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**The Use of Diplomatic Assurances in the Prevention
of Prohibited Treatment**

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ABSTRACT

In their professed effort to reconcile human rights and security concerns, Governments in Europe and North America have attempted to resort to the use of diplomatic assurances. Human rights advocates have been quick to condemn the practice. At the core of the critique is the observation that diplomatic assurances present an inherent contradiction: they are applied in relation to States that are generally not trusted to uphold existing human rights obligations. If most receiving States are already bound by a prohibition of torture by treaty law as well as international customary law of *jus cogens* quality, what is the added value of a diplomatic assurance?

I will argue here that the assurance may add a layer of bilateral obligations on top of or in addition to the multilateral obligation *erga omnes*. It is not inherently more or less binding than universal obligations; the difference – and the potential – lies in available enforcement options. Within the framework of a diplomatic assurance, sending States can dictate conditions of monitoring and enforcement that do not follow from existing obligations. This determines whether there is an added value and, crucially, whether in the individual case an assurance can cancel a risk of torture or other prohibited treatment. By elevating an individual case to the diplomatic level, it gains significance. By the same move, however, it becomes vulnerable to the exigencies of foreign relations.

INTRODUCTION

'This is a bit much. Why do we need all these things?'

Prime Minister Tony Blair when presented with draft diplomatic assurances to be sought from Egypt in 1999.¹

On the face of it, the concept of diplomatic assurances presents a paradox. They are used to exact guarantees of good behaviour from States that are known not to honour already established human rights obligations.² Nevertheless, in the context of recent years' growing concern about 'security', such assurances have been adopted or supported by an increasing number of European and North American States.³ 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? Can agreements on fair treatment be struck in one case without undermining the existing system as such? What are the implications for human rights law? However, the critique so far has primarily revolved around three main arguments: the prohibition of torture is absolute; assurances are used in relation to States that torture and therefore cannot be trusted; monitoring is hard or impossible (e.g. Amnesty International *et al.* 2006; HRW 2005). While these points raise valid concerns, they are unable to explain why, with modifications, assurances cannot be made to work. As long as States are not presented with strong evidence against the use, it is likely that they will continue the practice, which may contribute, in the long term, to establishing new customary international law of potentially uncertain content and value.

In this paper, I will explore some of the fundamental issues that determine if assurances can ever be permissible in the context of a risk of torture and whether they can have any future within the established multilateral framework of human rights. The overarching aim of this research is to determine the possible 'added value' of diplomatic assurances. The question also has a normative implication as it is argued that without such an added value, assurances are fundamentally incapable of preventing violations of international human rights, and, therefore, must indeed be abandoned. I will engage in these questions by

¹ *Youssef v. The Home Office* [2004] EWHC 1884 (QB), July 30, 2004, at 15.

² Diplomatic assurances are also sometimes referred to as 'diplomatic guarantees' or 'Memorandum of Understanding' (MOU). In the following, I will use 'diplomatic assurances' to denote any agreement between States that includes human rights safeguards in the context of removal (e.g. expulsion, extradition). My primary focus is assurances in the context of a risk of torture or other cruel or inhuman behaviour (Article 3 CAT and Article 3 ECHR).

³ Detailed information from European countries is available in Council of Europe (2006).

analysing international treaties, legal doctrine and scholarly articles, international case law and, to some extent, reports and statements of NGOs.⁴ My research is complemented by informal interviews with senior staff of the Swedish Ministry for Foreign Affairs, conducted in March 2006.

The study proceeds in three steps. First, I will lay out the contextual framework, i.e. the legal and political context and rationale of diplomatic assurances. Second, I will look at some key legal issues of assurances: what are the legal requirements on diplomatic assurances, are they legally binding, how do they relate to the already existing multilateral level of human rights law and what is the nature of the risk assessment? Third, I will step beyond the confines of law to draw on the recent insights of the flourishing field of compliance theories in international relations to see what factors influence compliance and how compliance can be enhanced. Lastly, I will return to my initial question with some final remarks on the added value.

1. THE CONTEXTUAL FRAMEWORK

1.1. Between securitization and human rights

Concerns about terrorism are not new, but since 11 September 2001 the ‘fight against terrorism’ has gained momentum. Among human rights lawyers and NGO advocates there is concern that terrorist attacks such as those in New York, Madrid and London are used to justify various exclusionary practices, adversely affecting migrants. The fear is that established human rights provisions, such as the *non-refoulement* principle, are ‘part of the body of shifting norms’ caused by the securitized climate (Hall 2004: 260). Others have argued, more cynically perhaps, that the security debate following 11th September 2001 was not essentially about a fundamental change of the ‘the rules of the game’ but that the discourse was already set in motion by other dynamics and that terrorism simply provided ‘a window of opportunity [for Northern States] for more restrictive policies and legislation’ (den Boer 2003). Chimni (1998:287) has highlighted the vacuousness of the security concept pointing out that it makes an attractive tool for States, ‘allowing ruling elites to inject it with any content’.

Assuming that there is at the very least a move towards a securitization of migration and border control, we might want to ask what consequences to expect for human rights and how the recent attention to diplomatic assurances fits into all of this.⁵

⁴ Academic writings on diplomatic assurances remain scarce; to my knowledge, no articles dedicated to the analysis of assurances have yet been published, but see Noll (2006) forthcoming. In light of the scarcity of academic contributions to date, the present research leans towards the theoretical and is explicitly exploratory in nature.

⁵ Buzan *et al.* (1998:25) emphasise that an issue is never securitized merely by the existence of a discourse that presents it as an existential threat (this is merely a *securitizing move*). To be ‘securitized’, an issue has to be accepted as such. In a recent conference paper, Boswell (2006) has questioned the widespread assumption that migration is being securitized in Europe, showing that although migrants have indeed been portrayed as a security risk primarily by governments, the relevant audiences (judiciary, parliament and others) have not accepted the presumed link between terrorism and foreigners.

By securitizing an issue, it is generally held that the actor seeks to elevate that issue from the realm of ‘low politics’ to which normal democratic and judicial rules apply, to the realm of ‘high politics’ characterized by urgency and executive decisions (Buzan *et al.* 1998: 21-26). Although the British context in particular seems to offer ample examples of restrictive measures against asylum seekers from the part of the Government, this has in recent years been met with a countermove by the judiciary. With the adoption in 1998 of the Human Rights Act the ‘fairly gentlemanly’ climate, dominating relations between judiciary and the executive until the 1970s, appears completely gone (*The Economist* 2006). The Human Rights Act incorporated the European Convention on Human Rights (ECHR) into British law and has fundamentally altered the power of British judges.⁶ In a series of highly publicized cases, British courts have clamped down on legislation found incompatible with the ECHR. In December 2004 the House of Lords famously ruled in favour of appeals by nine non-British detainees at the Belmarsh Prison, finding that the British derogation under Article 5 ECHR and the indefinite detention of non-British citizens was discriminatory and disproportionate.⁷ On 15 March 2005 the derogation under ECHR (as well as a similar derogation relating to Article 9 of the International Covenant on Civil and Political Rights, ICCPR) were formally withdrawn and replaced by the Control Orders under the Prevention of Terrorism Act 2005 (Shah 2005).

The developments in the United Kingdom have been seen as part of a general ‘advance of a human rights culture’ across Europe in which immigration matters have undergone a judicialization (Soysal 1994; Joppke 1999; Gibney 2003) where the demands of due process in asylum determination and better protection against *refoulement* are only two examples (Gibney 2003:33). This development of a new ‘rights culture’ has provoked a tension between ‘the law of inclusion and the politics of exclusion’ (Gibney 2003:35, 44) in which the contemporary requests for diplomatic assurances are presumably a part.

1.2. The rationale of diplomatic assurances

The prohibition of torture is possibly one of the best-established human rights provisions. All major universal and regional human rights conventions to date include a provision against torture and all of these provisions are framed in absolute, non-derogable terms.⁸ The provision against torture – sometimes including other ill-treatment – constitutes customary international law, and is widely recognized as a peremptory norm (*jus cogens*).⁹ In addition to a prohibition of committing or conceding to acts of torture, the provision either provides for (CAT Article 3) or has been held to imply (ECHR Article 3; ICCPR Art 7)¹⁰ an extra-

⁶ ‘In the breadth of its ambition and the potential reach of its terms, British law has never before seen anything like this in a piece of legislation’ (Gearty 2004:3).

⁷ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (16 December 2004).

⁸ ICCPR Article 4 (2); CAT Articles 2 (2) and 15; American Convention on Human Rights Article 27 (2); Arab Charter of Human Rights Article 4 (c); Inter-American Convention to Prevent and Punish Torture Article 5.

