf> accessed 22 June 2013. *Deportation* refers to ‘the act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain.’ See, EMN Glossary, ‘Deportation’ <<http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=D&id=66>> accessed 22 June 2013. According to the ECtHR, the term ‘extraordinary rendition’ refers to ‘an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.’ See, *El-Masri v Former Republic of Macedonia* App no 39630/69 (ECtHR, 13 December 2012) (El-Masri) para 221.

⁸ UNHCR, *Note on Diplomatic Assurances and International Refugee Protection* (2006) 2.

⁹ Martin Jones, ‘Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings’ (2006) 8 EJML 9, 11.

¹⁰ Vasillis Pergantis, ‘Soft Law, Diplomatic Assurances and the Instrumentalisation of Normativity: Wither a Liberal Promise?’ (2009) 56(2) NILR 137, 148.

¹¹*Y v SSHD* [2006] UKSIAC 36/2004_2, para 222. See also, *A and Others v UK* where the ECtHR found a violation of Article 5(1) of the Convention in respect of nine of the eleven applicants who were detained as suspect international terrorists and whose presence at liberty in the UK gave rise to a threat to national security (para 171). It also held that ‘one of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported “for the time being”’ (para 167). Therefore, as none of the nine applicants were persons ‘against whom action [was] being taken with a view to deportation or extradition’, their detention did not fall within the exception to the right to liberty set out in paragraph 5(1)(f) of the Convention (para 170). The Court also added that it ‘does not accept the Government’s argument that Article 5(1) permits a balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court’s jurisprudence under sub-paragraph (f) but also with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5’ (para 171). See, *A and Others v UK* App no 3455/05 (ECtHR, 19 February 2009).

deportation of unwanted foreigners in compliance with international human rights standards. MoUs were perceived as the suitable instrument to create a stable and standardized formal basis for deportation. It was thus presumed that, by obtaining international legitimacy, the UK's deportation with assurances policy would have been less exposed to the attacks of human rights circles, which have always been reproachful of any stratagem designed to displace the risk abroad through cooperation with third countries.

Although MoUs and individualized diplomatic assurances do not provide the legal basis for the return of a person to her country of origin, they are often used as a *conditio sine qua non* to removal. And, in numerous cases, national and (mostly) international courts have found that, despite assurances, a violation of the principle of *non-refoulement* occurred or would occur upon removal to a third country. Some domestic cases regarding transfer by means of MoUs are herein mentioned to illustrate the challenges national bodies have to face when dealing with 'unreturnable' migrants. However, this paper does not aim to make a systematic review of national decisions, as it only revolves around the case law of international human rights bodies.

In the *DD and AS v The Secretary of State for the Home Department*,¹² SIAC blocked the removal of two individuals from the UK to Libya by stating that, although it was unlikely that the assurances would not be transgressed, the risk that they would be ill-treated was not 'well-nigh unthinkable.'¹³ Detained under immigration powers, the appellants were deemed a threat to the national security of the host State. While Mr. DD was alleged to be a member of the Libyan Islamic Fighting Group engaging in terrorist activities,¹⁴ Mr. AS claimed asylum 'on the basis that he and his family had been persecuted and tortured by the Gaddafi regime because of their true Islamic views.'¹⁵

Formally, Libyan domestic law prohibited torture and subjected perpetrators to criminal sanctions. Nevertheless, torture was *de facto* practiced, as NGOs documented only few months before the signature of the UK-Libya MoU.¹⁶ Therefore, in reviewing the case, SIAC noted that individual diplomatic assurances negotiated under the MOU between Libya and the UK lacked efficacy in the Libyan context and, as such, could not be considered a reliable accord.¹⁷ SIAC found flawed the argument that Libya would honour the assurances in the interest of preserving amicable political relations. Moreover, the possibility to leave a violation undetected as a consequence of weak monitoring mechanisms brought contingency to the view that 'there [was] too much scope for something to go wrong, and too little in place to deter ill-treatment or to bring breaches of the MoU to the UK's attention.'¹⁸

In the *Youssef v The Home Office* case,¹⁹ assurances were sought because of 'evidence that detainees were routinely tortured by the Egyptian Security Service.'²⁰ However, the British request for an assurance concerning prison visits was declined by the Egyptian government

¹² *DD and AS v SSHD*, SC/42/2005 and SC/50/2005

¹³ *ibid* para 371.

¹⁴ *ibid* para 4.

¹⁵ *ibid* para 6.

¹⁶ Rebekah Braswell, 'Protection against Torture in Western Security Frameworks: The Erosion of *Non-refoulement* in the UK-Libya MOU' (2006) RSC Working Paper 10, 21-22.

¹⁷ *DD and AS*, para 371.

¹⁸ *ibid* para 428.

¹⁹ *Youssef v The Home Office* [2004] EWHC 1884 (*Youssef*).

²⁰ *ibid* para 6.

‘on the ground that they would constitute interference in the scope of the Egyptian judicial system and an infringement of national sovereignty.’²¹ Mere suspicion of, or a conviction for a particular crime cannot as such justify exclusion from protection.²² The seriousness of the security threat must be individually assessed and be proportional to the risk for the person intended to be removed.²³

3. The Committee against Torture and the Human Rights Committee

International bodies have often found assurances inadequate in trimming down the personalized risk to a level where there is no real risk or ‘substantial grounds’, especially where no effective monitoring mechanism has been set out, when they have been phrased in a very indeterminate and inaccurate manner, or when their strength has been grounded only on the ratification of main international human rights instruments by the receiving country. The decisive issue is not whether assurances have been given, but whether and to what extent they can be used as an instrument to eliminate the risk the individual would face, at the material time of removal.²⁴ In this regard, it is to be noted that international human rights bodies have not banned the use of diplomatic assurances as a tool to enhance overall protection by either eliminating the risk of torture altogether or reducing such a risk below the threshold required to avoid *refoulement*.

In the *Agiza v Sweden* case, the Committee against Torture held that the deportation with assurances did not reduce the manifest risk of torture and ill-treatment, thus amounting to a violation of Article 3. Despite the assurances that the individual would not be ill-treated and would be granted a fair trial upon return, the Committee determined that:

It was known, or should have been known, to the [Swedish] authorities [...] that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.²⁵

Even without a finding on the treatment of Mr. Agiza in his home country, where torture was widespread, the Committee against Torture argued that a violation of *non-refoulement* could be foreseen on account of his treatment on Swedish soil where also American and Egyptian authorities participated to the apprehension, intimate body search, and forced deportation of the applicant at Bromma airport. By the same token, the HRC held that the efforts placed by Sweden to obtain diplomatic assurances from Egypt were sufficient to have warned the sending government of the risk of torture and inhuman or degrading treatment if Mr. Alzery were returned there. Violation of Article 7 was indeed recorded.

