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Committee Against Torture

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

8-14 Avenue de la Paix

CH-1211 Geneva 10

SWITZERLAND

Attention:The Secretariat

Dear Sir/Madam

# Draft General Committee No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22

1. Please consider my comments in your review of the Draft General Comment.
2. I am a human rights barrister from New Zealand, and have written shadow reports to your Committee for each session since 2004.
3. In my human rights practice I have had a number of clients sought for extradition, or deportation. One case seeking extradition to China has been on-going for 6 years as it involves the possible death penalty, torture and fair trial.
4. I have three points to make: the first on diplomatic assurances, the second a stylistic technical point on consistency of terminology, the third a small addition at 18(e.

# Diplomatic Assurances

1. First, I recommend you add a new paragraph 21—*The Committee considers that diplomatic assurances from a State party to the Convention should not be accepted where that State party concerned exhibits a consistent pattern of gross, flagrant or mass violations of human rights. Such acceptance undermines the principle that all are equal before the law, and could be seen to accept that persons not subject to such assurances can be tortured.*
2. I make this recommendation on the basis that human rights law requires as set out in Article 14(1) of the ICCPR 1. … *All persons shall be equal before the courts and tribunals*.
3. Having one class of persons with a diplomatic assurance that they won’t be tortured (or put to death), and a second class relying on the Convention is not equal, and in my opinion actively condones torture of the persons not subject to the assurance.
4. As for the intellectual basis for this which has some complexities see a 2006 Oxford study by Nina Larsaeus.[[1]](#footnote-1) [Annexed as “1”]

While the practice of seeking diplomatic assurances in the context of extraditions and other forms of removals is certainly not new, the current use as a safeguard against torture and other ill-treatment has stirred up a storm within the human rights community. Highly renowned academics, including Guy Goodwin-Gill (see Goodwin-Gill and Husain 2005) and Manfred Nowak (2005), the latter speaking in his capacity as the United Nation’s Special Rapporteur on Torture, have deplored the practice and there is growing support for the claim that diplomatic assurances should be banned as a matter of principle. From a theoretical human rights perspective, the issue of diplomatic assurances is, however, less clear-cut and rather intriguing. What happens when we establish bilateral obligations alongside obligations *erga omnes*? How can you trust known defectors?[[2]](#footnote-2)

**2.5. Do diplomatic assurances defy the ‘object and purpose’ of the prohibition against torture?**

In the beginning of this paper, I noted that diplomatic assurances seemed to host an inherent paradox; they are employed in relation to States that are known not to honour established human rights obligations. By insisting on additional guarantees in certain cases, sending States do effectively acknowledge the existence of a widespread practice of torture in the receiving State while asking for an exception to the practice in the individual case. A number of NGOs have held in this respect that ‘to seek assurances only for the person subject to transfer, amounts to acquiescing tacitly in the torture of others similarly situated in the receiving country’ (Amnesty International *et al.* 2006:2).This statement sparks two questions of immediate relevance for the present study. Firstly, does the use of assurances, while nowhere expressly prohibited, defy the object and purpose of the convention, and is it therefore unlawful? Secondly, what does it mean to the multilateral system of human rights if violations are ‘tacitly acquiesced to’? From a policy perspective a third question may be added: if any such concerns arise, can they be avoided or resolved by prudent legal drafting?[[3]](#footnote-3)

1. In her conclusion the author says:

In the long run, these assurances could help to set up ‘beachheads’ of acceptable behaviour in countries that otherwise flout human rights habitually.

My findings, however, indicate that credible assurances come at a high price for States. Generally speaking, it seems unlikely that, in a North-South relationship, the sending State would *not* have the power, if it truly wanted, to enforce compliance with such an agreement. The crux is that the sending State might have limited incentives to detect violations and ultimately to apply the necessary pressure. Furthermore, using the power of issue linkages may just as well work in the opposite direction, so that the sending State accepts certain transgressions of the agreement in order to maintain good relations in other areas (e.g. in the prevention of irregular migration or conclusion of readmission agreements). Interestingly, while I have been arguing that assurances need to be legally binding, this fact is not what in the end will determine whether or not the agreement will be complied with. The decisive factor is the relative importance of the human rights of the individual compared to the day-to-day relations of the two States in a geopolitical context. From a legal perspective this is hardly a comfortable answer…

If, as I have argued, the risk assessment is essentially one of predicting compliance and compliance hinges on a power game that is impossible for the individual to influence or even to evaluate, this points at a very real challenge for human rights.[[4]](#footnote-4)

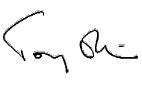
# Use of terminology

1. Secondly, Paragraph 18/4 4 reads: Article 3, paragraph 1, of the Convention provides that “No State party shall expel, return (refouler) or extradite a person to another State…
2. That wide terminology should be consistently used throughout the General Comment, e.g. in Para 18(a) delete “deportation” insert “expel, return (refouler) or extradite”
3. This should also be adjusted in paragraph’s 18(e) and (f), 22, 26, and 29, 30 (b), (c), (d), (e), (f), (g), (h), (i), (j),(m),and (n).
4. It is important to use the full terminology as I have found from experience courts will say but the General Comment does not include ‘extradition’ or ‘deportation’ as the case may be.

# New 18(e)

1. Thirdly, there is little point in having independent medical examinations unless there is appropriate follow-up.
2. It would be useful to add a new 18(e) and renumber accordingly, “Provide whatever psychiatric, psychological or other medical assistance as may reasonably be required.”

Yours faithfully



**DR TONY ELLIS**

**BARRISTER**

**24 March 2017**

1. “The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment” (2006) Refugee Studies Centre Working Paper No. 32, *University of Oxford*. [↑](#footnote-ref-1)
2. Ibid, p 3. [↑](#footnote-ref-2)
3. Ibid p 19. [↑](#footnote-ref-3)
4. Ibid, p 28. [↑](#footnote-ref-4)