DIPLOMATIC ASSURANCES – A PERMISSIBLE TOOL IN THE STRUGGLE AGAINST TERRORISM?

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Abstract: With the noble intentions of combating terrorism, numerous initiatives in the form of counter-terrorism measures have appeared on the global scene. States wanting to expel persons considered to be a threat to national security have aimed to establish so-called diplomatic assurances as a guarantee that States well-known for gross human rights violations will ensure that the person concerned is not exposed to torture or ill-treatment. Reliance on these assurances has been questioned by many; scholars, UN bodies and NGO's, and practice shows that there is reason for concern. This paper examines such reliance on diplomatic assurances by scrutinizing the practice and the case-law of the UN treaty bodies, the European Court of Human Rights (ECtHR) and the official statements and reports of UN institutions such as the Human Rights Council, The Officer of the High Commissioner for Human Rights as well as the Special Rapporteurs. Unreliable monitoring mechanisms and the lack of consequences in the case of a breach of such legally non-binding agreements leads to the conclusion that these assurances may be solely hypothetical, insignificant and of no real value.

For practical reasons, it should be mentioned that the term 'ill-treatment' corresponds to cruel, inhuman degrading treatment or punishment. The author's evaluation and opinion are not only presented in the conclusion itself but also in relation to the sources used and in the paragraphs analyzing whether diplomatic assurances provide effective protection, p. 7-10.

Resumé: Článek analyzuje otázky spojené s poskytováním mezinárodní účinné ochrany před krutým, nelidským, ponižujícím zacházením nebo trestáním, a to v kontextu se současným bojem proti terorismu. Autorka v této souvislosti analyzuje praktické problémy spojené s diplomatickou praxí a judikaturou na základě úmluvy OSN, rozhodováním Evropského soudu pro lidská práva (ESLP), a dále oficiálními prohlášeními a zprávami institucí OSN, jakou je Rada pro lidská práva, vysoký komisař OSN pro lidská práva, jakož i zvláštní zpravodaji. Nespolehlivost monitorovacích mechanismů a nedostatečná opatření v případě porušení právně nezávazných mezinárodních dohod vede autorku k závěru, že záruky před krutým uacházením a mučením mohou být pouze hypotetické, nevýznamné a v praxi nemají žádnou zásadní hodnotu.

Key words: Counter-terrorism, non-refoulement, national security, diplomatic assurances, the Muhammed drawings.

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1. What are diplomatic assurances?

The term *"diplomatic assurances",* as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in conformity with conditions set by the sending State or, more generally, to secure treatment in accordance with the sending State's human rights obligations under international law.[1] This practice is resorted to with increasing frequency to remove persons which the sending State suspects of involvement in terrorist activities and/or considers a danger to national security, including to countries which are reported to practice or condone torture.[2] Where the receiving State has given diplomatic assurances with regard to a particular individual, such assurances do not, however, affect the sending State's obligations under customary international law or under the international and regional human rights treaties to which it is party.[3]

2. The principle of *non-refoulement*

2.1 The 1951 Refugee Convention art. 33

International refugee law specifically provides for the protection of refugees against removal to a country where they would be at risk of persecution. This is known as the principle of *non-refoulement*, which is often referred to as the cornerstone of international refugee protection and is enshrined in art. 33 (1) of the 1951 Convention relating to the Status of Refugees (hereafter the "Refugee Convention"). No reservations are allowed with regard to this provision.[4] Exceptions to the principle of *non-refoulement* under the Refugee Convention are permitted only in the circumstances expressly provided for in art. 33 (2).

> *Prohibition of expulsion or return ('refoulement'):*
> *1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

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1 UNHCR, *Note on Diplomatic Assurances*, op.cit. para. 1.

2 *Ibid.*; See also High Commissioner for Human Rights, Human Rights Day Statement: *On Terrorists and Torturers*, 7 December 2005; Human Rights Committee, *Concluding Observations* on *Yemen*, 9 August 2005, para. 13, CCPR/CO/84/YEM; *Canada*, 2 November 2005, CCPR/C/CAN/CO/5 and Committee Against Torture, *Concluding Observations* on *Canada*, 7 July 2005, para. 4(b), CAT/C/CR/34/CAN; *UK*, 10 December 2004, para. 4(d), CAT/C/CR/33/3.