In *Alzery* and *Agiza*, the view of the Committee against Torture and the HRC that assurances were not sufficient to reduce the risk of torture upon removal²⁶ seemed to concede that international human rights treaty monitoring bodies would be prepared to accept

²¹ *ibid* para 14.

²² Lauterpacht and Bethlehem 2003, 118.

²³ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd edn, Oxford University Press 2007) 239-41.

²⁴ See, *Chahal v UK*, para 105; *Saadi v Italy*, para 148; *Agiza v Sweden*, para 13.4.

²⁵ *Agiza v Sweden*, para 13.4.

²⁶ *ibid*; *Alzery v Sweden*, paras 11.3-11.5.

assurances if differently modelled through supervision and enforcement mechanisms. For example, in the *Pelit v Azerbaijan* case concerning the issuance of diplomatic assurances by Turkey to Azerbaijan, the Committee against Torture argued that:

While a certain degree of post-expulsion monitoring of the complainant's situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise [...] nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy.²⁷

Another noteworthy case is *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan* concerning the extradition to Uzbekistan of four rejected refugees charged *in absentia* of terrorism. In the Committee's view, the applicants' extradition amounted, *inter alia*, to a violation of Article 7 of the Covenant. Indeed,

The procurement of assurances from the Uzbek General Prosecutor's Office, which, moreover, contained *no concrete mechanism for their enforcement*, was insufficient to protect against such risk. The Committee reiterates that at the very minimum, the assurances procured should contain such a *monitoring* mechanism and be safeguarded by *arrangements made outside the text of the assurances* themselves, which would provide for their effective implementation (emphasis added).²⁸

The Committee noted that the assessment of the risk of *refoulement* prohibited by Article 7 of the ICCPR should be conducted in light of the information that was known or ought to have been known at the time of extradition, and '[did] not require proof of actual torture having subsequently occurred, although information as to subsequent events is relevant to the assessment of initial risk.'²⁹ The existence of assurances is one of the elements relevant to the overall determination of the risk. Since public reports had widely described the inhuman treatment meted out to detainees, especially those held for political and security reasons, a real risk of torture could be envisaged. In *Valetov v Kazakhstan* (March 2014), the HRC concluded that the decision of the Kazakh authorities to extradite the applicant to Kyrgyzstan amounted to a violation of Article 7 of the Covenant as the procurement of general assurances from the Prosecutor General of Kyrgyzstan could not be considered an effective mechanism protecting the author from the risk of torture. According to the Committee, such a failure was attributable to the absence of practical arrangements in the assurances and to a lack of sufficient efforts by Kyrgyzstan to ensure the effective implementation of the assurances.³⁰

In its 2013 Report to the UK, the Committee against Torture noted with concern the State party's reliance on diplomatic assurances to smooth the deportation of suspected terrorists to countries in which the widespread practice of torture is alleged. It thus urges the UK to refrain

²⁷*Pelit v Azerbaijan*, Comm no 281/2005 CAT/C38/D/281/2005, 5 June 2007, para 11.

²⁸*Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan*, CCPR/C/93/D/1461,1462,1476 & 1477/2006 (HRC, 31 July 2008) para 12.5.

²⁹*ibid* para 12.4.

³⁰*Valetov v Kazakhstan* Comm no 2104/2011 (HRC, 17 March 2014) para 14.6. In this case, the applicant did not apply for asylum, but tried to prove that he had already been heavily tortured in Kyrgyzstan while in detention for an ordinary crime, and that extradition to Kyrgyzstan would lead again to his arrest and torture, which is systematically practiced by the authorities of the requesting State (para 3.1).

from seeking and relying on diplomatic assurances where there are substantial grounds for believing that the person at issue would run the risk of being subjected to torture upon return. Moreover, it adds that:

The more widespread the practice of torture or cruel, inhuman or degrading treatment is, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.³¹

4. The ECtHR

The ECtHR has always attached greatest importance to the human rights record of the receiving country in order to assess the safety of removals, especially when carried out in the framework of national security decisions. Although it has reviewed cases involving diplomatic assurances against torture and ill-treatment prior to 2008,³² in the well-known *Saadi v Italy* case, the Court laid out some key criteria for gauging reliability of diplomatic assurances on a case by case basis. The respondent government justified expulsion of Mr Saadi to Tunisia on the basis of diplomatic assurances according to which the requested State had given ‘an undertaking to apply in the present case the relevant Tunisian law [...] which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner’s lawyer and family.’³³ The Tunisian Ministry of Foreign Affairs provided the assurance in the form of a *Note Verbale* the day before the Grand Chamber hearing. The ECtHR pointed out that the individual ‘real risk’ of ill-treatment for the deportee could not be obliterated by such a generic note, which was limited to observing that Tunisian laws respected the rights of prisoners, and that Tunisia had acceded to the relevant international treaties and conventions.³⁴

The Court held that if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention. It also insisted on the importance of looking beyond the oath of the receiving State and examining its actions and human rights track record. In this regard,

The existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly

³¹ Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session* (6-31 May 2013) paras 18-19.

³² See, e.g., *Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR, 12 April 2005) para 153. In this extradition case, the Court did not find violation of Article 3, and deemed acceptable to rely on assurances against torture and ill-treatment from Russia; see also, *Burga Ortiz v Germany* App no 1101/04 (ECtHR, 16 October 2006) 9–10; *Sanchez Munte v Germany* App no 43346/05 (ECtHR, 16 October 2006) 7–8. In all these cases, the Court held that Germany did not violate Article 3 by extraditing the applicant. In their dissenting Opinion to the *Mamatkulov v Turkey* decision, Judges Bratza, Bonello and Hedigan strongly criticized the decision of the Court for the weight given to the assurances. They also stressed 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.’ See, *Mamatkulov v Turkey* Apps nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) 295, 303, 322 and para 10 of the dissenting Opinion.

³³ *Saadi v Italy*, para 116.