⁹ See e.g. Report of the Special Rapporteur on Torture (P. Kooijmans), E/CN.4/1986/15, at para. 3; *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998; ILC (2001:283-284).

¹⁰ This prohibition of *refoulement* by the ECHR was first established in the 1989 landmark decision of *Soering*, where the European Commission for Human Rights found that removing an individual from the United Kingdom to the state of Virginia, USA, where he would risk suffering from the so called death row phenomenon, would violate the prohibition against torture. For our purposes the decision is also interesting

territorial application in the sense that it is also prohibited to expel, extradite or otherwise remove a person to a country where he or she risks being tortured. In a series of much publicized cases, international courts have established that this includes instances of national security, and similar considerations.¹¹

In refugee law the security debate has reawakened an interest in Article 1 F of the Refugee Convention, which excludes from international protection anyone who has committed certain serious crimes prior to the arrival in the host country. While the exclusion clause is generally favoured as a method integral to the refugee law system, to ensure that people ‘unworthy’ of refugee status are not awarded international protection, the rule has its limitations. One such issue highlighted by writers is the post-exclusion phase (Fitzpatrick 2000; Geoff 2003; Larsaeus 2004). While it is recognized that the 1951 Refugee Convention is well suited to ensure that terrorists and other criminals are not awarded refugee status, the issue of what to do with excluded, non-removable individuals has proven harder to resolve. Following the principle of *aut dedere aut judicare* there is, in case of most of the crimes relevant to suspected terrorism, at least a *permissive* universal jurisdiction of international law (Larsaeus 2004). If States are unable to remove or extradite an alleged terrorist owing to their human rights obligations, they may be able to prosecute that person in domestic courts. Yet, due to the difference in the standard of proof in criminal proceedings, ‘beyond reasonable doubt’, compared to refugee status determination, ‘serious reasons for considering’, it is quite possible that individuals suspected of involvement in terrorist activities are not convicted in court. The continued detention of such a person, without prospects of deportation or extradition, is precluded by the European Convention (Article 5).¹²

Since the 1996 decision in *Chahal*, European States, most openly the United Kingdom, have sought new avenues for responding to perceived security threats. In 1999, the British Government initiated contacts with the Government of Egypt in view of negotiating safeguards for the return of four alleged Islamic militants. The men were found to have submitted plausible claims of harassment and torture by Egyptian officials but were excluded from refugee status with reference to Article 1 F. Over a period of several months, they were detained pending deportation as the Government sought to obtain assurances from the Egyptian Government that would satisfy UK courts.¹³ Eventually, as the British Government had failed to secure even a most watered down assurance covering only torture and lacking

because it included an early and unusually informative discussion on the significance of a diplomatic assurance given to support the UK assertion that Soering would not be sentenced to death. In 1992 the Human Rights Committee declared its view that Article 7 of the ICCPR also implies a non-refoulement provision. See General Comment No 20 (1992).

¹¹ See e.g. *Tapia Paez v. Sweden*, CAT Communication No. 39/1996; see ECHR jurisprudence in *Soering v. United Kingdom*, Ser. A 161, 7 July 1989; *Chahal v. United Kingdom*, Judgment 70/1995/576/662, 15 Nov 1996; *Ahmed v. Austria*, Judgment 71/1995/577/663, 17 Dec 1996.

¹² Article 9 of the ICCPR raises similar issues.

¹³ *Youssef v The Home Office* [2004] EWHC 1884 (QB), (30 July 2004). Court records include detailed descriptions of correspondence between the Foreign and Commonwealth Office, senior legal advisors and Prime Minister Blair.

the initially suggested monitoring mechanism, the Home Secretary decided to release the men.

In a recent third party intervention in the case of *Ramzy v the Netherlands*, currently under consideration in Strasbourg, the United Kingdom, flanked by the Lithuanian, Portuguese and Slovakian Governments, have laid out the ‘difficulties’ created by the majority’s judgment in *Chahal*.¹⁴ The Governments estimate that most of those individuals who are found to pose a major terrorist threat would risk prohibited treatment if returned. If such a person commits a criminal offence it is possible to try him or her in the criminal courts with the possibility of a jail sentence. The Governments, however, anticipate that individuals implicated in terrorism ‘would take great care not to commit any criminal offences’ (para. 14) and if they did, these would probably be minor offences like ‘theft or fraud’, with low sentences (para. 14.1). Even if they were to commit serious offences, authorities may not be able to secure a conviction if they are barred from relying on secret intelligence information in criminal proceedings.¹⁵ Furthermore, preventive measures such as detention raise legal issues and lesser measures, such as surveillance or control orders, provide only partial protection from the terrorist threat. In the light of these obstacles to ensuring public safety, the Governments find that the only option left is deportation.

While this illustration of the difficulties facing liberal Governments in their legitimate wish to safeguard the security of their citizens is largely accurate, it leaves one feeling uneasy. If the Governments truly consider an individual to be a security risk, simply deporting that person to the streets of her hometown does not seem to be an adequate solution. The efficiency of the measure rests on the presumption that removed persons will be apprehended upon return – in other words that another country assumes the role that the judicial systems in the United Kingdom, Lithuania, Portugal and Slovakia would not have permitted. This problem is central to the application of diplomatic assurances and one that seems hard to resolve.

It has become already clear that making diplomatic assurances effective and safe is potentially fraught with serious difficulties that touch both sensitive legal and political issues. I will now first turn to some of the key legal issues surrounding diplomatic assurances. Next to analysing the fundamental legal requirements, I will particularly investigate if assurances are legally binding, how they influence the risk assessment and finally how they affect the established multilateral system of human rights protection.

¹⁴ Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom in Application No. 25424/05 *Ramzy v the Netherlands* at para. 11-16.

¹⁵ This with clear reference to *Lawless v Ireland* (No. 3), judgment of 1 July 1961, paras. 35 and 36.

2. THE LEGAL FRAMEWORK

2.1. An added value

Assuming that diplomatic assurances are only considered in situations where a removing State is not confident that the existing legal framework is a sufficient safeguard, it can be inferred that an assurance must *add* something in order to prevent a violation of international law. Considering that most States are already bound by the prohibition of torture as a matter of both conventional law and customary international law, generally held to be of *jus cogens* quality, this may seem a high standard to meet. Indeed, analysing the legitimacy of diplomatic assurances, care must *also* be taken to establish that the assurance contemplated is not effectively *undermining* the protection capacity either in the individual case or of the international protection against torture as a whole (Noll 2006; Amnesty 2005; Human Rights Watch 2004, 2005).

Here, I will argue that the *de facto* function of a diplomatic assurance is to elevate the circumstances of a single person to a case of ‘diplomatic significance’ or personal ‘trust’ between senior State officials.¹⁶ By establishing a bilateral accord separate from the multilateral treaties, both States can distance themselves from the perceived failings of the former. The sending State can signal that, in contradiction to the multilateral level where States do not exercise their right to State complaint, the present State is committed to some degree of monitoring or even prepared to enforce compliance. The receiving State can collect good will and will have neither to admit failure nor, arguably, change its general practice. In this perspective, it is not the format of the assurance that is of essence but to what level of commitment the case has been raised. Consequently, recent examples of assurances are markedly informal. For a third party it is not apparent whether or not they are even intended to be legally binding. As will be seen in the following, the legal drafting would suggest they are not, while the legal logic requires that they are.

It is a recurring theme in NGO advocacy that because Article 3 (ECHR/CAT) is absolute, the use of diplomatic assurances in the context of a risk of torture is wrong or prohibited.¹⁷ It is a way to circumvent the prohibition, thus violating the object and purpose of the prohibition against torture. I will argue that this assumption is premature. In light of States’ widespread repetition of similar provisions against *refoulement*, several scholars have concluded that the absolute principle of *non-refoulement* as such constitutes international

¹⁶ As already noted, Prime Minister Tony Blair has shown preparedness to engage directly to secure diplomatic assurances, see *Youssef v The Home Office*, note 1.