3 UNGA resolution on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 16 November 2005. The General Assembly *"[...] recognize[d] that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement."*, para. 8, A/RES/60/148; Human Rights Council, *Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 8th Session, 18 June 2008, para. 6 (d), *in fine.* A/HRC/RES/8/8; *Diplomatic Assurances – not an adequate safeguard for deportees,* UN Special Rapporteur against Torture warns, UN, Press Release, 23 August 2005. Retrieved at www.ohchr.org.

4 Cf. Refugee Convention art. 42.

> *2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

This provision applies to any person who is a refugee pursuant to the conditions set out in the Refugee Convention.[5] The person is protected from *direct refoulement*[6] as well as *indirect refoulement*,[7] for instance as a consequence of the principle of 'first country of asylum' pursuant to the *Dublin Regulations*.[8]

For the *"security of the country"* exception to the principle of non-refoulement to apply, there must be an individualized finding that the refugee poses a current or future danger to the host State. The danger must be very serious and a threat to the national security of the host State.[9] Terrorist activities are among the acts customarily labelled as threats to national security. For the danger to the community exception to apply, the refugee in question must have been convicted of a crime of a very grave nature. Furthermore, it is a requirement that the refugee, in light of the crime and final conviction, constitutes a very serious present or future danger to the community of the host country.[10] Thus, there must be a link between the crime, the conviction, and the fact that the refugee in question *"constitutes a danger to the community"*.[11] The principle of *non-refoulement* as enshrined in art. 33 of the Refugee Convention is part of customary international law and therefore binding on all States, including those which have not yet become party to the Refugee Convention and/or its 1967 Protocol.[12]

Consequently, it is clear that the Refugee Convention allows for a balance between the protection of the individual on one hand and national security on the other hand. With regard to the burden of proof, it should be mentioned that the individual enjoys the benefit of the doubt.[13]

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[5] Anyone who meets the inclusion criteria of Art. 1A (2) of the Refugee Convention and does not come within the scope of one of its exclusion provisions in art. 1 D, art. 1 E or art. 1 F. The principle applies equally to situations where someone has not (yet) been determined as a 'refugee'.

[6] Where the country of refuge sends ('refoules') the individual to the country of origin where there is a risk of persecution.

[7] Where a person is sent from the country of refuge to a safe third State and the third State sends the person to the country of origin.

[8] The Dublin Regulation EC No. 343/2003 is a binding measure of European Community law for determining which State should be responsible for examining an application for asylum made within EU territory. The provisions of the *"Dublin II"* Regulation were implemented on 1 September 2003 and replaced those of the Dublin Convention.

[9] A. Grahl-Madsen, *Commentary on the Refugee Convention*, UNHCR, 1997, Commentary to Art. 33, para 8; UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, para. 12 (i).

[10] UNHCR, *Note on Diplomatic Assurances*, op.cit., 12 (ii). A. Grahl-Madsen, *Commentary on the Refugee Convention*, op.cit., para. 9.

[11] A. Grahl-Madsen, *Commentary on the Refugee Convention*, op.cit., para. 10.

[12] UNHCR, *Note on Diplomatic Assurances*, op.cit., para. 15.

[13] A. Grahl-Madsen, *Commentary on the Refugee Convention*, op.cit., para. 203.

2.2 Convention Against Torture art. 3

The prohibition against torture and ill-treatment is an absolute right contained in various human rights treaties.[14] The prohibition of *refoulement* to a risk of torture is also part of customary international law[15] and has attained the rank of a peremptory norm of international law, or *jus cogens*.[16] Consequently, States are under an obligation not to transfer any individual to a State if this would result in exposing him or her to torture, notwithstanding whether the State has become party to the relevant instrument.

> *1. 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.*
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

When interpreting CAT art. 3 in accordance with the ordinary meaning to be given to the terms of the treaty,[17] it appears that the provision covers torture *only* and not inhuman treatment.[18] This is also confirmed in communications from the Committee Against Torture.[19] Thus, CAT is not applicable to treatment not amounting to torture as encompassed in CAT art. 16. However, States that are additionally bound by the ECHR and/or the ICCPR[20] have undertaken an extended obligation not to *'refoule'* individuals to States where there is a risk of ill-treatment. States that are well-known for resorting to diplomatic assurances,[21] such as Canada, the USA, Sweden, Germany, the Netherlands and the UK, are all parties to the ICCPR, and the four last mentioned States are parties to the ECHR as well.[22] Denmark is currently considering the use of diplomatic assurances and is also a party to these instruments. This means that in reality these States cannot *'refoule'* individuals to States where they would be at risk of being ill-treated.