³⁴ *ibid* para 147.

contrary to the principles of the Convention.³⁵

The Court also added that the fact that Tunisian authorities had given the diplomatic assurances requested by Italy,

Would have not absolved the Court from the obligation to examine whether such assurances provided, in their *practical application*, a sufficient guarantee that the applicant would be protected against the risk of treatments prohibited by the Convention [...] The weight to be given to the assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.³⁶

In the *Ben Khemais v Italy* case, the ECtHR reached the same conclusion, affirming that it is up to the Court to determine, on a case-by-case basis, whether it can be firmly established that diplomatic assurances provide effective protection against ill-treatment.³⁷ Despite Tunisian authorities issued a *Note Verbale* more detailed than in *Saadi*, Mr Ben Khemais was not allowed to receive visits from Italian diplomatic authorities or the foreign lawyer representing him before the ECtHR.³⁸

In *Labsi v Slovakia*, the Court ruled that the expulsion of the applicant to Algeria breached Article 3 of the Convention as the assurances by the Algerian authorities did not provide, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of ill-treatment. Indeed, upon return, the deportee had been detained by the Department of Intelligence and Security (DRS) for twelve days before being transferred to El Harrach prison for a trial. Moreover, no follow-up existed to the request for a visit of an official of the Slovakian Ministry of the Interior to be arranged with a view to examining the applicant's situation in Algeria.³⁹ As no contact with the applicant was guaranteed, 'compliance with the assurances given could not be objectively verified through diplomatic or other monitoring mechanisms.'⁴⁰

In *Trabelsi v Belgium* (September 2014), the Court concluded that the extradition of a Tunisian citizen to the US exposed the applicant to the risk of inhuman and degrading

³⁵ *ibid.* See also, *Nizamov and Others v Russia* App no nos. 22636/13, 24034/13, 24334/13 and 24528/13 (ECtHR, 7 May 2014) para 43; and, in a different context, *Hirsi v Italy*, para 128. In many other cases, the Court was not persuaded that the existence of assurances could guarantee effective protection against violations of Article 3 when there was a dismal human rights situation with systematic use of torture in the readmitting country, regardless of the formal ratification of human rights instruments. See, e.g., *Khaydarov v Russia*, para 105, 111 and 115; *Ismoilov v Russia* App no 2947/06 (ECtHR, 24 April 2008) para 127; *Soldatenko v Ukraine*.

³⁶ *Saadi v Italy*, paras 147-8. The Courts makes reference to the *Chahal v UK* case, para 105. See also, *Zarmayev v Belgium* App no 35/10 (ECtHR, 27 February 2014) para 92; *Izomkhon Dzhurayev and Others v Russia* App no 1890/11 (ECtHR, 3 October 2013) para 111; *Labsi v Slovakia* App 33809/08 (ECtHR, 15 May 2012) para 119.

³⁷ *Ben Khemais v Italy*, para 57. In many other cases, the Court asserts its competence in reviewing assurances. See, e.g., *Trabelsi v Belgium* App no 140/10 (ECtHR, 4 September 2014) para 151; *Ryabikin v Russia* App no 8320/04 (ECtHR, 19 June 2008) para 119; *Abdulazhon Isakov v Russia*, para 111; *Muminov v Russia*, para 97.

³⁸ Such a custodial condition *de facto* hindered the possibility for the detainee to access international human rights bodies and courts. The lack of enforcement mechanisms can also testify to the reluctance of the requesting and requested States to commit themselves to provide the deportee with an effective remedy against violations of his fundamental rights caused by the inhuman treatment inflicted by the authorities of the readmitting country. Reference to the lack of enforcement mechanisms as an element of inadequacy of diplomatic assurances was pointed out by the Committee against Torture in the *Agiza v Sweden* case, para 13.4.

³⁹ *Labsi v Slovakia*, paras 130-1

⁴⁰ *ibid* para 130

treatment, as the life sentence liable to be imposed on Mr Trabelsi cannot be described as reducible for the purposes of Article 3 of the Convention.⁴¹ Indeed, by referring to the diplomatic assurances provided by the requesting State, the Court held that:

The US authorities' explanations concerning sentencing and their references to the applicable provisions of US legislation on sentence reduction and Presidential pardons are very general and vague and cannot be deemed sufficiently precise (see, *Othman (Abu Qatada)*, para 189).⁴²

A crucial requirement for the effective implementation of diplomatic assurances rests on the capacity of the receiving State to exercise effective control over the whereabouts of the individual. Considering the way in which torture is secretly administered and the difficulty of obtaining information by the captive, national and international courts have at times halted extradition and deportation when they believed it to be highly unlikely that the government giving assurances, despite its good faith, was *de facto* able to enforce its undertakings. In the *Chahal* case, the ECtHR was 'not persuaded that the [...] assurance would provide Mr Chahal with an adequate guarantee of safety.' This lack of confidence about the condition for removal was mainly due to the lack of sufficient control over the security forces of a certain prison.⁴³

Instead, in *Soering v UK*, the key factor against extradition was the independence of the executive and the judiciary in the receiving State. Despite the friendly relations between the UK and the US, because of the independence of the judiciary, the Court considered the assurances issued by the Federal Government absolutely insignificant. Since Mr Soering was charged with an offence falling under the jurisdiction of the Commonwealth of Virginia, the Federal State was not competent to issue a binding diplomatic assurance. Additionally, even informing the judges of the wishes of the UK, at the stage of sentencing, could not prevent them from imposing the death penalty.⁴⁴ Since Virginia courts could not bind themselves in advance to a certain result for a future decision, the risk of the death penalty being imposed could not be eliminated.

Therefore, of essence is whether the government issuing the assurances is able to control the territory and any public official operating within its territory. Only if the responsible entity has the power to enforce the agreements and can be trusted in this role, can the assurances be used to assess the likelihood of a State's compliance with a certain agreement. The diverse elements considered by the Court to assess the suitability of an assurance also demonstrate how the ratification of human rights instruments by the requested State or relevant domestic law is not sufficient to consider the receiving country safe for the individual in question.

Mutatis Mutandis, in the *MSS v Belgium and Greece* case concerning the intra-EU transfer of an asylum seeker under the Dublin system, the ECtHR establishes the refutability of the 'presumption of safety' and of the semi-automatic application of mutual trust:

⁴¹ *Trabelsi v Belgium*, para 138-9. Mr Trabelsi's application for refugee status and subsidiary protection was rejected on the grounds that he had committed offences contrary to the aims and principles of the United Nations within the meaning of Article 1(f) of the Geneva Convention.

