

The University of Chicago

Making Diplomatic Assurances Effective:
State Protections Against Torture

by Grayon William Sotir

June 2018

A paper submitted in partial fulfillment of the requirements for the Master of Arts degree in the
Master of Arts Program in the Committee on International Relations

Faculty Advisor: Dr. Tom Ginsburg

Preceptor: Yuna Blajer de la Garza

Acknowledgements:

I have been privileged by the unconditional support of innumerable people throughout this challenging process:

To Jennifer Wellman, my mother: thank you for instilling an unshakeable faith in the value of hard work. I would not be where I am without you.

To my numerous unnamed companions on the Committee on International Relations: thank you for your friendship and love — it will always be reciprocated.

My deepest gratitude to Dr. Tom Ginsburg of the University of Chicago, for his numerous contributions, steadfast encouragement, and personal guidance. His lectures on international human rights law inspired the subject of this thesis, and this project could not have been completed without him.

Special thanks to Yuna Blajer de la Garza, for her friendship and guidance throughout my time at the University of Chicago. Her workshops aided me tremendously as I drafted the earliest framework for this project.

This thesis is written with tremendous appreciation for the international human rights community, whose dedication to justice and dignity has been essential for establishing universal standards promoting peace and prosperity across the globe. Their commitment to humanity has earned my deepest respect.

Table of Contents:

I. Introduction	4
II. Research Questions	6
III. Structure	7
IV. Torture and Non-Refoulement Obligations	
<i>A. The Prohibition Against Torture</i>	7
<i>B. The Obligation of Non-Refoulement</i>	11
V. Understanding Diplomatic Assurances	
<i>A. What are Diplomatic Assurances?</i>	14
<i>B. The Legal History of Diplomatic Assurances</i>	17
VI. Addressing the Problems of Diplomatic Assurances	28
VII. Conclusion	35
VIII. Works Cited	38

I. Introduction:

One of the greatest tensions in modern international relations exists between nation-states and supranational structures. Nation-states naturally seek to preserve their own sovereignty and power, as they have an inherent interest in making those decisions which most directly benefit their institutional survival.¹ Meanwhile, supranational structures seek to accumulate and centralize power from individual states in order to achieve the collective objectives of an increasingly integrated and cooperative global community.² While this tension has been felt across all political and social cleavages, each with an assortment of unique motivations and interests, questions of international human rights have become especially contentious. In this age of intense cultural, political, and legal globalization, the very notions of “national partiality” and “special obligations” have become subject to suspicion, leading to fierce debates about what it is exactly that sovereign states owe to nationals of foreign states.³ International human rights law is, in many respects, the discipline most dedicated to answering these questions. Its study is not only essential to understanding the rapidly evolving nature of 21st-century international relations, but is also paramount to the formulation and study of evolving norms, customs, and philosophies concerning human conduct.

In the aftermath of the attacks on September 11, 2001, when the United States declared an international “War On Terror,” several western democracies violated many of the international human rights laws they once played a central role in establishing, especially by committing

¹ See: Waltz, Kenneth Neal. *Theory of International Politics* (1979); Mearsheimer, John J. *The Tragedy of Great Power Politics* (2001). p. 3; 29-54.

² See: Wendt, Alexander. *Social Theory of International Politics* (1999).

³ See: Sotir, Grayon W. “In Defense of National Partiality: An Argument Refuting Liberal Claims of Nationalism’s Immorality” (2017). p. 4-12.

“torture,” and “refoulement” against suspected terrorists.⁴ States that were seeking security in uncertain times were in conflict with interstate organizations such as the United Nations and the European Union, both of which have strived to establish international standards for the humane treatment of all persons. The human rights community, comprised especially of formally instituted multinational commissions, non-governmental organizations, and legal practitioners, had an inherent interest in clarifying the precise obligations of states to mitigate future human rights violations. However, there was a great deal of confusion concerning the legality and acceptability of “diplomatic assurances” as a justification for extradition and refoulement. For the purposes of this paper, we will adopt Sara Isman’s definition of diplomatic assurances, and understand a diplomatic assurance to be any formal or informal promise from the country of return guaranteeing that the returnee will not be subjected to torture or mistreatment.⁵ Even today, it cannot be said that there is a universally accepted answer to the question of the legality of diplomatic assurances. Some argue that they are inherently unreliable, while others suggest that the specifics of their implementation are simply in need of revision.⁶

Because an increasingly globalized world cannot exist without an increasingly globalized conception of justice, the questions contained herein are of exceptional importance, and aspire to contribute to the development of significant human rights standards which might achieve meaningful results. This project can be best described as a policy proposal. It aspires to offer

⁴ "In War On Terror, Many Countries Violating Human Rights Standards, Third Committee Told; Meetings Coverage and Press Releases." United Nations. October 26, 2005. Accessed March 17, 2018. <https://www.un.org/press/en/2005/gashc3830.doc.htm>.