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[14] The right to freedom from torture is encompassed in UDHR art. 5, CAT art. 1, ICCPR Art. 7 and at the regional level in ECHR art. 3, ACHR Art. 5(2), African (Banjul) Charter art. 5 Inter-American Convention to Prevent and Punish Torture art. 2.

[15] ICTY, *Prosecutor v. Kunarac and others*, Appeals Chamber, Judgement of 12 June 2002, para. 145.

[16] Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, Oxford, 2008, p. 8. See also ICTY, *Prosecutor v. Furundzija*, Trial Chamber, Judgement of 10 December 1998, para. 153-157.

[17] *Vienna Convention on the Law of Treaties* (VCLT), art. 31 (1).

[18] Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 200; Committee Against Torture, General Comment no. 1, para. 1.

[19] See for instance individual communications of the Committee Against Torture, *S.V v. Canada*, 1996, CAT/C/26/D/49/1996 para. 9.8; *T.M. v. Sweden*, 2003, CAT/C/31/D/288/2003.

[20] These two instruments are dealt with below.

[21] *Attia v. Sweden*, Committee Against Torture, 24 November 2003, para. 11.14. CAT/C/31/D/199/2002.

[22] For the status of ratifications, see the UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. Retrieved 28 April 2009.

2.3 ICCPR art. 7

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

Even in situations of public emergency such as those envisaged by ICCPR art. 4 (1), freedom from torture and ill-treatment is a non-derogable right under art. 4 (2).[23] Read together with ICCPR art. 2, States are obliged to ensure an effective protection through a machinery of control, and complaints about ill-treatment must be investigated effectively by competent authorities.[24]

2.4 ECHR art. 3

The ECtHR is one of the regional human rights systems. While limited in its geographical scope, its jurisprudence plays a vital role for the interpretation of the prohibition against torture and ill-treatment among other international organs, such as the UN Committee Against Torture and the Human Rights Committee. The ECHR has no direct reference to the principle of *non-refoulement*. ECHR art. 3 states:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

The ECtHR applies a dynamic interpretation of the ECHR. In relation to torture and ill-treatment, this means that the distinction between ill-treatment and torture may change over time and certain acts which had previously been classified as 'inhuman and degrading treatment' as opposed to 'torture,' might be classified differently in the future.[25]

Extensive case-law from the ECtHR shows that States have an obligation *not* to deport individuals to States where there are substantial grounds for believing that the person would face a real risk of being subjected to treatment contrary to art. 3.[26] *Chahal*[27] concerned an Indian Sikh in the UK, who was regarded as a threat to national security and was detained administratively for deportation. The ECtHR stressed that art. 3 makes no provision for exceptions and no derogation from it is

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[23] *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, 1984, para. 58 and 69 (b). E/CN.4/1984/4. See also Human Rights Committee, General Comment no. 7, on ICCPR art. 7, para. 1.

[24] Human Rights Committee, General Comment no. 7, op.cit., para. 1.

[25] The ECtHR referred to the dynamic interpretation in *Tyrer v. UK* (1978), para. 31: "The *Convention is a living instrument which* [...] *must be interpreted in the light of present-day conditions."* This principle was repeated in, *inter alia, Marckx v. Belgium* (1979) para. 41; *Soering v. UK* (1989) para. 102 and *Dudgeon v. UK* (1981) para. 18 and *Dikme v. Turkey* (2000) para. 92. See also Jacobs & White, *The European Convention on Human Rights*, Oxford, 2nd edition, 1996, p. 49f and UN Special Rapporteur on Torture, Nowak, Human Rights Council, 7th Session, 14 January 2009, para. 34 and 47, A/HRC/10/44.

[26] See, *inter alia,* ECtHR in *Soering v. UK* (1989), para. 88, 91 and 98; *Chahal v. UK* (1996), 74, 78, 80 and more recently *Saadi v. Italy* (2008), para. 146.