⁴² *ibid* para 135

⁴³ For example, in the *Chahal v UK* case, the ECtHR recognized the lack of control by the Indian Federal Government over the Punjabi military forces. See, *Chahal v UK*, para 105. See also, the decision taken by a British Court in a case concerning extradition to Russia: *The Government of the Russian Federation v Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, 13 November 2003.

⁴⁴ *ibid* para 97.

The Belgian government argued that in any event [the Belgian authorities] had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.⁴⁵

To my knowledge, after *Saadi*, the Court ruled on thirteen cases concerning individuals (generally alleged terrorists and suspects of criminal conspiracy linked to fundamentalist Islamist groups) who faced deportation or who had already been transferred by Italy to Tunisia under the auspices of diplomatic assurances. It determined in all but one case that removal of the applicants did or would violate Article 3.⁴⁶ A crucial hurdle the Court noticed was down to the existence of the same formulaic assurances within a standardized document indicating the data of each single applicant, who had not yet been deported.⁴⁷ Despite the fact that assurances for the two applicants who had already been removed were more specific, the Court found a violation of the principle of *non-refoulement* embodied in Article 3.⁴⁸ Likewise, in *Akram Karimov v Russia*, the Court considered that the assurances given by the Uzbek authorities were couched in general terms and did not provide any evidence of the existence of enforcement and monitoring mechanisms.⁴⁹

In a large number of cases, the Court declared that no trust could be placed in a country with a dismal human rights record of monitoring and protection of detainees against torture and mistreatment especially when sources have reported unlawful practices resorted to or tolerated by the authorities of that State.⁵⁰ In rejecting the reliability of the assurances

⁴⁵ *MSS v Belgium and Greece*, para 353. See also, Moreno-Lax 2012b.

⁴⁶ See, *Toumi v Italy*, para 85; *Trabelsi v Italy* App no 50163/08 (ECtHR, 13 April 2010) para 52; *Sellem v Italy* App no 12584/08 (ECtHR, 5 March 2009) para 43–44; *Abdelhedi v Italy*, App no 2638/07 (ECtHR 24 March 2009) para 50–51; *Ben Salah v Italy* App no 38128/06 (ECtHR, 24 March 2009) paras 39–40; *Bouyahia v Italy* App no 46792/06 (ECtHR, 24 March 2009) paras 42–43; *CBZ v Italy* App no 44006/06 (ECtHR, 24 March 2009) paras 43–44; *Darraji v Italy* App no 11549/05 (ECtHR, 24 March 2009) paras 66–67; *O v Italy* App no 37257/06 (ECtHR, 24 March 2009) paras 44–45; *Soltana v Italy* App no 37336/06 (ECtHR, 24 March 2009) paras 46–47; *Hamraoui v Italy* App no 16201/07 (ECtHR, 24 March 2009) paras 45–46; *Ben Khemais v Italy*, paras 61–65. In the *Cherif* case, the Court did not address the application of Article 3 as the applicant failed to provide a power of attorney document authorizing the named party to pursue the case. See, *Cherif v Italy* App no 1860/07 (ECtHR, 7 April 2009) paras 50–51. In *Gasayev v Spain*, the Court accepted assurances as sufficient to eliminate the risk of *refoulement* under Article 3 thanks to adequate detention conditions in Russia and monitoring by Spanish diplomatic personnel. See, *Gasayev v Spain* App no 48514/06 (ECtHR, 17 February 2009). Also in *Bakoyev v Russia*, the ECtHR held the applicant's extradition to Uzbekistan - which had provided diplomatic assurances on the fair treatment of the transferee - would not give rise to a violation of Article 3 of the Convention. See, *Bakoyev v Russia* App no 30225/11 (ECtHR, 5 February 2013).

⁴⁷ See, *Sellem v Italy*, para 18 (assurances provided 3 January 2009); *Cherif v Italy*, para 26; *Abdelhedi v Italy*, para 17; *Ben Salah v Italy*, para 14; *Bouyahia v Italy*, para 16; *CBZ v Italy*, para 17; *Darraji v Italy*, para 35; *Soltana v Italy*, para 205; *Hamraoui v Italy*, para 15; *Ben Khemais v Italy*, para 27.

⁴⁸ For an analysis of the jurisprudence of the ECtHR on diplomatic assurances, see, Alice Izumo, 'Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence' (2008) 42 *Columbia Human Rights Law Review* 233.

⁴⁹ *Akram Karimov v Russia*, para 133. See also, *Abdulkhakov v Russia* App no 14743/11 (ECtHR, 2 October 2012) para 150.

⁵⁰ Violations of Article 3 of the Convention have been found, for example, in the following cases: *Koktysh v Ukraine* App no 43707/07 (ECtHR, 10 December 2009) para 64; *Klein v Russia* App no 24268/08 (ECtHR, 1 April 2010); *Mamadaliyev v Russia* App no 5614/13 (ECtHR, 24 July 2014) paras 66–72; *Kadirzhanov and Mamashev v Russia* (ECtHR, 17 July 2014) paras 98–100; *Akram Karimov v Russia* App no 62892/12 (ECtHR,

provided by the requesting State, the Court added in *Gayratbek Saliyev v Russia* that:

It has not been demonstrated before the Court that Kyrgyzstan's commitment to guaranteeing access to the applicant by Russian diplomatic staff would lead to effective protection against proscribed ill-treatment in practical terms, as it has not been shown that the aforementioned staff would be in possession of the expertise required for effective follow-up of the Kyrgyz authorities' compliance with their undertakings. Nor was there any guarantee that they would be able to speak to the applicant without witnesses. In addition, their potential involvement was not supported by any practical mechanism setting out, for instance, a procedure by which the applicant could lodge complaints with them or for their unfettered access to detention facilities.⁵¹

As a general consideration, whilst national courts are more inclined to recognize assurances as a ground for a safe expulsion on security grounds, international human rights bodies have unquestionably struck the balance in favour of the protection of the fundamental rights of the deportees, especially with regard to the prohibition of torture. Nonetheless, diplomatic assurances have not been categorically outlawed, but rather weighed in the balance, as one factor out of many, when they offer sufficient protection and guarantees to eliminate the risk for the deportee.