⁵ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 23.

⁶ Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). p. 252.

suggestions which mitigate the harms of diplomatic assurances by precisely identifying their inherent problems and responding to them with implementable solutions. This proposal operates under the assumption that while diplomatic assurances are problematic for a host of reasons, they are nevertheless inevitable given the interests of states relative to the international community. Any meaningful solution to diplomatic assurances must shy away from the paternalistic strengthening of supranational structures like the UN, because states have an inherent interest in maintaining as much sovereignty as possible. This thesis is not concerned with what states “ought” to do, but is instead interested in identifying solutions to problems which states are capable of addressing themselves given their inherent bias for self-preservation. My work also makes the presupposition that meaningful human rights dialogue should shy away from idealism and instead favor pragmatism. When the interests of human rights lawyers and the interests of states align, meaningful reform becomes a tangible possibility. Therefore, this work will focus on strengthening the capacity of states to exercise control and protections over refouled terrorism suspects, rather than focusing on strengthening supranational institutions, if possible. These suggestions are neither infallible nor are they fallacious. They are merely the starting point for a larger conversation which must continue in the international human rights community.

II. Research Questions:

What are the inherent problems of diplomatic assurances? What policies, standards, and practices can states adopt to fix these problems without relinquishing considerable power to supranational institutions?

III. Structure:

First, I will review the existing human rights literature and offer a detailed background on the ways in which states are legally obligated not to torture, and how these obligations also extend to the obligation of non-refoulement. Understanding both of these obligations is requisite to clearly identify the reasons that states rely on diplomatic assurances. Second, I will discuss the characteristics and the legal history of diplomatic assurances. This will demonstrate how states have attempted to circumvent their human rights obligations using diplomatic assurances, and concisely summarize the nature of the debate over whether or not diplomatic assurances can be a legitimate tool in international human rights law. Third, I will detail the problems inherent in diplomatic assurances, and highlight the absence of meaningful enforcement mechanisms that could make such assurances successful. Finally, I will offer solutions which meaningfully address the problems inherent in diplomatic assurances without relying on the strengthening of supranational institutions.

IV. Torture and Non-Refoulement Obligations:

A. The Prohibition Against Torture:

Even those with a limited background in international human rights law are typically familiar with each state's clearly defined obligation not to torture. In fact, the prohibition against torture is one of the most universally accepted human rights obligations, and was originally designed to protect against the widely defined "cruel, inhuman, or degrading treatment or punishment" of any individual or group, regardless of "race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status.”⁷ Though this prohibition was previously rooted in non-binding customary international law as *jus cogens*, states came to formally codify their specific obligations through several international treaties and agreements during the 20th century.⁸ After the attacks on September 11, 2001, the international community sought to clarify the specific non-torture obligations of states as they engaged in counterterrorism operations. A 2003 Security Council resolution demanded that states “ensure that any measures taken to combat terrorism comply with all their obligations under international law,” and that states are further obligated to “adopt such [counterterrorism] measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁹ Because such Security Council resolutions offer considerable weight when determining the standards for the interpretation and application of international law, it is easy to assert that states were indeed legally bound to extend their non-torture obligations to suspected terrorists. This was widely accepted as true throughout the “War On Terror.”

However, despite the fact that states were legally bound by these international obligations, many continued to resort to torture in order to obtain information, influence the behavior of the detained individual, or remain in a position of power over the detained individual.¹⁰ States that resort to torture may be further motivated by the desire to punish,

⁷ *Universal Declaration of Human Rights* (1948): Article 5; Article 2.

⁸ Examples include: *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); *American Convention on Human Rights* (1969): Article 5.2; *International Covenant on Civil and Political Rights* (1976): Article 7; *African Charter on Human and Peoples’ Rights* (1981): Article 5; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984): Article 3.

⁹ SC resolution 1456 (2003), S/RES/1456(2003), 20 January 2003, para. 6.

¹⁰ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 10

revenge against, deter, coerce, or re-educate detained individuals. In the cases of Maher Arar, Ahmad El-Maati, and Abdullah Almalki, torture was used to obtain false confessions. In 2001, El-Maati was detained at the U.S.-Canadian border as a terrorism suspect. He was interrogated and released, but was placed under surveillance by the Canadian Security Intelligence Service, which relayed their suspicions to the Syrian government. When El-Maati flew to Syria to attend a wedding ceremony, he was arrested at the Syrian airport and subsequently tortured. El-Maati was coerced into signing a confession written by his Syrian captors, not by himself.¹¹ The confession offered false information implicating Maher Arar and Abdullah Almalki, legitimizing the U.S and Canadian governments' subsequent decisions to detain and question them as potential terrorists.¹² Such coerced confessions expanded the capacity of the U.S. and Canada to investigate additional suspects, making torture a means of unlimited investigative jurisdiction.¹³ This is just one example of a state motivation to torture in the pursuit of national security. Countless cases from Guantánamo Bay illustrate the same tactics in practice, despite the protests of the international community.¹⁴

Although El-Maati's case was resolved through an internal investigation by the Canadian government, the prohibition of torture is typically enforced by broader regional instruments, especially the three human rights courts, the European Court of Human Rights (ECtHR), the

¹¹ Hawkins, Katherine R. "The promises of torturers: diplomatic assurances and the legality of rendition" (2005). p. 219.