¹⁷ See e.g. Amnesty International *et al.* (2006) ‘Ultimately, there can be no minimum standard for the content and use of diplomatic assurances against a real risk to an individual of torture or other ill-treatment, because any such standard will fall far short of States’ absolute and non-derogable obligations pursuant to the international prohibition of torture or other ill-treatment.’ Other actors have been more reserved in their opinions. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT 2006:14) ‘retains an open mind on this subject’ but notes that ‘it has yet to see convincing proposals for an effective and workable mechanism.’ The Venice Commission (2006) has held that assurances ‘may be appropriate as concerns risks of application of the death penalty or for fair trial violations, because such risks can in most instances be monitored satisfactorily.’ Where, however ‘there is substantial evidence that a country practises or permits torture in respect of certain categories of prisoners, guarantees may not satisfactorily reduce this risk in cases of requests for extradition of prisoners belonging to those categories.’

customary law (Lauterpacht and Bethlehem 2003; Bruin and Wouters 2003; Goodwin-Gill 1996) or even *jus cogens* (Allain 2001). This means that the *refoulement* of an individual to a country where she risks being subjected to torture is prohibited for all States regardless of whether they have signed an international (or regional) convention to that end and, in the case of a *jus cogens* norm, that any conflicting convention or norm is automatically considered ‘null and void’.¹⁸ While I share this interpretation, and can certainly agree that from the point of view of advocacy ‘[m]uch can be gained by insisting on the *jus cogens* nature of *non-refoulement*’ (Allain 2001: 534), I disagree with the suggestion that this would preclude the use of diplomatic assurances. My conclusion rests on two claims: firstly, the relevant point in time for judging whether a removal would include a risk of torture is ‘the time of the removal’, not before and not after.¹⁹ Secondly, in assessing the risks connected with removal to a certain country, ‘[a]ll pertinent information may be introduced by either party to bear on this matter’.²⁰ This reading has been adopted by the European bodies since the days of *Soering*. The legal issue in *Soering* was undisputed: if the diplomatic assurance would have given significant guarantees ‘that the death penalty would not be imposed or carried out, then the risk of subjection to the death row phenomenon would have been nullified and a real risk of a violation of Article 3 would not have arisen’ (Bruin and Wouters 2003:27).

This logic has been accepted and followed in relation to the removal with a risk of death penalty for over three decades. Naturally, as Bruin and Wouters (2003) point out, the situation is more complicated when the assurance aims at addressing extra-judicial acts of torture which the receiving State is highly reluctant to admit is happening in the first place. Nevertheless, analysing the handful of decisions from the European Court of Human Rights (ECtHR) and the Committee Against Torture where assurances have figured centrally, the possibility that assurances may sufficiently reduce the risk of torture has never been ruled out. The legality of assurances hinges on the question whether they can cancel a real risk (i.e. reduce the risk to a level where it is no real risk or ‘substantial grounds’) and whether the assurance or system of assurances can be applied without doing damage to the multilateral level of human rights.

2.2. Empty promises or legally binding bilateral agreements?

When exploring the value of diplomatic assurances, a main factor certainly is whether or not the assurance is a legally binding agreement or if it merely represents a political commitment to act towards certain agreed ends. In international relations, even in the field of human rights law, both forms are common. The name of an instrument does not necessarily say anything about its legal status.²¹ ‘Treaties’ and ‘conventions’ of course are ‘treaties’ falling in the ambit of the Vienna Convention on the Law of Treaties (VCLT), but so are sometimes ‘agreements’, ‘understandings’, ‘protocols’, ‘arrangements’ and a number of other

¹⁸ Vienna Convention on the Law of Treaties (VCLT) Article 53.

¹⁹ *Agiza v Sweden* CAT/C/34/D/233/2003, 24 May 2005 at para 13.2.

²⁰ General Comment No. 01: Implementation of Article 3 of the Convention in the context of Article 22: 21/11/97. A/53/44, annex IX, CAT General Comment No. 01, at para. 7.

²¹ See e.g. the UN Charter, which most definitely is a binding treaty and the OSCE Charter of Paris 1990 (establishing the OSCE), which by Aust’s understanding is a non-binding MOU.

instruments (Malanczuk 1997:36). The decisive aspect is whether they were *intended* by the parties to be treaties, i.e. to create legally binding rights and obligations (Oppenheim 1955: 900; 1992:1200; McNair 1961:15, ILC 1966:189). In practice, it seems, treaties are named more in accordance with the internal customs of the international organization or groups of States within which they were drafted (Aust 2000:20). Apart from treaties, there is a vast array of loose agreements, sometimes referred to as ‘non-binding’ or ‘political agreements’ (Schachter 1977, 1991); ‘international instruments’ or ‘Memoranda of Understanding’ (Aust 1986) or ‘informal agreements’ (Lipson 1991). Such agreements are generally perceived to be normative in the sense that they are intended to influence future behaviour, but not to be legally binding as such (Klabbers 1996), although it is sometimes held that they can at times give rise to ‘legal consequences’ (Aust 1986, 2000). According to Aust, such agreements (which he calls ‘memoranda of understanding’) are often used in situations where parties could just as well have chosen the form of a treaty but prefer the non-binding format because it offers procedural advantages such as confidentiality, flexibility and speed (Aust 1986: 789).²² Again, it is not always possible to determine the status of an instrument by its name; the decisive factor is whether the State Parties intended the agreement to be binding.²³

With respect to diplomatic assurances, Noll (2006:10) has argued that non-binding agreements would be ‘quite meaningless’: ‘Either, the agreement is legally binding and may therefore alter the risk assessment undertaken by a removing state. Or it is not binding, and will not affect the risk assessment, turning removal into a violation of pertinent human rights violations.’

Consequently, Noll finds that at least the sending State must have intended the agreement to confer more than mere political pressure. Without yet taking a stand concerning the validity of the conclusion, it seems that this logic is of little use for the domestic court or international body charged with the task of ascertaining the efficiency of the agreement; for what if, after removal of the individual, it turns out that neither the sending nor the receiving State intended to create legally binding additional safeguards?

Speaking with thirty years of experience from the British Foreign Office, Aust points out that in practice it is customary for States to indicate whether their intention is to conclude a treaty or a non-binding MOU by means of diplomatic terminology. Hence, if drafted in English, terms such as ‘shall’, ‘agreement’, ‘obligations’, ‘rights’ and ‘enter into force’ are used to denote the intention to establish a treaty, while the equivalent words for a non-binding agreement would be ‘will’, ‘understanding(s)’, ‘commitments’, ‘benefits’ and ‘come into effect’ (Aust 2000: Appendix G). In addition, a non-binding instrument would usually be designated ‘memorandum of understanding’. Especially within the Commonwealth there has been a strong aim for consistency, to the extent that ‘foreign government negotiators may have been rather bemused by requests, [...] to change the title of a draft from ‘Agreement’ to ‘Memorandum of Understanding’ or ‘Arrangement’ and every ‘shall’ to ‘will’ (Aust

²² For further discussion on the choice between binding and non-binding agreements, see Chinkin (2000:28).

²³ Aust gives three examples of instruments named MOU that are in fact treaties. Cf. Klabbers (1996) who maintains that MOUs should generally be seen as legally binding instruments.

2000:30). Further evidence of the intentions of the parties may include express statements as to the nature of the instrument (e.g. that it ‘represents a political commitment by the sides’) or registration with the United Nations (UN) according to Article 102 of the UN Charter. The content of an instrument usually does not give much indication of status since the same subject matter can be contained in both treaties and MOUs.²⁴

Naturally, not everyone agrees with Aust’s arguments, especially not his insistence on the existence of non-binding instruments capable, nonetheless, of conferring legal consequences. Klabbers has objected that:

[i]t remains unclear where the difference lies between an agreement being legally binding and an agreement not so binding but having legal consequences. At the end of the day, the net result seems to be the same; states can be legally bound both by legally binding agreements and by non-legally binding agreements. In the former case, they become intentionally legally bound; in the latter, they become so bound without having intended as much, by virtue of good faith, estoppel or reliance. But if that is the case, what then can be said to justify the distinction? (Klabbers 1996:111).

For one thing, I would suggest, the distinction is justified by the parties’ intent. The *intent* to establish legally binding obligations is, as we have seen, central to the definition of a treaty and indeed, central to the concept of sovereign States. The first rule in interpreting a treaty is to look at the ‘ordinary meaning’ of the terms of a treaty (Article 31 VCLT). If the careful drafting of treaties is of no consequence, then trouble looms in many areas of treaty law.

Returning to diplomatic assurances, the recent British adoption of reciprocal assurances, the MOUs with Jordan, Libya and Lebanon, beg to be examined. Studying the drafting of the MOU with Jordan, the first to be agreed, the wording is unflinching:

MEMORANDUM OF UNDERSTANDING [...]

[...]

Understandings

It is *understood* that the authorities of the United Kingdom and of Jordan *will* comply with their human rights obligations [referring to human rights obligations which are, in fact ‘obligations’] under international law regarding a person returned under this *arrangement*. Where someone has been accepted under the terms of this arrangement, the conditions set out in the following paragraphs (numbered 1-8) *will* apply, together with any further specific assurances provided by the receiving state.

1. If arrested, detained or imprisoned following his return, a returned person *will* be afforded adequate accommodation, nourishment, and medical treatment, and *will* be treated in a humane and proper manner, in accordance with internationally accepted standards.