The salience of individualized and detailed assurances is reasserted with emphasis in the long-expected 2012 *Abu Qatada v UK* case, which represents a first opportunity for the Strasbourg judges to consider the UK's practice of negotiation of MoUs for returning suspect terrorists to countries of origin. By contending that Abu Qatada could not be safely deported to Jordan, the ECtHR moved away from its previous jurisprudence and expanded the scope of *non-refoulement*. It argued that deportation with assurances would not be in violation of Article 3 of the Convention. Removal would rather result in a breach of Article 6 because of the real risk that evidence obtained through torture would be admitted at his retrial in Jordan, thus amounting to a 'flagrant denial of justice.' Moreover, transgression of the right to counsel, the right against arbitrary arrest and detention, or to a fair trial may aggravate the risk of torture itself.⁵²

In order to determine the quality of the assurances given and their reliability in light of the receiving State's practice, the Court concluded that: i) torture in Jordan remains 'widespread and routine'; ii) it continues to be practiced with impunity within a criminal justice system that 'lacks many of the standard, internationally recognized safeguards to prevent torture and punish its perpetrators; iii) Jordan lacks a genuinely independent complaint mechanisms; iv) it denies 'prompt access to lawyers and independent medical examinations.'⁵³

28 May 2014) para 133-4; *Gayratbek Saliyev v Russia* App no 39093/13 (ECtHR, 17 April 2014) paras 67-8; *Ismailov v Russia* App no 20110/13 (ECtHR, 17 April 2014), paras 88-9; *Izomkhon Dzhurayev and Others v Russia* App no 1890/11 (ECtHR, 3 October 2013) paras 133-5; *Sidikovy v Russia* App 73455/11 (ECtHR, 20 June 2013) para 150. By contrast, in the *Ahmad v UK* case concerning extradition to the US, the Court argued that it 'has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law.' It is here worth observing how the Court tended to minimize facts that could have contributed to compromise the US human rights record. See, *Ahmad v United Kingdom* App no 24027/07 (ECtHR, 12 April 2012) para 179. See also, *Boumediene v Bosnia and Herzegovina* App no 38703/06 (ECtHR, 18 December 2008); *Al-Moayad v Germany* App no 35865/03 (ECtHR, 20 February 2007). It can be pointed out here that no one of these individuals lodged an asylum application. On the *Ahmad* case, see, Mavronicola and Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK', (2013) *Modern Law Review* 3(76)

⁵¹ *Gayratbek Saliyev v Russia*, para 66. See also, *Izomkhon Dzhurayev and Others v Russia*, para 133; *Kadirzhanov and Mamashev v Russia*, para 96.

⁵² Jones 2006, 33.

⁵³ *Abu Qatada v UK* para 191.

Nevertheless, by relying on the strong political relations between the UK and Jordan, the ECtHR reckoned diplomatic assurances negotiated in the framework of the 2005 MoU specific and comprehensive enough to remove any real risk of ill-treatment of Abu Qatada.⁵⁴ It also added that the extent to which States fail to comply with international human rights obligations against torture is, at most, only one factor to be weighed in the assessment of diplomatic assurances' reliability. States should not refrain from seeking assurances from countries that systematically violate human rights; otherwise 'it would be paradoxical if the very fact of having to seek assurances meant one could not rely on them.'⁵⁵

Already in 1996, in the *Chahal* case, seven of the nineteen judges submitted a partly dissenting opinion upholding the position of the UK that in terrorism cases, where people are deported outside the territorial jurisdiction of the Council of Europe's Member States, a balancing approach, between national security interests and the extent of the potential risk of the deportee in the State of destination, should be applied.⁵⁶

Both the ECtHR and SIAC had to conclude that the Jordanian prosecutors refused to give an undertaking in advance that they would not use confessions obtained by torture. Consequently, the UK government did not receive minimum assurances on torture evidence, even though for more than 10 years Jordan had been under the pressure and spotlight of the international community. Considering, in addition, that transgression of the right to counsel, the right against arbitrary arrest and detention, and to a fair trial, more generally, may aggravate the risk of torture itself,⁵⁷ I wonder how the ECtHR, which unconditionally assumed that Jordanian government was 'incapable of properly investigating allegations of torture and excluding torture evidence'⁵⁸ was able to assure that a suspected terrorist would not be mistreated to extract a confession.

Whilst Abu Qatada has always challenged the reliability of diplomatic assurances negotiated under the MoU, he was prepared to leave the UK for Jordan once the two countries 'enshrined in law' their bilateral agreement through the ratification of a fair trial *Treaty*.⁵⁹ Therefore, to overcome the objections of the British Courts, the Home Secretary decided to conclude a new 'mutual legal assistance agreement', which entered into force in June 2013. This Treaty comprises a number of fair trial guarantees for deportees and a stringent ban on the use of torture-obtained evidence. It places the onus on the prosecution to prove beyond any doubt that the statement has been obtained out of free will and choice and has not been acquired through torture or ill-treatment.⁶⁰ The SIAC Judge, Mr. Justice Irwin said

⁵⁴ *ibid* para 194.

⁵⁵ *ibid* para 193.

⁵⁶ *Chahal v UK*, Joint Partly Dissenting Opinion, para 1. On the difficult interplay between, on the one hand, national security, and on the other hand, due process and the rule of law, see, Adam Wagner, 'Abu Qatada: in the Public Interest', UK Human Rights Blog, 16 November 2012.

⁵⁷ Jones 2006, 33.

⁵⁸ *Abu Qatada v UK*, para 285.

⁵⁹ See, the Statement by Abu Qatada's lawyer Edward Fitzgerald QC, as cited in Robert Booth and Shiv Malik, 'Abu Qatada arrives in Jordan after eight-year deportation battle', *The Guardian*, 7 July 2013 <<http://www.theguardian.com/world/2013/jul/07/abu-qatada-jordan-deportation-battle> accessed 15 July 2013>; Alan Travis, 'Abu Qatada "will voluntarily go back to Jordan when new treaty is ratified"', *The Guardian*, 10 May 2013 <<http://www.guardian.co.uk/world/2013/may/10/abu-qatada-jordan-treaty-ratified>> accessed 15 July 2013.

⁶⁰ Article 27 reads as follows: '3) Where there are serious and credible allegations that a statement from a person has been obtained by torture or ill-treatment by the authorities of the receiving State and it might be used in a criminal trial in the receiving State [...] then the statement shall not be submitted by the prosecution nor admitted by the Court in the receiving State, unless the prosecution submits evidence on the conditions in which

ratification of the mutual legal assistance agreement by Jordan was not enough. Only its entry into force would have let the treaty override any of the rulings by the Jordanian courts.⁶¹ Thus, on 7 July 2013, Abu Qatada finally agreed to return to Jordan following a formal approval of the Treaty by Jordan's King Abdullah.