[27] *Chahal v. UK* (1996) para. 76.

permissible under art. 15, even in the event of a public emergency threatening the life of the nation.[28]

In the case of *Saadi*[29] from 2008, a Tunisian national in Italy was ordered deported to Tunisia as a consequence of 'measures combating international terrorism'. The Italian Government tried to carry out the deportation relying on diplomatic assurances that, if Saadi were to be deported to Tunisia, he would not be subjected to treatment contrary to ECHR art. 3 The UK intervened and invoked a dynamic interpretation of the ECHR in order to balance the protection of the individual against the protection of society from acts of terrorism.[30] The UK claimed that the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. Furthermore, the UK held that national-security considerations must influence the standard of proof required by the applicant.[31] Thus, the UK wanted a higher standard to apply, but the ECtHR rejected this, reemphasizing the absolute character of ECHR art. 3, as laid down in *Chahal*.[32] The ECtHR held that *"the prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment, that the person may be subject to on return."*[33] Consequently, the global struggle against terrorism does not change the interpretation of art. 3.[34]

European jurisprudence thus shows that the ECtHR acknowledges that diplomatic assurances may *in concreto* result in no substantial grounds for a real risk of torture or inhuman treatment.[35] In other words, a diplomatic assurance *may* remove the risk of torture and inhuman treatment, but diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of torture and inhuman treatment.[36] The ECtHR assesses the assurance concerned on a case-by-case basis where the actual context is decisive.

In recent case-law, the ECtHR has laid down two requirements of the deporting Government in the use of the option to return an individual in reliance on diplomatic assurances: The deporting State must dispel any doubts about the safety of the deportee.[37] Additionally, the ECtHR held in two Russian cases from 2008 that diplomatic assurances must ensure adequate protection against the risk of ill-treatment, where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the ECHR.[38]

[28] *Ibid.,* para. 79; *Dikme v. Turkey* (2000) para. 89.
[29] *Saadi v. Italy* (2008).
[30] *Ibid.,* para. 117-123.
[31] *Ibid.*, para. 122.
[32] *Ibid.*, para. 127.
[33] *Ibid.*, para. 139.
[34] *Ibid.*, para. 140.
[35] *Mamatkulov and Askarov v. Turkey* (2005) para. 76f.
[36] *Saadi v. Italy* (2008), para. 147f.
[37] *Ibid.*, para. 129.
[38] *Ismoilov and others v Russia* (2008), para. 127; *Ryabikin v Russia* (2008) para. 119.

One may therefore conclude that the protection in ECHR art. 3 is broader than the protection in the Refugee Convention art. 33 (1), which allows for exceptions due to national security reasons pursuant to art. 33 (2).

3. Do diplomatic assurances provide effective protection?

3.1 Monitoring

Diplomatic assurances are political bilateral agreements and are not legally binding.[39] Therefore the question of monitoring such assurances and the consequences in case of a breach arise. In 2002, the then Special Rapporteur on Torture, Theo Van Boven, appealed to all States to ensure that suspected terrorists and others will not be surrendered *"unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring, that they are treated with full respect for their human dignity."*[40] Supposedly, contrary to the intentions of Mr. Van Boven, States relied upon this statement as implicitly acknowledging the use of diplomatic assurances – a practice which was subsequently described by the current Special Rapporteur Manfred Nowak as *"a practice of circumventing the absolute prohibition of refoulement in the context of their counter-terrorism strategies."*[41]

In the view of the Special Rapporteur on Torture, post-return mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.[42] The *Agiza*-case[43] shows the difficulties in monitoring these assurances. Mr. Agiza was exposed to torture and ill-treatment. At the same time, Mr. Agiza's situation was monitored by the Swedish embassy in Cairo, mainly by visits approximately once every month. On most occasions, visits were conducted by the Swedish Ambassador. Senior officials from the Ministry of Foreign Affairs carried out other visits.[44] However, many meetings were neither in

[39] Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 215; Nowak, *Report by the Special Rapporteur on Torture*, UNGA 69th Session, 30 August 2005, para. 51. A/60/316; Nowak, *Report by the Special Rapporteur on Torture*, HRC, 62nd Session, 23 December 2005, para. 31, d), E/CN.4/2006/6; Viewpoint by Hammarberg, Commissioner for Human Rights, The Council of Europe, *"Torture can never, ever be accepted"*, 27 June 2006.