²⁴ As an exception, Aust (2000:27) notes provisions providing for dispute settlement involving UN judiciary bodies since that would understandably be inconsistent with an intention to establish a non-binding instrument. To this we might add, that had it been the intention to make use of UN dispute settlement, the instrument should also be registered with the United Nations pursuant to Article 102 of the UN Charter, since this is a prerequisite for invoking a treaty before a UN organ.

2. A returned person who is arrested or detained *will* be brought promptly before a judge or other officer authorized by law to exercise judicial power in order that the lawfulness of his detention may be decided.
3. A returned person who is arrested or detained *will* be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.
4. [...]

This Memorandum of Understanding represents the *understandings* reached [...]

Signed in duplicate at Amman [...] ²⁵

Following Aust, the choice of terminology in the drafting of the MOU with Jordan would strongly suggest that the United Kingdom did not intend the instrument to be legally binding. Klabbers, however, seems to argue that intended or not, as an instrument embodying an agreement, MOUs should be regarded as treaties. Applying the latter argument on the example of the Jordan MOU, we could be presented with a situation where domestic courts allow the deportation on the basis that, as a legally binding agreement it is deemed a sufficient safeguard. If a court would infer from an MOU that parties intend to be legally bound by its provision, when in reality they are not and, perhaps, have no intention to adhere to it if conditions change, the protective capacity of the assurance is effectively misrepresented. Furthermore, since the intention was never to conclude a treaty, the MOU is unlikely to have been registered as such and consequently, the sending State may not use the dispute settlement mechanisms of the UN bodies. If, on the other hand, Aust's theory is applied, as a non-binding instrument the MOU might not be accepted as a sufficient safeguard in the first place. If it were accepted, it would still not formally be eligible for UN dispute settlement, but could possibly evoke legal consequences as a matter of fairness and estoppel.

The fact that the nature of the arrangement, as a legally binding agreement or a political 'understanding', is seemingly up to the parties' discretion raises serious issues in relation to the fundamental requirement of legal certainty. The better view, I suggest, is that an assurance must, at a minimum, be unequivocally binding as law for it to provide an added value.

2.3. Risk assessment

The question of the relevant risk assessment is central: '[A] risk assessment translates the positive obligations abstractly inherent in a norm into concrete guidelines for action. Protection and predictability are intertwined: the more predictable a violation is, the stronger is the protection claim of the presumptive victim' (Noll 1998:378).

The Convention Against Torture applies a burden of proof that is ostensibly higher than that of the *non-refoulement* provision, Article 33(1), of the Refugee Convention (Gorlick 2003:375). It requires the existence of 'substantial grounds' for believing that a

²⁵ Emphasis added. Full text available e.g. at <www.asil.org/pdfs/ilbukjord050818.pdf>.

person is at risk of being subjected to torture. In a series of case law starting with *Mutombo v Switzerland* the CAT Committee has established the fact that a ‘consistent pattern of gross, flagrant or mass violations of human rights’ (Article 3:2) does not on its own provide substantial grounds for believing that a particular individual will be subjected to torture; the risk needs to be personal.²⁶ In its General Comment No 01²⁷ the Committee has specified the level of risk that the claimant must establish to generate an obligation of protection: ‘the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.’ Furthermore, ‘[t]he author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present.’²⁸ While the existence of a consistent pattern of gross, flagrant or mass violations of human rights is explicitly mentioned as information that the competent authority must take into account, either party may use any pertinent information that may have a bearing on the risk assessment. Gorlick (1999) has summarized the evidence sought by the Committee as follows:

- Is there evidence of a consistent pattern of gross, flagrant or mass violations of human rights?
- Is there evidence of previous torture or maltreatment of the applicant by public officials?²⁹
- Are there medical or other independent evidence to support a claim of previous torture or maltreatment?
- Has the internal human rights situation changed?
- Has the applicant engaged in political or other activities that may make him or her particularly vulnerable if he or she were to be returned?
- Is there evidence supporting the credibility of the applicant?
- Are there relevant factual inconsistencies in the applicant’s claim?

It is clear from the above list that the sending State has very little chance of reducing the risk by improving a generally unsafe situation, at least within a timeframe that could make this a viable solution for removal. The function of a diplomatic assurance therefore is to reduce the

²⁶ On the other hand, CAT has simultaneously reiterated that the absence of a general pattern of human rights violations does not preclude the existence of a real personal risk.

²⁷ General Comment No. 01: Implementation of Article 3 of the Convention in the context of article 22: 21/11/97. A/53/44, annex IX, CAT General Comment No. 01.

²⁸ See Article 3 CAT.

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.

²⁹ An important remark needs to be made regarding the definition of ‘public official’. In *Sadiq Shek Elmi v Australia*, CAT found that where non-state ‘factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments’ any members of these factions, in this case members of the Hawiye militia, are comparable with ‘public officials or other persons acting in an official capacity’ and consequently may give rise to claims of torture as defined in Article 1. Hence, in the unlikely event that diplomatic assurances would be considered in relation to failed states, or any similar situation, these would need to be effective in relation to all factions with the *de facto* power of a legitimate Government.

risk in a *specific* case by directly influencing the receiving State's performance. There is little authoritative direction on how this should be achieved in practice. Guidance may, however, be sought from the handful of cases where international or domestic courts have ruled on expulsion orders supplemented with diplomatic assurances.³⁰

In one of the first of these rulings, the 1989 *Soering* case, two elements are of particular interest for this study. The first has to do with the inability of the Federal State to issue a binding assurance. Because *Soering* was charged with an offence falling under the jurisdiction of the Commonwealth of Virginia, the US Federal Government was not competent to negotiate the terms of the transfer with the United Kingdom. Furthermore, as judicial bodies, Virginia courts could not be bound in advance to what decisions they would later arrive at, and the third factor influencing the force of the federal assurance, the Governor of Virginia had a policy never to promise in advance to exercise his executive power to commute a death penalty.

The second interesting element of this judgment was the fact that the Court chose to raise the issue of trust and the diplomatic relations between the United Kingdom and the United States, quoting a statement made by the Home Office to the Parliament. '[If the United Kingdom is] prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out [...] It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances' (para. 97). The Court then goes on to reject the assumption that diplomatic relations even between countries as close as the United Kingdom and the USA could make up for insufficient safeguards at the removal. 'Whatever the position under Virginia law and practice [...], and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed.' In light of the fact that the Commonwealth's Attorney on the basis of existing evidence had persisted in seeking the death penalty, the Court found that it was 'hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon".'

The well-known *Chahal* case, usually cited as a case where the Court confirmed the absoluteness of Article 3 ECHR, also includes the following assurance from the Indian Government that stated:

We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above.

³⁰ It should be noted that in international law, as in the civil law tradition, judicial decisions are not binding on other than the parties in that particular case. They are important, however, as subsidiary means for the determination of rules of law. *See* ICJ Statute Art 38.

While the Court claimed ‘not [to] doubt the good faith of the Indian Government in providing the assurances [...], it would appear that, despite the efforts of that Government, the NHRC [the National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem [...]’ The Court was therefore not persuaded that the assurance was an adequate guarantee of safety against violations by the hands of the police of the Punjabi security forces. The fact that Mr Chahal was a high profile Sikh separatist further increased the risk of harm.

In July 2005, in the somewhat similar case of *Mamatkulov and Askarov v. Turkey*,³¹ the ECtHR Grand Chamber majority did not find a violation of Article 3. The case concerned the extradition of two Uzbek nationals who were at the time of the extradition request suspected of several offences including an attempted terrorist attack on the President of the Republic of Uzbekistan and conspiracy to overthrow the constitutional regime. The Turkish Government was provided with the assurance from the Government of Uzbekistan that:

[t]he applicants’ property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital punishment. [...] The Republic of Uzbekistan is a party to the United Nations Convention against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole.

The Government also provided medical reports from the doctors who had examined Mr Mamatkulov and Mr Askarov in the Uzbek prisons in which they were being held. According to information from Amnesty International, the human rights situation in Uzbekistan at the material time was a reason for concern (para. 55). In particular, the event in February 1999 when hundreds of people were detained following bomb explosions in the capital, Tashkent, gave heightened reason for concern. Those detained, reportedly ill-treated and tortured, included suspected supporters of *Erk, Birlik* and other banned political and Islamic opposition parties and movements. The two men were members of *Erk* and their legal representatives argued that this put them at particular risk of being subjected to torture. Furthermore, the representatives argued, once the extradition had taken place they had been unable to establish contact with the applicants by letter or telephone, either before or after their trial. As third-party interveners, Human Rights Watch and the AIRE Centre added that ‘close relatives of the applicants’ co-accused had been subjected to torture and political prisoners had died as a result of ill-treatment received in Uzbek prisons’ (para. 65). They also held that in the light of the ‘political situation obtaining in Uzbekistan and the lack of effective judicial supervision of the security forces’ the assurances were not a sufficient guarantee (para. 65).