To conclude, it is encouraging that, in November 2012, SIAC did not open the backdoor to *refoulement* by means of new assurances from Jordan—a country where torture is ‘systematic and routine.’ Nevertheless, the general image of the ECtHR, one year after *Abu Qatada*, ends up to be that one of a tightrope walker. It is the image of a Court that nimbly (yet not always convincingly) keeps the equilibrium between, on one hand, the effort to protect human rights within and beyond borders, and on the other hand, the exigency to uphold States’ concern to face terrorist violence by displacing as far as possible the ‘foreign-born threat’ and, as a consequence, any responsibility for human rights violations.

5. When assurances are reliable and when they are not: An easy distinction?

This Section asks under what circumstances diplomatic assurances can be considered sufficiently reliable instruments to eliminate the risk of torture or other inhuman treatment. As observed above, international human rights bodies have generally rejected *ipso facto* assurances as a reliable basis for a safe transfer. In the *Ben Khemais v Italy* case, for example, the ECtHR held that the fact the complainant had not suffered immediate ill-treatment upon his return to Tunisia, as ensured by the authorities of this State, would not amount to a reliable prediction of the fate of that person in the future.⁶²

The implicit importance of the Court’s reasoning lies in the consideration that an assessment of the safety of the receiving country for the individual must be done also in the long run and in light of the general human rights situation in the receiving country. Although a court or any other supervisory body should consider the subsistence of stable relations between the two involved States, and gauge the personalized risk existing at the material time of the expulsion, these bodies cannot neglect the possible irremediable consequences for the deportee if torture is practiced once the spotlights are off on a certain particular case and the visits from diplomats monitoring the detainee become even more rare.

Whilst assurances concerning death penalty can be more easily supervised, it has been suggested that diplomatic assurances on human treatment might suffice only in three cases: i) where exchanged with countries that do not possess patterns of torture toward prisoners and suspect terrorists; ii) where ‘a previous systemic pattern of torture has been brought under control’; iii) when ‘although isolated, non systemic acts continued, there was independent

the statement was obtained, and the Court is satisfied to a high standard that such statement has been provided out of free-will and choice and was not obtained by torture or ill-treatment by the authorities of the receiving State.

4) Where, before the date of signature of this Treaty, a Court in the sending State has found that there is a real risk that a statement from a person has been obtained by torture or ill-treatment by the authorities of the receiving State, and might be used in criminal trial in the receiving State [...] this statement shall not be submitted by the prosecution nor admitted by the Court in the receiving State, unless the prosecution in the receiving State proves beyond any doubt that the statement has been provided out of free-will and choice and was not obtained by torture or ill-treatment by the authorities of the receiving State, and the Court in the receiving State is so satisfied.’ See, Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, London, 24 March 2013, entry into force 1 July 2013.

⁶¹Travis 2013.

⁶²*Ben Khemais v Italy* App no 246/07 (ECtHR, 24 February 2009) para 64.

monitoring by a body with a track record of effectiveness, and criminal sanctions against transgressors.⁶³

More specifically, the ECtHR crafted a series of further criteria, which, in my view, are only the starting point of any discussion on reliability. If satisfied, they might create a presumption of sufficiency, but in any manner whatsoever can be considered exhaustive. These criteria include: i) whether the terms of the assurances have been disclosed to the Court; ii) whether they are specific or rather general and vague; iii) whether the agent giving the assurances is able to bind the receiving State and, additionally, local authorities; iv) whether the assurances concern treatments that are legal or illegal in the readmitting State; v) whether the two States have strong and durable relations; vi) whether the readmitting State has traditionally respected previous assurances of similar sort; vii) whether monitoring mechanisms exist to supervise compliance; viii) whether an effective system of protection against torture is in force in the receiving country, in terms of investigation, prosecution of torture-related crimes, and cooperation with international monitoring bodies; ix) whether the applicant has previously been ill-treated; and x) whether the reliability of assurances has already been examined by national courts of the sending State.⁶⁴

States have tried to strengthen the reliability of diplomatic assurances by delegating monitoring responsibilities to an independent and authoritative third party, composed not necessarily of diplomats, but preferably of members of NGOs and human rights organizations. It has been argued that contacts with detainees should take place over time and be carried out by individuals with the necessary expertise. As the HRC suggests, a video recording of all interrogations can also be kept.⁶⁵ A monitoring body could exercise external pressure on the sending State not to conceal any information about human rights transgressions. It can also stand as a deterrent for the receiving country by means, for example, of publication of monitoring reports of violations and the institutionalization of automatic enforcement mechanisms and venues of legal redress when illegal practices are detected. However, even if diplomats phrase assurances in very specific terms, with the activation of monitoring mechanisms coupled with a system of public reports of abuses, I believe they cannot be considered reliable in those contexts where torture is pervasive, especially in respect of detained suspected terrorists.

6. Conclusion

MoUs are drafted with the intent to normalize diplomatic relations, establish a common plan of action, and make human rights authoritative sources of reciprocal commitments. Pursuing the intent of progressively stabilizing bilateral relations, MoUs can be part of international cooperation, and have the effect of exercising pressure on the readmitting State to enhance the general human rights situation within its territory for the sake of the construction of a safe and credible deportation policy with the sending country.

Moreover, in the absence of clear guidelines on the role and use of diplomatic assurances, MoUs could serve the purpose of crafting a set of public minimum standards, which could guide States while negotiating more detailed assurances in specific cases. Indeed, no regulation of this practice exists, and international human rights organizations, as well as the Council of Europe and the Committee against Torture have opposed any proposals for the

⁶³These are the criteria developed by the applicant in his submission in the *Abu Qatada v UK* case before the ECtHR. See, para 168.

⁶⁴*Abu Qatada v UK*, para 189.

⁶⁵HRC, General Comment no 20, 10 March 1992.

creation of guidelines pointing to best practices or setting minimum standards for the use of assurances.⁶⁶ Also the criteria crafted by the ECtHR to assess the reliability of a readmitting State can only be considered as preliminary benchmarks.