[40] T. Van Boven, *Report by the Special Rapporteur on Torture and other Cruel, Inhuman, Degrading Treatment or Punishment,* 2 July 2002, para. 35, A/57/173. See also Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 212f.

[41] Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 213 and p. 215. This concern is shared by M. Scheinin, the Special Rapporteur *on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Report, *Mission to Spain*, Human Rights Council, 10th Session, 16 December 2008, A/HRC/10/3/Add.2.

[42] Nowak, *Report by the Special Rapporteur on Torture*, UNGA 69th Session, 30 August 2005, para. 40-50, A/60/316.

[43] *Agiza v. Sweden*, Committee Against Torture, 24 May 2005. CAT/C/34/D/233/2003.

[44] *Agiza v. Sweden*, op.cit., para. 4.14.

private nor with medical examinations undertaken.[45] It is therefore clear that even when a State visits the person from time to time, it cannot enforce these guarantees.

Practice from the UN treaty bodies demonstrates that there is no general prohibition against resorting to diplomatic assurances. The Committee Against Torture implicitly recognizes the use of diplomatic assurances,[46] in particular where the suppression of international terrorism is an issue.[47] The requirement of good faith of the sending State is underlined and was assumed to have been met by the Swedish government in the *Agiza*-case because of the high political level of the negotiations and the access to the prisoner granted to Swedish officials. The requirement of monitoring is also present, although again *"it is assumed to have been met."*[48] Nevertheless, we know from this case that Mr. Agiza was in fact tortured and ill-treated.

The communications from the Human Rights Committee show it acknowledges that measures taken to combat terrorism, including denial of »safe havens«, deriving from binding Security Council resolutions are both legitimate and important. However, their execution must be carried out with full respect of the rights enshrined in the ICCPR, including the prohibition of torture and ill-treatment.[49] In its General Comment no. 2 from 2007, the Human Rights Committee stresses in line with the practice from the ECtHR that no exemptions or derogations from the prohibition of torture or ill-treatment can be made in any circumstances whatsoever.[50] This includes any threat of terrorist acts. Furthermore, the Human Rights Committee emphasizes its deep concern and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations.[51] In April 2009, the Human Rights Committee expressed concern in its Concluding Observations at the continued reliance of Sweden on diplomatic assurances in relation to expulsions and transfers of non-Swedish nationals.[52] In sum, the Human Rights Committee questions the value of diplomatic assurances when a systematic pattern of torture and ill-treatment is well-known.[53]

Besides the UN Special Rapporteurs, other important UN organs have articulated concern over the worrying pattern of increasing use of diplomatic assurances and

[45] *Agiza v. Sweden*, op.cit., para. 3.5.

[46] *Attia v. Sweden*, Committee Against Torture, 24 November 2003, para. 12.3. CAT/C/31/D/199/2002.

[47] *Ibid.*, para 13.1.

[48] Despite unchallenged evidence that the monitoring visits were not held in private and were not confidential, cf. Human Rights Watch, Empty Promises, 14 April 2004. The article can be retrieved at http://www.hrw.org/en/reports/2004/04/14/empty-promises. Last accessed 16 April 2009.

[49] *Agiza v. Sweden*, op.cit., para. 13.1.

[50] Human Rights Committee, General Comment no. 2, 2007, para. 5-7.

[51] *Ibid.*, para. 5.

[52] Human Rights Committee, Concluding Observations of Sweden, 2 April 2009, CCPR/C/SWE/CO/6.

[53] The Human Rights Committee states: *"The State party should ensure that no individuals, including persons suspected of terrorism, are exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment. The State party should further recognise that the more systematic the practice of torture or cruel, inhuman or degrading treatment, 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"*, *Ibid.,* para. 16.

emphasized that the principle of non-refoulement must be strictly observed and that diplomatic assurances should not be resorted to.[54] The High Commissioner for Human Rights has expressed a deep concern about the effectiveness of monitoring where the individual concerned faces a risk of torture and cruel, inhuman or degrading treatment.[55] The Human Rights Council urges States *"not to expel, return ("refouler"), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture."*[56] The Council recognizes diplomatic assurances as such but emphasizes that where are used, they do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement.[57]

Within the Council of Europe, the Commissioner for Human Rights, Thomas Hammarberg, strongly opposes forced returns even if they occur under the cover of diplomatic assurances to countries with long-standing, proven records of torture.[58]