The Court was not unanimous in its decision. A majority found that the requisite risk had not been sufficiently shown. Although a general risk of torture had been established, they

³¹ *Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99), judgment Strasbourg, 6 Feb 2003 (Grand Chamber).

did not find that enough corroborative evidence had been produced to permit the Court to conclude that ‘substantial grounds’ existed at the date of the extradition. ‘In the light of the material before it’ the Court was ‘not able to conclude that substantial grounds existed at the aforementioned date [the date of the extradition] for believing that the applicants faced a real risk of treatment proscribed by Article 3.’ The decision, however, was controversial; five members of the Court issued either concurring or partly dissenting opinions. In a partly dissenting joint opinion Judges Bratza, Bonello and Hedigan found it ‘unclear [...] what further corroborative evidence could reasonably be expected of the applicants,’ especially since Turkey has not stayed the extradition at the Courts’ request pursuant to Article 39. The opinion was particularly instructive in its discussion on the provided assurances. Their concern can be summarized as the following:

- The assurances were not communicated to the Court until after the extradition had been effected.
- The effectiveness must be determined on an individual basis depending on the situation at the material time. In the present case evidence pertaining to the treatment of political dissidents was sufficient to ‘give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety’ (para. 10).
- *Despite* their treaty obligations there were widespread allegations of ill-treatment and torture at the time of the applicants’ arrest and surrender (para. 11).
- The medical reports were ‘very brief and unspecific’ and were only carried out after almost two years has passed since the extradition and some 18 months after the trial. They were not therefore enough to refute the ‘well-foundedness of the applicants’ fears at the time of their extradition’ (para. 12).

Just three months after the decision in *Mamatkulov and Askarov* a new diplomatic assurance figured centrally in the widely publicized decision of *Agiza v Sweden*, determined by the CAT at its Thirty-fourth session in May 2005. In an *aide-mémoire* the Swedish Government presented the understanding that the two Egyptians would be awarded a fair trial, ‘not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt.’³² The Swedish note was followed by an Egyptian response asserting ‘full understanding to all items of this *mémoire*, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights.’ This would be done ‘according to what the Egyptian constitution, and law stipulates.’ The *mémoires* were exchanged in Cairo during a visit by the Swedish State Secretary who stressed the centrality of the assurance, noting that ‘Sweden found itself in a difficult position, and that Egypt’s failure to honour the guarantees would impact strongly on other similar European cases in the future’ (para. 4.24). Sweden was given (verbal) assurances from Egypt that it would be possible for the Swedish embassy in Cairo to visit the men regularly and to monitor the

³² *Aides-Mémoire* between Sweden and Egypt, 12 December 2001, on file with author.

trials.³³ Satisfied that these assurances were sufficient and ‘considerably stronger than the ones in the *Chahal* case’, on 18th December 2001 the Swedish Government made the decision to reject their claim for asylum and expel Agiza and El-Zary to Egypt.³⁴ The decision was effectuated on the evening of the same day, with American assistance and under extraordinary circumstances.³⁵ When the issue was brought to the CAT almost two years later, allegations of torture were already circulating. While determining, according to settled case-law, that the relevant point in time for the risk assessment was the time of the removal, the Court also took notice of the situation surrounding the deportation, which ‘at least’ amounted to cruel, inhuman or degrading treatment or punishment, and confirmed the ‘natural conclusion’ that the men would be at risk of torture.³⁶ The Committee found that Sweden should at least have known that torture was widespread in Egypt and that people detained on security grounds were at special risk. Since its own security intelligence suggested that the men were implicated in terrorist activities and at least two foreign security agencies had shown interest in the men, the Court found a personal risk. ‘The procurement of diplomatic assurances, which moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk’ (para. 13.4.).

From this review, it is possible to establish a few basic requirements without which an assurance can hardly cancel a real risk of prohibited treatment. Crucially, even if given in good faith, an assurance is ‘not of itself a sufficient safeguard where doubts exist as to its effective implementation’.³⁷ *Soering* and *Chahal* point to the essence of dealing with the competent partner. In *Soering* it was the independence of the judiciary that rendered the assurance from the Federal Government insignificant; in *Chahal* it was the lack of control of the Federal Government (whose ‘good faith’ the Committee did not dispute) over the Punjabi military and over the police force that decreased its efficiency. Furthermore, it shows that the appeal to special relationship, trust or vested interest adds little value and, from the legal perspective of the Court and Committee, has under the circumstances not been convincing. In *Soering*, the Court raised the point that it would probably be ‘a serious blow’ to the relations between the two States if the Courts of Virginia would execute a person despite the explicit request from the British Government. In the case of *Agiza*, the Swedish argued that Egypt had everything to win from complying since ‘failure to honour the guarantees would impact strongly on other similar European cases in the future’. The Committee, however, did not find the reliance on trust compelling.

³³ Committee on the Constitution, Betänkande 2005/06:KU2 p.14.

³⁴ For a full review about the circumstances in the case see e.g. Joseph (2005).

³⁵ The men were allegedly wearing shackles and handcuffs during the duration of the flight, fastened in the plane to a special harness. The circumstances surrounding the deportation were revealed to the public in May 2004 through ‘Kalla Fakta’, a TV programme on Swedish Channel 4, and immediately caused a public outcry. The Government’s decisions regarding the removal have been subject to two major investigations by the Committee on the Constitution (Konstitutionsutskottet). However, it is still not established whether the Swedish Foreign Minister at the time, Anna Lindh, had authorized the American assistance.

³⁶ CAT found the fact that, ‘immediately preceding expulsion, the complainant was subjected on the State party’s territory to treatment in breach of, at least, article 16 of the Convention [cruel, inhuman or degrading treatment or punishment] by foreign agents but with the acquiescence of the State party’s police’.

³⁷ *Mamatkulov and Askarov v. Turkey*, Joint partly dissenting opinion, at para. 10.

2.4. Monitoring and enforcement

The problem of ensuring adequate monitoring is central in the current critique of the use of assurances. Successive UN Special Rapporteurs on Torture and the UN Committee against Torture have expressed concern about the efficiency of monitoring. While the previous rapporteur showed an open mind, Manfred Nowak's position is clear: 'Post-return monitoring mechanisms are no guarantee against torture – even the best monitoring mechanisms (e.g. ICRC and CPT) are not “watertight” safeguards against torture.'³⁸ While the statement is certainly true, it should perhaps be remembered that the level of risk that States will have to show is not a 'watertight safeguard against torture' but to show that there is no longer a 'substantial', 'personal and present' risk of torture. As I have argued in previous sections, in relation to States with poor human rights records, the safeguards required by sending States must necessarily be extraordinarily high. Although international treaty monitoring bodies and Courts have on occasions discussed the lack of (*Agiza v. Sweden*) or the existence of (*Mamatkulov v. Turkey*) monitoring and enforcement mechanisms at prominent positions in their considerations there is not yet a developed legal practice as to what would constitute sufficient monitoring provisions. Any legal assessment of the adequacy of a proposed monitoring and enforcement mechanism will have to be made case by case and with due consideration taken of all circumstances of the relevant case.

Practical guidance may be sought from a number of existing standards for effective prison monitoring, including the United Nations Standard Minimum Rules for the Treatment of Prisoners;³⁹ UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment;⁴⁰ the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Prison Rules.⁴¹ Among key requirements of the international standards listed are private interviews with detainees without advance notice and medical examinations by independent doctors. The Optional Protocol to CAT, adopted by the UN General Assembly in December 2002, is particularly interesting.⁴² It establishes a mandatory and legally binding monitoring process where the task of visiting places of detention is shared between a new international Subcommittee affiliated with the CAT Committee and National Preventive Mechanisms.⁴³ It is 'expected that this will lead to an increased focus on the independence, regularity and satisfactory quality of visits to places of detention' (Vedel Kessing 2003: 576).

In the context of diplomatic assurances I would argue that monitoring serves a double purpose; both as means of preventing torture from happening (i.e. deterrence) and as a way

³⁸ Report of the Special Rapporteur on the question of torture, Manfred Nowak, Commission on Human Rights Sixty-second session, E/CN.4/2006/6, 23 December 2005. At para. 31 (e).

³⁹ Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁴⁰ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988.

⁴¹ Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

⁴² The protocol was adopted with 127 votes in favour, 4 against (USA, Nigeria, Palau, Marshall Islands), and 42 abstentions.