The fact that an MoU enunciates clear-cut commitments does not bar the requesting State from seeking further specific assurances,⁶⁷ and the individual in question from explaining why in that particular case, the assurances envisaged by the MoU are not enough. However, even if MoUs are blanket agreements whose content is fulfilled *in concreto* through a case by case negotiation of human rights safeguards for a specific person, such individualized assurances might not be sufficient to consider *ipso facto* the readmitting State reliable with regard to the treatment of the deportee. It is also worth underlying that the unique UK's diplomatic assurances programme, formalized within MoUs, could foreseeably act as a blueprint for other countries.

States do not make return decisions on the basis of diplomatic assurances (either in the form of MoUs or individualized assurances). Nevertheless, assurances are one of the main elements - at times the most important one - States weigh in the balance while deciding on the expulsion of a person. The possibility of influencing the risk assessment is not *a priori* problematic, but it can turn out to be awkward where the mere existence of diplomatic assurances is assumed as both the primary criterion for rejection or exclusion from refugee status and complementary protection, or as a pre-condition to removal. In the case law of international human rights bodies, diplomatic assurances are generally upheld as one factor amongst many in the assessment of the risk, rather than trusted at face value.⁶⁸

However, even if assurances are considered legally permissible and able in principle to reduce the risk of *refoulement*, they are not always effective in practice in preventing torture and ill-treatment because of the way in which torture is secretly administered and the difficulty of obtaining information by the captive.⁶⁹ As a result, national courts and, primarily, international human rights bodies have frequently held that *refoulement* took place or would take place upon removal. This *ex ante* crisis of guarantees assumes even more salience in an *ex post* perspective, as no enforcement mechanisms to protect deported individuals from the breach of a diplomatic assurance is envisaged. Negotiation of assurances must, therefore, be case-specific and consider the entire human rights situation in the readmitting country, including its torture track record, in order to verify whether assurances suffice to protect from such a risk. For example, it is not enough that the promisor has ratified international human rights instruments to consider it safe, but its compliance with human rights *in concreto* must be gauged. I hold the view that, in principle, the content of diplomatic assurances does not seem to raise problems of incompatibility with human rights and refugee protection standards. Notwithstanding, in practice, the principle of *non-refoulement* can be violated.

⁶⁶ See, e.g., AI, *Reject rather than Regulate: Call on Council of Europe Member States not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment* (2 December 2005) <<http://www.amnesty.org/en/library/info/IOR61/025/2005>>. See also, Human Rights Watch, *No Guidelines on Empty 'No Torture' Promises: Council of Europe Rejects Minimum Standards for Diplomatic Assurances* (3 April 2006). With regard to the Committee against Torture's proposal, see, UNCAT, *Third-Second Session, Summary of the Record of the First Part (Public) of the 61th Meeting* (2 August 2004) UN Doc CAT/C/SR.617, para 29.

⁶⁷ See, UK-Libya MoU, Application and Scope, para 5; UK-Jordan MoU, Application and Scope, para 6; UK-Lebanon MoU, Application and Scope, para 5.

⁶⁸ For example, while deciding on the reliability of assurances, the ECtHR attaches considerable importance also to 'information and evidence obtained subsequent to the applicants' extradition.' See, *Shamayev and Others v Georgia and Russia*, para 345.

⁶⁹ Johnston 2011, 48.

A dangerous employment of assurances may occur in at least five circumstances: i) when the assessment of the risk excessively relies on the assurances given by the readmitting government, primary source of the fear, without bringing into the picture the general human rights situation and the pervasiveness of torture in the receiving country; ii) when the receiving country has a history of failing both to comply with assurances and investigate the allegations of prohibited treatments against other detainees; iii) when the assurances are negotiated during the examination of the asylum claim, thus violating the principle of confidentiality and the right of an asylum seeker to access and enjoy fair asylum procedures; iv) when the existence of diplomatic assurances accelerates the rejection of the protection claim and the enforcement of the return procedures, thus preventing the individual from both challenging the decisions and having access to an effective remedy;⁷⁰ v) when an efficient system of monitoring is lacking, and the government issuing the assurances is not able to enforce the agreement because of the lack of control of the territory or the security forces of the prison where the individual in question is detained.

I believe that the fact that MoUs are blanket agreements does not mean they are neutral. Rather they constitute the matrix of any other contact between requesting and requested State; they formalize within a written accord the human rights commitments of a State with a dismal human rights track record. Regardless of their legal status, the format of MoUs cannot be considered a ‘legal nicety’ to make *ordinary* a human rendition that common sense would at times *de facto* label as ‘extraordinary.’ Using the law to veil an arrangement designed to remove a person to ‘interrogation as opposed to “justice”’⁷¹ within the borders of a country notoriously known for its dubious techniques of questioning is at the very least objectionable.

I believe that amendments on further human rights safeguards in the text of MoUs would do little to sort the problem out. Even with new sophisticated monitoring procedures and enforcement mechanisms, there will always be limits in detecting torture and eliminating the personal risk for the deportee. A number of contradictions are inherent in the process of seeking assurances given that ‘even as the sending State seeks protection for one, so it acquiesces in the torture of others.’⁷² Moreover, it remains unanswered why States need to frame their human rights commitments within bilateral political agreements - despite being subject to judicial control - which replicate human rights standards that have already been enshrined within international human rights treaties creating clear binding obligations and mechanisms of individual complaints.

⁷⁰ Points iii and iv are beyond the scope of this paper. I discuss the impact of deportation with assurances on access to asylum and an effective remedy in ‘Access to Protection: Negotiating Rights and Diplomatic Assurances under Memoranda of Understanding’, in Gauci, J.P., Giuffrè M. and Tsourdi, L., (eds.), *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Brill, Martinus Nijhoff Publishers.

⁷¹ See, Antenor Hallo de Wolf and James Watson, ‘Navigating the Boundaries of Prevention: the Role of OPCAT in Deportations with Diplomatic Assurances’ (2009) 27 NQHR 525, 540; see also, Craig Forcese, ‘The Capacity to Protect: Diplomatic Protection of Dual Nationals in the ‘War on Terror’ (2006) 17(2) EJIL 369, 371; Tullio Scovazzi, ‘Tortura e formalismi giuridici di basso profilo’ (2006) *Rivista di Diritto Internazionale*, 905 ff. See also, *Babar Ahmad and Others v the United Kingdom*, para 113. The US has inaugurated the extraordinary rendition practice after 11 September 2001. In this regard, President Bush signed a classified order allowing the CIA to carry out renditions without the authorization of White House, Department of State, or Department of Justice. Transfers could be executed ‘solely for the purpose of detention and interrogation’ to countries where the prisoners did not face any criminal charges. See, Douglas Jehl and David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, NY Times, 6 March 2005, A1. See also, Katherine R Hawkins, ‘The Promises of Torturers: Diplomatic Assurances and the Legality of “Rendition,”’ (2006) 20 Geo.Immigr. L.J.213.