Many NGO's have also expressed their concern about the increasing use of diplomatic assurances. In the view of Amnesty International, reliance on diplomatic assurances is deeply problematic since these assurances do not provide an effective safeguard against torture, ill-treatment or other serious human rights violations.[59] The concern is shared by Human Rights Watch[60] and the International Commission of Jurists.[61]

The above reasoning and practice lead to the question of; *how many cases demonstrating the ineffectiveness of these guarantees are necessary to conclude that States cannot rely on diplomatic assurances?* In criminal law, most States around the world apply the principle of *in dubio pro reo*. Despite the fact that many of the cases of administrative expulsion as a counter-terrorism measure arise outside of the criminal system, the interference with the rights of the individual seems to be at least of similar gravity. Although the sending States act in good faith and with the aim to monitor diplomatic assurances, the use of assurances can be anticipated to have an

[54] Nowak, M., *Report by the Special Rapporteur on Torture and other Cruel, Inhuman, Degrading Treatment or Punishment,* 1 September 2004, para. 35. A/59/324.

[55] High Commissioner for Human Rights, *"Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism"*, Human Rights Council, 2 June 2008, para. 32. A/HRC/8/13. See also High Commissioner for Human Rights, Human Rights Day Statement, *"On Terrorists and Torturers"*, 7 December 2005. Retrieved at www.ohchr.org.

[56] Human Rights Council, *Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, op.cit., para. 6 (d).

[57] *Ibid*.

[58] Report by T. Hammarberg, Commissioner for Human Rights of the Council of Europe, visit to Italy on 13-15 January 2009, 16 April 2009, IV, p. 3; See also the viewpoint by T. Hammarberg, Commissioner for Human Rights, The Council of Europe, *"Torture can never, ever be accepted"*, 27 June 2006.

[59] Amnesty International, *Open letter to Danish Minister of Justice re: Denmark and diplomatic assurances against grave violations of human rights*, 18 June 2008.

[60] Human Rights Watch, *Statement on the case of Khouzam v. Hogan*, 12 August 2007, para. 8-17.

[61] General debate in the Human Rights Council, statement by Mr. Lukas Machon, 4 June 2008, see http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/0A2BEE45EB2C22B0C125745E004D1CAB?OpenDocument. Last accessed 16 April 2009.

undermining effect irrespective of what individualized monitoring mechanism may accompany them. Hence, one may conclude that the guarantee of these assurances may be solely hypothetical, insignificant and of no real value.

3.2 Consequences in case of breach

The very fact that diplomatic assurances are sought is implicitly an acknowledgement that the receiving State is practicing torture, at least according to the deporting State. As held by the Special Rapporteur, the following question arises: *"Why States that violate binding obligations under treaty and customary law should comply with non-binding assurances."*[62]

For torture as an international crime, individuals giving orders to or aiding and abetting torture can be held responsible.[63] Turning to the attribution of a specific act to a State, the question is whether this political obligation contained in diplomatic assurances may trigger the law on State responsibility relating to aiding or assisting in the commission of an internationally wrongful act[64] *if* the individual is *de facto* tortured or ill-treated upon his arrival in the receiving State. The Commentaries by the ILC on this particular responsibility emphasize that the assistance must be *voluntary*.[65] Furthermore, the scope of responsibility for aid or assistance is limited in three ways. Firstly, the relevant State organ providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[66] The first requirement is fulfilled on the basis of the sending State's assessment of the need for a diplomatic assurance. The third requirement is also fulfilled since the prohibition of torture and ill-treatment is a norm of *jus cogens* and, as stated above, it cannot be allowed under any circumstances. The second condition expressed by the ILC would hardly be complied with since no sending State would declare to have *a view to facilitating the commission of that act*. Hence, the sending State can only be held directly responsible for a breach of an international obligation not to '*refoule*' and not assist acts of torture or ill-treatment. The duty of the sending State thus lies in whether the person concerned is actually sent back or not. Nevertheless, this shows that States that rely on diplomatic assurances and return individuals to States where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture, are balancing on a very thin line.