⁴³ It is stressed that the National Preventive Mechanisms must be independent institutions.

of identifying violations. If this is so, the question put forward to lawyers is both whether an actual monitoring process suffices to deter potential torturers and whether the mechanism established is capable of detecting violations. Numerous NGOs have pointed out that evidence of torture may be exceedingly hard to detect and usually takes both human rights and public health experts. As to the element of deterrence, it is not obvious in a legal framework how this could be quantitatively assessed. In the last section of this paper I will return to this issue.

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).⁴⁴ 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?

States Parties to multilateral agreements are free to modify their arrangements bilaterally if they so choose. However, they are not permitted to make any modifications that would ‘affect the enjoyment by the other parties of their rights under the treaty or their obligations’.⁴⁵ In the case of agreements regulating the prohibition of torture, these are as *erga omnes* obligations by their very nature the concern of all States. If States were to conclude diplomatic assurances *inter se* in the form of bilateral agreements that would provide a lower level of rights than those of the multilateral treaty, the assurances would be unlawful (Sadat-Akhavi 2003: 83).⁴⁶ If the assurances would also entail violations of other

⁴⁴ Generally speaking, acquiescing to violations of *any* norm of international law is usually a bad idea, unless, that is, a state is willing to see the practice develop into customary international law. The concept of persistent objector, which seems generally accepted in the doctrine (Sevastik 2002), provides that in order not to become legally bound by an emerging customary norm, States need to assert their objection as ‘persistent objectors’ for which certain requirements apply. In this case, however, the multilateral norm would be isolated to some degree by the fact that neither the receiving state nor the sending state would be likely to admit the prevalence of torture or other mal-treatment and therefore the *opinio juris* needed for a customary norm to emerge that allowed such treatment would be missing. In the case of the prohibition of torture, its status as *jus cogens* would also prevent the crystallization of any norm that conflicts with it (VCLT Article 53).

⁴⁵ VCLT 41.1.b (i).

⁴⁶ Regarding the application of VCLT 41.1.b (i) Noll (2006) has argued that the removal of individuals with diplomatic assurances cannot ‘based on a strictly formalistic approach’ be held to affect the enjoyment or the performance of other States Parties. It is not correct, he argues, to raise the *erga omnes* argument in this stage as this ‘would deprive the *lex specialis* of 41.1.b. (ii) of its independent meaning.’ Noll’s concern is warranted if the conditions set out in Article 41.1.b. (i.e. (i) and (ii)) are two distinct provisions. However, as indicated by the preparatory work of Article 41, sub-paragraph 41.1.b. (ii) was included with so-called ‘interdependent’

norms of non-*ius cogens* character (e.g. fair trial or death penalty), these assurances would be unlawful were they found to be ‘incompatible with the effective execution of the object and purpose of the treaty as a whole’ (VCLT 41 1b (ii)). If instead, the diplomatic assurance, as must be intended, provides stronger protection, this problem does not arise. Noll (2006) raises the interesting question of how a treaty should be interpreted according to VCLT 41 1b if it downgrades the prohibition against torture but provides better protection (e.g. by means of monitoring) for the few to whom it applies. In a way this leads us to the same question already referred to: are assurances detrimental to the multilateral obligations to prevent torture? I shall refrain from entering into that discussion here and stop at pointing out that there is a clear recognition in international law that in the event of conflict between two treaties providing protection for an individual, the treaty (or treaty norm) providing the most favourable provision for the individual shall prevail (Sadat-Akhavi 2003).

In reality, it would seem impracticable for States to construct *ad hoc* diplomatic assurances as modifications of their treaty obligations. Article 42.1 VCLT requires such modifications to be duly notified with all States Parties, a process that might be lengthier and more public than States would prefer. Of course, in order to constitute a modification of existing treaty law the assurance itself would also have to be construed as binding as law, something which, logically, would exclude the British MOUs where such a notification process would otherwise have seemed warranted. If the assurance is not construed as a modification and if it would conflict with the multilateral treaty norm, the same concept of most-preferable-norm would seem to apply.⁴⁷

While the ordinary meaning of the relevant treaty provisions cannot be said to preclude the use of assurances, the practice could nevertheless be found unlawful if it would undermine the object and purpose of the convention or treaty in the process. The notion of the ‘object and purpose’ is a curious concept, intended to ‘cover all possible situations and all kinds of treaties’ (ILC 1972:292); it is inherently flexible and has often been applied by publicists ‘in various ways, depending mainly on the point they wish to make’ (Klabbers 1997:141). Nevertheless, as Klabbers (1997) notes, the ‘object and purpose’ represents one of the few references to substantive norms in the law of treaties,⁴⁸ and, essentially, as held by the International Court of Justice (ICJ) in the *Nicaragua* case, it can be violated independently from a breach of any of the treaty’s material articles.⁴⁹ Legal writers have

treaties in mind, i.e. treaties (e.g. certain treaties on disarmament) where the obligations of each and every party depend on the mutual performance of parties (Sadat-Akhavi 2003:58). Sadat-Akhavi (*ibid.*) finds that sub-paragraph 41.1.b. (ii) is ‘nothing more than a new formulation of 41.1.b. (i)’ and that it is questionable if the two sub-paragraphs should indeed be seen as distinct provisions. As it happens, in our example of diplomatic assurances the result will be the same whether we apply (i) or (ii) – if the agreement on assurances provides better protection it is permitted, otherwise it is not. Interestingly, if the modification by means of an *inter se* agreement (the assurances) is illegal it will nevertheless not only remain valid (Mus 1998:226-227 with references), but also take priority over the conflicting multilateral treaty (VCLT Article 30 para. 4 a).

⁴⁷ To prevent ambiguity it is highly advisable that states in *inter se* agreements determine a ‘unifying concept’ (Noll 2006) making it unequivocally clear that what is intended is not a alteration of the multilateral treaty norm(s) but an implementation of additional safeguards. Preferably, these references should be made in regard to relevant treaty norms as they have been interpreted or will be interpreted by treaty monitoring bodies.

⁴⁸ See centrally, VCLT Articles 18; 31; 19 (c); 41 (1)(b)(ii); 58; 69 (2) (b).

⁴⁹ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits) [1984] ICJ Reports 392, at para. 270-282.

offered more or less detailed definitions of the object and purpose of CAT. Boulesbaa (1999:131) has suggested it to be ‘the regulation and prohibition of all governmental conduct that inflicts pain or suffering for the ends stated in Article 1, regardless of whether such conduct is affirmative or negative’, whereas the CAT Committee itself has given a very general definition: ‘to prevent torture’.⁵⁰ It is evident that the definition of a treaty’s object and purpose is fundamental in establishing whether a subsequent conduct is in violation thereof. However, just as important is to determine the nature of the new agreement or conduct.

It may be useful first to establish that the use of diplomatic assurances is not in itself inconsistent with the object and purpose (defined as ‘the prevention of torture’) of preventing torture. Assuming that the State has found the assurance to be a sufficient safeguard the transferral will not be a violation of the prohibition of torture. If, on the other hand, the State is not acting in good faith or the assurance is not sufficient to prevent a risk of torture, then the State is acting not only in violation of the object and purpose of the Convention, but also against the explicit prohibition of torture. The primary question therefore seems to be not whether the individual transferral is permitted but whether the establishment of a bilateral agreement in any way serves to condone or uphold the practice of torture or if it is in any way detrimental to the multilateral agreement. As long as the nature of the new agreement is not clear, the answer is ambiguous. On the one hand, it seems difficult to claim that the promotion of measures for the prevention of torture in one case would lead to more torture in other cases. On the other hand, establishing bilateral agreements that *certain* individuals (i.e. individuals of special interest to the sending State) shall not be mistreated can be interpreted as an acceptance of such treatment in other cases. If the practice of requesting diplomatic assurances continues to grow, thereby creating two parallel systems, one multilateral, which States can violate without sanctions, and one bilateral which demands detailed compliance, the practice of assurances could possibly be found to defy the object and purpose of the convention.

Interestingly the same question of the nature of the assurance arises if trying to approach the parallel systems from the perspective of State responsibility. As a norm of *jus cogens* quality, the existence of torture in a country would seem to suggest a positive obligation *erga omnes* to act against violations.⁵¹ While applicable to all States, this obligation would logically seem to weigh particularly heavy on a State that, under the circumstances, chooses to employ diplomatic assurances. According to the ILC Draft Articles on State Responsibility ‘a serious breach by a State of an obligation arising under a peremptory norm of general international law’ will give rise to certain obligations.⁵² For States other than the violating State, it includes the obligations ‘to bring to an end through

⁵⁰ *Alan v Switzerland* Communication No 21/1995, CAT/C/16/D/21/1995 (1996).