⁷² Guy S Goodwin-Gill and Raza Husain ‘Diplomatic Assurances and Deportation’, unpublished conference paper, *JUSTICE/Sweet & Maxwell Conference on Counter-terrorism and Human Rights* (28 June 2005), as cited in Larsaeus 2006, 3. See also, Gregor Noll, ‘Diplomatic Assurances and the Silence of Human Rights Law’ (2006) 7 MJIL 104.

Beyond the progressive politicization of rights, diplomatic assurances - whether framed or not within MoUs - would appear as an unjustifiable duplication of transfer procedures, which have already been codified within bilateral extradition *treaties* aimed to transfer a suspected or convicted criminal to another country.⁷³ Extradition agreements and treaties of mutual cooperation in criminal matters set out clear-cut conditions under which States may entertain or deny extradition requests. Additionally, they encompass common bars to extradition, such as the possibility of certain forms of punishment, death penalty, or the risk of torture, inhuman or degrading treatment or punishment.

Devolving upon diplomats and political acts the protection of fundamental rights in security-related deportations would also defend the maintenance of a regime of exceptionalism for people suspected of serious criminality and who cannot be removed to their country of origin. Indeed, although the primary and most suitable option should be prosecution in the host country, there is often notable difficulty in pursuing such a route because of the difficulty in collecting evidence, lack of witnesses, and limited ability of the police to carry out investigations far from the place where the crime has been committed.⁷⁴ In this context, diplomatic assurances would become the suitable political tool for governments and intelligence services to transfer abroad undesirable foreigners, despite the fact that both the deportees have not been convicted of any crime and that one of the bars to removal contained in the extradition treaties would apply.

The recent proliferation of diplomatic assurances and security-related deportations symbolizes the new tendency of governments to consider foreigners a threat to public safety, thus strengthening the link between refugees and terrorists and jumbling the logic of protection with the logic of security.⁷⁵ For instance, the hysteria provoked by the decisions of the Strasbourg Court and British courts to stay the deportation of *Abu Qatada* has to be read in light of the endeavour of British governments to clear their streets, at all costs, from foreign-born suspected terrorists.⁷⁶ The same considerations can be extended to any other countries engaged in the fight against terrorism. It is worth noting that, despite the existence of a wide range of safeguards (a MoU, individualized assurances, and a mutual legal assistance treaty) once in Jordan, *Abu Qatada's* lawyer had to file a complaint with the monitoring body, the Adaleh Centre, as his client's access to legal advice was restricted.⁷⁷ Moreover, in acquitting him of the first terrorist charge, Jordanian judges ruled, on 26 June

⁷³ I have already more extensively dealt with the issue of "repoliticization of rights" as a consequence of the use of diplomatic assurances in the Chapter 'Access to Protection: Negotiating Rights and Diplomatic Assurances under Memoranda of Understanding', in Gauci, J.P., Giuffrè M. and Tsourdi, L., (eds.), *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Brill, Martinus Nijhoff Publishers.

⁷⁴ See, Sarah Singer's Amsterdam Workshop (27 March 2015) paper for further details.

⁷⁵ Eveline Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU Response to the Terrorist Attacks of 11.09' (2003) 4 *European Journal of Migration and Law* 399.

⁷⁶ As an example of the disappointment with which SIAC's decision has been met, see, The Sun, 'Home Secretary slams Qatada decision as "unacceptable"' <<http://www.thesun.co.uk/sol/homepage/news/4114354/Home-Secretary-slams-Qatada-decision-as-unacceptable.html>> accessed 2 April 2013; see also, Douglas Murray, 'Abu Qatada's victory proves how low we have been laid', The Spectator, 13 November 2012 <<http://blogs.spectator.co.uk/douglas-murray/2012/11/abu-qatadas-victory-proves-how-low-we-have-been-laid/>> accessed 3 January 2012. To read more on the reactions to the Court of Appeal decision, see, Sky News, 'Abu Qatada Stays As Theresa May Loses Appeal' <<http://news.sky.com/story/1070407/abu-qatada-stays-as-theresa-may-loses-appeal>> accessed 2 April 2, 2013; The Guardian, 'Abu Qatada: Theresa May loses latest attempt to deport Islamist cleric', <<http://www.guardian.co.uk/world/2013/mar/27/abu-qatada-theresa-may-loses>> accessed 2 April 2 2013.

⁷⁷ Khetam Malkawi, 'Abu Qatada will not submit new Bail Request – Lawyer' *The Jordan Times* (30 September 2013) <www.jordantimes.com>.

2014, that the confession by his co-defendant Abd al-Nasser al-Khamaiseh was admissible evidence but did not constitute sufficient grounds for conviction.⁷⁸ According to the ECtHR, transferring an individual to a country where torture-extracted evidence could be used against the deportee would amount to a violation of Article 6 of the Convention. Additionally, using such a confession infringed the 2013 UK-Jordan mutual legal assistance treaty, whereby statements obtained by torture or ill-treatment shall not be submitted by the prosecution nor admitted by the Court in the receiving country.⁷⁹

Generally speaking, executives have sought diplomatic assurances either in the form of MoUs or individualized assurances, and national courts have in the main upheld their use. In some circumstances, assurances against the death penalty – if issued by the judiciary - might be deemed trustworthy instruments that enhance the regime of protection owed to extraditees. However, given that the safety of return is a matter of fact,⁸⁰ I deem highly problematical, from a human rights and refugee law perspective, the possibility of returning a person, with the assurance she will not be tortured, to a country where torture is a *systematic* practice. Accordingly, I believe States should refrain from relying on diplomatic assurances - whether framed or not within standardized MoUs - with countries that persist in the use of torture.

⁷⁸ Alice Su, ‘Isis beheadings of journalists are against Islam, says Abu Qatada’ *The Guardian* (7 September 2014) < <http://www.theguardian.com/world/2014/sep/07/isis-beheadings-islam-abu-qatada> >

⁷⁹ Article 7(3) of the 2013 UK-Jordan Treaty.

⁸⁰ Jones 2008, 183, 186.