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[62] Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 215.
[63] *Inter alia,* Rome Statute, art. 25 (3), cf., art. 7 (1) (f) and art. 8 (2) (a) (ii) and art. 8 (2) (c) (i).
[64] ILC, *Draft Articles on State Responsibility*, art. 16. The articles are considered customary international law.
[65] ILC, *Draft Articles on State Responsibility*, art. 16, Commentaries, para. 1.
[66] *Ibid.*, para. 3.

4. Conclusion on the use of diplomatic assurances in general

While not *per se* in contradiction with State obligations under international human rights law or refugee law, it is clear that diplomatic assurances give rise to serious concerns among international institutions. The above-mentioned UN organs such as the treaty bodies and the Human Rights Council are all established by the Member States of the UN. The same applies to the mandate of the Special Rapporteurs and the High Commissioner for Human Rights, who are elected by Members to represent the institution. These organs and procedures are all created in order to monitor and guide the Members in the full realization of the purpose and principles of the UN. One of the main purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms.[67] On one hand, these institutions may in the future influence *opino juris* as well as State practice of the Member States to refrain from using diplomatic assurances as a tool to counter terrorism and thereby create a new rule of customary international law. However, this does not correspond to the development we see today with increasing use being made of diplomatic assurances.

Diplomatic assurances contain an inherent weakness since such assurances constitute in and of themselves an implicit recognition by States that torture is carried out in the receiving State. Through the diplomatic assurance, the sending State undertakes a *political* obligation to ensure that torture or ill-treatment is not used against a particular individual. The individual concerned has no recourse or right of review if the assurances are violated and in general there are no sanctions linked to a breach of a diplomatic assurance. Some States have tried to develop guidelines for monitoring diplomatic assurances,[68] but in fact the guarantees relating to torture and inhuman treatment cannot be monitored in a reliable and effective manner, in contrast with assurances to refrain from applying the death penalty.[69] The weight to be given to such assurances shall be assessed on a case-by-case basis, and the fact that the receiving State has ratified the relevant treaties does not in itself suffice.

Practice shows that monitoring mechanisms often consist of formal diplomatic contact with the supervision of the prison guards. Furthermore, victims of torture and ill-treatment would in many instances be reluctant to disclose within earshot of a supervising officer those elements that could reflect negatively on such officer. A State party's diplomatic representatives are rarely medically trained to determine signs of torture, and may distort their interpretations in favour of their Government. In addition, there is no incentive for States to shed light upon violations.

[67] UN Charter art. 1 (3).

[68] *Inter alia* the UK and Sweden, see Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 216.

[69] Nowak and McArthur, *The United Nations Convention Against Torture, A Commentary*, op.cit., p. 216 f. Nowak argues that diplomatic assurances on refraining from death penalties is a useful tool in extradition cases. They are effective because the government providing the assurance has the legal and factual power to ensure that the public prosecutor refrains from requesting the death penalty or that it in any case will not be carried out. Furthermore, there is not the same degree of secrecy in relation to a death penalty as there is with regard to torture, since death penalties are not generally prohibited.

5. Case-study: Does Denmark violate the principle of *non-refoulement* if the two Tunisians are sent back?

Summery of the case[70]

On the 30th of September 2005 the Danish newspaper 'Jyllandsposten' published the caricature drawings of the Prophet Muhammad, among others the drawing made by Mr. Kurt Westergaard showing the Prophet with a bomb in his turban. On the 12th of February 2008, with the aim of preventing a terror related assassination of Kurt Westergaard, the police arrested three persons. The operation took place based on surveillance carried out over a longer period of time.

Not wanting to take any undue risks, the Security Police (PET) decided to intervene at a very early stage in order to interrupt the planning and the actual assassination. Thus, the operation must be seen as a preventive measure where the aim was to stop a crime from being committed. As part of the operation, PET arrested a 40-year-old Danish citizen of Moroccan origin. The person arrested was charged with attempting to violate Section 114 of the Danish Criminal Code concerning terrorism, but the charges were later withdrawn and he was released.

Additionally, PET arrested two Tunisian citizens. Pursuant to the provisions of the Danish Aliens Act, it was decided that the two Tunisian citizens were to be deported following an administrative expulsion order considering them a threat to national security. The two Tunisian citizens were imprisoned according to the Danish Aliens Act while awaiting their deportation from Denmark.