⁵¹ See the *Barcelona Traction, Light and Power Company, Ltd* (Belgium v. Spain), 5 February 1970, ICJ Reports 1970, p. 32. The precise relationship of *jus cogens* norms and obligations *erga omnes* is, however, disputed, see e.g. Ragazzi (1997).

⁵² Article 40 (1) Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries. The ILC Draft is said to represent a codification and progressive development of customary international law (Malanczuk 1997) and was cited by the ICJ already in its previous draft, see *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), at para.7.

lawful means any serious breach within the meaning of article 40' and not to 'recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. A serious breach according to Article 40 (2) must be either 'gross or systematic', where "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.'⁵³ If the existence of a widespread practice of torture amounts to a 'serious breach' would that render diplomatic assurances unlawful? Apart from the fact that the examples of State practice given in the commentaries, e.g. the response by States to the Iraqi annexation of Kuwait and to the apartheid regime in South Africa, seem to indicate quite a different level of violence, the same question arises. Can sending States by the use of diplomatic assurances, be held to 'render aid or assistance' in maintaining the widespread practice of torture in a country?⁵⁴ Again, this seems to be dependent on how the assurance is drafted and how the parties generally frame the use of assurances. Nevertheless, the Articles are intended to be progressive and as such the Article 41 offers a legal argument for the position advanced by several NGOs above, that States by adopting diplomatic assurances are 'acquiescing' to torture.

From this legal review of diplomatic assurances a few preliminary points can already be made. Firstly, their value hinges crucially on three points: do they add anything, can they be enforced and are they compatible with the multilateral system of human rights? From the outset it was argued that in order to have any chances of preventing violations of international law, diplomatic assurances must *add* something. As a first criterion, it seemed crucial that assurances are drafted in a legally binding form – 'trust' alone seemed to add nothing. The binding form was also advanced as a necessary feature, as a matter of legal certainty and the rule of law. Interestingly, I found that the assurances showing the most elaborate monitoring mechanisms, the British Memoranda of Understanding, are not even *intended* to confer binding rights and obligations and therefore, arguably, *are* not legally binding.

Secondly, to be permissible, assurances must not be found to *undermine* the system of human rights law as such. Examining the concept of diplomatic assurances from a treaty law perspective, I could not find that assurances must necessarily pose a threat to the 'object and purpose' of the convention against torture. While bilateral agreements could conflict with multilateral treaty norms, and theoretically, raise issues of State responsibility, this was dependent on an interpretation that even agreements providing effective and additional safeguards are detrimental to the universal system of human rights.

Finally, a rather obvious demand was that the party with which the agreement is struck is able to control the territory, and any public official (in the interpretation of *Sadiq*

⁵³ ILC Draft Article 40, commentaries at para 8.

⁵⁴ In practice this interpretation seems unlikely. Articles 40-41 are among the most controversial provisions of the Draft Articles, 'based more on the advocacy of scholars who see a need for *jus cogens* than on actual state practice', and are not expected to gain general support from States (Shelton 2002:842).

Shek Elmi v Australia), so that the agreement can effectively be upheld.⁵⁵ If this is the case, I advanced the argument that the nature of the risk assessment would change with the adoption of a diplomatic assurance. From being primarily an assessment of the risks of certain treatment in a specific setting, the relevant risk assessment would become whether the receiving State is likely to comply with a specific agreement. In other words, does the counterpart have the power to enforce an agreement and can it be trusted to do so? Examining the handful of cases where international courts and monitoring bodies have had reasons to deliberate over assurances, I found that issues about ‘trust’ did not figure centrally. If anything, it was noted as insufficient or irrelevant. Interestingly, in their decisions there were no indications that the adoption of an assurance did in any way alter the nature of the risk assessment. In *Chahal* the ECtHR appears to have put much weight on the fact that, as a ‘Sikh separatist’ Mr Chahal was at particular risk of torture and in the case of *Agiza*, the interest shown by various security services as well as the means of deportation was taken as evidence for a risk of torture. However, as evidenced in the following, recognizing this shift in the risk assessment may have an advantage, as it is possible to consult disciplines outside law that have more sophisticated theories on how and why international agreements are kept and how best to ensure compliance.

3. ON COMPLIANCE AND TRUST

In previous sections I advanced the hypothesis that once a risk of torture has been established in a specific case the nature of a further risk assessment changes in focus. It changes from being primarily an issue of whether a specific person may risk being affected by a generalized threat of torture, to whether the State from which the diplomatic assurance is obtained can be expected to comply with the agreement.

Despite Louis Henkin’s famous claim nearly fifty years ago that ‘*almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*’ ([1968] 1979: 47; emphasis in original) still precious little is known about the degree to which States actually comply with international obligations (Haas 2000; Chayes and Chayes 1993).

In the following I will turn to international relations theory (IR) in search of factors influencing whether or not an agreement will be complied with and how the prospects of compliance can be enhanced. The question is crucial and goes to the core of the legitimacy of diplomatic assurances. If the assurance has no prospects of inducing compliance, it cannot cancel a ‘real risk’ of prohibited treatment and any removal based on that assurance would necessarily be unlawful.⁵⁶

⁵⁵ An interesting question that I have not been able to deal with here is whether it must also be able to control the *political* power. What happens if there is a change of government? This, again, seems to point to the necessity that assurances are not only a political agreement between two governments but are actually legally binding.

⁵⁶ Here I shall refrain from discussing exactly how high the probability of compliance must be in order to make an otherwise unlawful removal permissible. Suffice to say that, since the finding of a personal and real risk of

While the principle of *pacta sunt servanda*, treaties are to be observed, remains fundamental to the edifice of international law, legal scholars have increasingly turned to international relations theory for answers to why in practice treaties are not always observed. Over the last 15 years this branch of international relations has ‘animated some of the most exciting scholarship of international law’ (Abbott 1999:361) heralding a burgeoning body of interdisciplinary ‘IR-IL’ research (Raustiala and Slaughter 2002; Abbott 1992; Slaughter *et al.* 1998). As a purposefully interdisciplinary approach, IR-IL research has made use of the different currents in international relations scholarship, which has led to a thriving yet at times confusing set of compliance theories. Simmons (1998) has identified four approaches to compliance within international relations theory, which she calls *the realist tradition*, *rational functionalism*, *the domestic regime* and *normative approaches*. Raustiala and Slaughter (2002) have identified other categories by focusing on variables such as problem structure, solution structure and solution process. Compliance theories have often been developed in relation to specific policy areas, where in particular the analysis of the GATT/WTO framework (Downs and Rocke 1995), and environmental treaties (Jacobson and Brown Weiss 1995; Brown Weiss and Jacobson 1998), have yielded fruitful results by drawing on the insights from various IR schools. What has emerged as central but contentious issues are the balancing of incentives against sanctions, the importance of reputation and the legitimacy of the agreement or norm, but many problems are situation-specific. A specific challenge when analysing compliance strategies in relation to diplomatic assurances is that, for reasons that I will return to, the sending and the receiving State can be assumed to respond quite differently to different compliance strategies, or ‘institutional designs’ (Abbott 1999:362).

In attempting a first tentative analysis of the compliance mechanisms governing diplomatic relations my examination is informed by an institutional neoliberal understanding of international relations, but I will seek to complement this view, where appropriate, with the findings of some of the most recent and interesting contributions in this flourishing field.

As a traditional insight of international relations theory, sovereign States are thought to be entering agreements reluctantly and only if it is in their interest to do so. Once in a contractual relationship they will *uphold* their obligations only if it is in their interest. The institutional neoliberal strand of international relations theories has focused on compliance as an issue of weighing costs and benefits, usually translated into threats of sanctions (military, economic or other sanctions). However, ‘interest’ does not necessarily mean the immediate outcomes, and long-term effects of defection, in particular the reputational consequences of non-compliance, have often been advanced as central.

For reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to (Keohane 1984:108).

prohibited treatment prompted the conclusion of the assurance, the demands are likely to be extraordinarily high.

Drawing on the game theory inspired models of Axelrod and Keohane (1985), Hovi (1998:112) has argued that there are several reasons why agreements may be enforced. There may not be any incentives to defect in the first place; parties may lack the capacity to defect; or parties may be sufficiently deterred from defecting, possibly due to the use of threats. Testing this assumption with diplomatic assurances it would seem that the key to compliance lies in either the lack of incentives to defect or sufficient deterrence. Incapability can be ruled out since the receiving State has presumably already proved its capacity to violate human rights law. Again drawing on Axelrod and Keohane, Hovi claims that for threats to be effective three conditions must apply. Firstly, it must be possible to identify violations. Secondly, the threat must be sufficiently accurate in that it does not unduly affect complying parties, and thirdly, there must be sufficient incentives for the other parties to the agreement to carry out the threat.⁵⁷ The underlying assumption is that a threat will not be credible and therefore not an effective deterrent if it is too costly for the party responsible for carrying it out.