As a consequence of this case the Danish Government established a working group with the aim to decide upon issues relating to administrative expulsion as a counter-terrorism measure in the light of international obligations. In this regard the working group should determine whether the possibility of deportation based on diplomatic assurances in general is in keeping with international obligations. The working group published its report on 11 March 2009 and in relation to diplomatic assurances basically came to the following conclusions:[71]

- Expulsion in reliance on diplomatic assurances does not *per se* constitute a breach of international obligations but must only be resorted to with great caution.
- Reliance on diplomatic assurances requires:
  - A stable Government in the receiving State, one which has effective control over law enforcement authorities (police, prison guards etc.)
  - A diplomatic assurance cannot be general but must be concrete and contain specific information regarding the person concerned.
  - The agreement must be precise, definite and detailed.

[70] The facts of the case are based on the official statement by the Security Police, PET. http://www.pet.dk/Nyheder/tegn-disrup-uk.aspx (English). Last accessed 22 April 2009.

[71] Summarized and translated from the report (in Danish), *"Betænkning om administrativ udvisning af udlændinge, der må anses for en fare for statens sikkerhed"*, February 2009, para. 10.3.4, p. 267. The report can be found at www.nyidanmark.dk.

- The agreement should be monitored effectively by independent and qualified professionals who are allowed to visit the person concerned without prior notice of the authorities of the receiving State. The meetings should be conducted in private and without witnesses.
- If the receiving State is a party to the OPCAT, the visits should be carried out by the local National Prevention Mechanism, NPM.
- The working group finally suggests that the Danish Government determine the consequences of a breach of such an assurance and urges the Government to explicitly refer to these consequences in the agreement.

In Tunisia, torture is prohibited in national legislation. However, despite the prohibition set out in CAT art. 15, information obtained as a result of torture is allowed as evidence before the national courts.[72] The definition of terrorism pursuant to national legislation in Tunisia is broad.[73] There is therefore every reason to believe that the two Tunisians, whose presence in Denmark is perceived as a threat to national security, will also be considered as terrorists in Tunisia – despite the lack of a conviction in this regard. In March 2008, Tunisia was under review pursuant to the recently adopted UN *Universal Periodic Review* mechanism, the UPR. The review confirmed the impression of Tunisia as a State with a consistent pattern of gross violations of human rights and one where allegations of torture are rarely investigated.[74] This was also demonstrated by NGO's in the *Saadi*-case.[75] In this regard, Amnesty International noted that following a large number of unfair trials, persons facing terrorism charges had been sentenced to lengthy prison sentences, and cases of torture and ill-treatment continued to be reported.[76] The ECtHR relied on the reports by Amnesty International and Human Rights Watch.[77] Bearing in mind the reasoning in the case of *Saadi,* it would be incorrect to require a higher standard of proof where the person is considered to represent a serious danger to national security, since the assessment of the level of risk if the person is returned is independent of such a test. That the situation in Tunisia should have changed drastically unfortunately does not seem convincing. On this basis, the reliance on a diplomatic assurance for this specific case is to be deemed of no value whatsoever. The Danish Government therefore cannot send the two Tunisians to their country of origin, because this would constitute a violation of the principle of *non-refoulement*.

Finally, an additional element should be mentioned *if* Denmark in the future decides to rely on diplomatic assurances. The struggle against torture is one of

[72] Human Rights Committee, *Concluding observations, Tunisia*, 28 March 2008, para. 12, CCPR/C/TUN/CO/5.

[73] *Ibid.*, para. 15.

[74] *Ibid.*, para. 11, CCPR/C/TUN/CO/5. See also, Human Rights Council, *Universal Periodic Review* (UPR), examination of Tunisia 22 May 2008, report 26 June 2008, para. 27-49, p. 13-20, A/HRC/8/21/add.1.

[75] *Saadi v. Italy* (2008), para. 65-79.

[76] *Ibid.*, para. 65.

[77] *Ibid.*, para 143.

the highest priorities in Danish foreign policy. Denmark has a year-long leading role in the negotiations at the Human Rights Council and the General Assembly as concerns negotiating resolutions related to the prohibition of torture and ill-treatment. One should therefore not underestimate the political signal sent out by relying on such assurances, a signal which might have a decisive influence on other States considering this. Furthermore, one cannot exclude the possibility that unrelated counter-contributions would be sought by the receiving State as a precondition for accepting the persons concerned.