If compliance relies solely on threats it seems hard, however, to understand why the receiving State would choose to enter into the agreement in the first place. Logically, there would have to be some incentives both for the entry into and for compliance with a specific agreement. As noted by Haas (2000:45), even if a State has decided that signing an agreement is in its best interest, the subsequent decisions to actually comply with it are associated with 'distinct and different' political calculations. Although game theoretical models like these can be used to test assumptions, their practical value has been questioned. Researchers seeking to test their theories on empirical data will often find it hard to determine *ex ante* what games are being played (Simmons and Martin 2002).

Looking for incentives instead of only for threats, there are a number of possible reasons why a receiving State would like to agree to diplomatic assurances. First, there may be a perfectly legitimate general wish to readmit a national. Agreeing on diplomatic assurances may also be a means of acquiring good will and generally enhance a State's poor reputation. Furthermore, especially the kind of semi-permanent assurances recently concluded between the British Government and several States seem to offer ample opportunity to link compliance with assurances to rewards (or sanctions) in other areas of greater importance to the receiving State, such as trade relations or institutional or development aid. An example is the Organization for Security and Cooperation in Europe (OSCE) that has been using trade sanctions as an enforcement device in the area of environmental law. It should be acknowledged, though, that unless the removal is in response to an extradition request, it is likely to be more in the interest of the sending than the receiving State. This means that if the sending State is perceived to demand too much and give too little in return, there is no reason why the receiving State should like to enter into the agreement in the first place. This could explain the failure of the British Government to secure a diplomatic assurance from Egypt in 1999.⁵⁸

⁵⁷ In game theory terms this would translate into a renegotiation-proof, subgame-perfect equilibrium (Hovi 1998: 129-131).

⁵⁸ *Youssef v. The Home Office*, see references note 1.

So far, I have focused primarily on the *receiving* State but as previously pointed out, the sending State has an important role to play in the enforcement of the agreement. Diplomatic assurances thus present a double challenge for compliance. Firstly, the receiving State's compliance with the agreement has to be ensured. Secondly, the sending State's commitment to compliance must be ensured. A fundamental problem is that none of the parties has any incentives to identify violations; the sending State no more than the receiving State since a violation of the agreement is likely to translate into the illegality of the removal in the first place. Presumably in a global perspective, the sending State has even more reputation to lose from non-compliance with the prohibition of ill-treatment than the receiving State. In contrast to the receiving State, the sending State is likely to have a reputation of generally honouring human rights obligations. If, however, the receiving State defects (and subjects the individual to ill-treatment) both States are most likely to be found to have violated their international obligations; the State responsible for the ill-treatment and the sending State for effectuating the removal. Furthermore, some of the most powerful enforcement responses suggested, e.g. the obligation to return a person where human rights violations are detected (Noll 2006), would involve very high costs, primarily for the enforcing State.⁵⁹ One way out of problems like this is to externalize monitoring and make enforcement follow automatically (Hovi 1998). A practical solution would be to appoint an independent and authoritative third party to monitor the compliance with the agreement. It is not possible to determine generally the necessary scope of monitoring (e.g. the frequency or forms of visits). Instead, the terms of each monitoring authority must be either sufficient for detecting any violations of the agreement or far-reaching enough to deter violation (possibly in conjunction with a threat of sanctions). To maintain external pressure on the sending State not to be complacent about any evidence of non-compliance, enforcement mechanisms can be designed to operate automatically and externally. A second mechanism for enhancing credibility could be based on recent insights concerning the role of structural links between international institutions and domestic actors (Koh 1997; Haas 2000; Brown Weiss 2004). In the field of environmental agreements Brown Weiss (2004) has shown that liberal democratic States, in particular, respond well to transparency and 'sunshine' methods such as national reporting and publication of violations as a means of promoting compliance. In the case of diplomatic assurances, 'sunshine' strategies can be institutionalized, e.g. by making publication of monitoring reports by the appointed monitoring body mandatory, or by Government commitment to submitting reports, e.g. to the National Parliament of the State of removed individuals on a regular basis.

After this analysis of the issue of compliance I return to the question of 'trust' that was raised a number of times throughout this study. A fundamental critique of the use of diplomatic assurances, as we have seen, is that there is no basis for trust. 'It defies common sense to presume that a government that routinely flouts its binding obligations under international law can be trusted to respect a nonbinding promise in an isolated case' (HRW 2005). While much of this criticism is based on the assumption that assurances would be

⁵⁹ The fact that the sending state has gone to great lengths to effectuate the removal in the first place would seem to indicate the scale of political, security and other costs it sees of keeping the individual in the country.

non-binding, the same is arguably valid in relation to legally binding diplomatic assurances. Why should a State be trusted to uphold bilateral binding agreements when it has proved to disregard multilateral binding agreements? How much is a promise worth when given by a State that routinely violates human rights obligations? To answer this question it seems necessary to define what is meant by ‘trust’. Although there is no single definition, researchers seem to agree on core elements that are either included or implied by ‘trust’ (Hoffman 2002). Firstly, there has to be some *uncertainty* relating to the trustee’s future behaviour; if there were no risk of betrayal we would not have to rely on ‘trust’ (*ibid.*). Secondly, there must be a willingness to place one’s interest in the hands of the other party (Hardin 1993; Luhmann 1979). Thirdly, the ‘trust’ in someone implies a *prediction* about that person’s future actions (Luhmann 1979). Seen together, the decision to ‘trust’ a party is not dissimilar from deciding whether to place a bet (Hoffman 2002).

Applying this understanding of trust, there seems to be no room for trusting a party to comply with a certain agreement if that party has already defected from a similar agreement with similar costs and benefits. For there to be any room for ‘trust’ in relation to States that routinely violate human rights obligations, the assurance must at a minimum offer something qualitatively different that is capable of altering the prediction of compliance.

In this section I have explored various options for enhancing compliance with diplomatic assurances. These measures may serve to reduce the necessity for trust. It was argued that within the bilateral relations of the sending and receiving State, compliance can be promoted by introducing credible threats (e.g. in the form of interruption of aid or diplomatic relations) and incentives (e.g. as aid or trade relations). For such threats to be credible, however, the sending State must commit itself to their enforcement (e.g. by public policy statements, transparent reporting and ‘sunshine’ mechanisms) and this is something that we have seen no evidence of in the markedly informal context of assurances produced to date.

While these findings have the potential of making diplomatic assurances more credible, they undeniably increase the costs of assurances by submitting the sending State to monitoring mechanisms outside its control. Perhaps this is the price to pay for making diplomatic assurances work?

CONCLUDING REMARKS

The adoption of diplomatic assurances has been portrayed by human rights advocates as a fundamental threat to essential principles of human rights such as *non-refoulement*. This study, however, has shown a far less clear-cut picture of apparently diametrically opposed currents within which the role of diplomatic assurances remains uncertain. Under the best possible circumstances, the bilateral framework of diplomatic assurances may establish the efficient monitoring and enforcement mechanisms that are currently missing in the multilateral system of human rights. With prudent drafting it can do so without indicating an

acceptance of other ill-treatment. This is the potential added value that we have been looking for. By elevating the fate of a certain individual to a level of diplomatic significance, the sending State can apply pressure to comply by linking the agreement with any other issue in the two states' bilateral relations. 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.

Diplomatic assurances, however, are employed in a peculiar context where there is on the one hand a move towards securitization and on the other hand a development towards advancing human rights and a judicialization of migration issues. The growth in recent years of so called 'extraordinary renditions' and rumours of secret CIA prisons in Europe and Asia do not necessarily instil confidence in the 'beachhead' hypothesis. To some extent the excesses of the executive may be countered by judicial activism. In recent years the issues of security and migration have led to clashes between the judiciary and the Governments in several countries where the judiciary has usually not supported the trading off of individual human rights against 'security'. Against this backdrop, the conclusion of semi-permanent, reciprocal assurances of Britain with Jordan, Libya and Lebanon may be seen to represent a new development of international diplomatic assurances. Compared to any other assurance analysed in this study they are more comprehensive, they unequivocally establish the human rights obligations as the ultimate source of authority and they enunciate key obligations to prevent legal uncertainty. The reciprocity of the agreements seems to insulate them from allegations that assurances condone prohibited practice in the receiving State. The fact alone that the Government sees itself forced to formulate such elaborate guarantees could perhaps be read as a victory for the judiciary if not for human rights. However, if British Courts would choose to accept the MOUs this may also serve to normalize the practice of diplomatic assurances and put the argumentative burden on the individual and her legal representative to explain why, in this particular case, otherwise sufficient guarantees are not enough. 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.

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