¹² *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abouz-Elmaati and Muayyed Nureddin* (2009).

¹³ Hawkins, Katherine R. "The promises of torturers: diplomatic assurances and the legality of rendition" (2005). p. 27.

¹⁴ The Parliamentary Assembly of the Council of Europe: Resolution 1433. "Lawfulness of detentions by the United States in Guantánamo Bay" (2005). Article 7.

Inter-American Court of Human Rights (ACtHR), and the African Court on Human and Peoples' Rights (ACtHPR). The most important human rights instrument of the UN is known as the Human Rights Committee under the International Covenant on Civil and Political Rights (1976).¹⁵ This committee exercises a wide jurisdiction and will hear any complaint in which a state who is party to the Covenant is accused of violating the human rights of any individual. The prohibition of torture includes obligations to prevent torture whenever and wherever possible, giving it an undefined level of universal jurisdiction. This also means that the prohibition of torture applies whether or not the Covenant has been explicitly recognized by a state.

Lucia Bernátová explains that the “danger of counterterrorism policies often is hidden in their expanded power for which there is no adequate control.” She adds that in some cases, “this allows states to resort, in the name of counterterrorism, to methods infringing on a variety of human rights.”¹⁶ And yet, as a peremptory norm, the obligation not to torture is an ancient and fundamental principle of international law from which no derogation is permitted. Isman explains that torture “is prohibited under international law in all situations, and at all times... The prohibition is absolute and has the character of *jus cogens*... states are bound to put in place all those measures that may pre-empt the perpetration of torture.”¹⁷ The practice of torture has also been illegal under multi-national treaty laws for decades. Such treaties legally bind states regardless of their respective national security concerns. Perhaps the most important legal standard on the subject is known as the Convention against Torture and Other Cruel, Inhuman or

¹⁵ *International Covenant on Civil and Political Rights* (1976). Article 26.

¹⁶ Bernátová, Lucia. “Standards of Diplomatic Assurances? A Comparative Study of the Impact of Diplomatic Assurances Against Torture on Risk Assessment in Refoulement Cases” (2014).

¹⁷ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 10

Degrading Treatment or Punishment (UNCAT).¹⁸ Article 1 of the UNCAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”¹⁹ While this article broadly defines every state’s obligation not to commit physical or mental harm to an individual, the UNCAT also provides more precise obligations in its following articles, including the obligation of non-refoulement.

B. The Obligation of Non-Refoulement:

Article 3 of UNCAT specifically forbids extradition or return of any person to a state where there are substantial grounds for believing that he or she would be subjected to mistreatment or torture.²⁰ This is known as the obligation of “non-refoulement,” and 162 sovereign states have formally accepted this obligation through the UNCAT alone. These states not only have an obligation to “not torture,” but are also responsible for ensuring that any person in their care is not sent to a state where they face a substantial risk of torture: “Similar to the determination of refugee status, the decision on the existence of a prohibition of *refoulement* is an assessment of what might happen to the person upon return to another country, i.e. a hypothesis of the future.”²¹

Traditionally, non-refoulement has been discussed in cases of asylum seekers and refugees, but it became a major point of contention after the attacks on September 11, 2001.

¹⁸ Note: UNCAT is the abbreviation for the informal second name of the Convention, the United Nations Convention Against Torture.

¹⁹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). Article 1.

²⁰ *Ibid.* Article 3.

²¹ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 16.

Throughout the “War On Terror,” states frequently returned alleged terrorists to their countries of origin. This was especially true when the holding state believed the alleged terrorist to pose some sort of threat to its national security.²² Those states that were primarily concerned with protecting their homelands now appear to have knowingly violated their non-refoulement obligations for the sake of expediency. When confronted with a choice, rather than risking national security, western states repeatedly exported suspects to foreign countries to be processed and consequently tortured. Jane Mayer named this illegal phenomenon the “outsourcing of torture.”²³ She goes on to explain that the Bush Administration relied on a “very precise reading of an imprecise clause in the UNCAT” (which the U.S. ratified in 1994) requiring “substantial grounds” for believing that a detainee will be tortured abroad.²⁴ This interpretation was used in an attempt to justify U.S. renditions to countries like Egypt, Morocco, Syria, and Jordan, all of which had been cited for human rights violations by the U.S. State Department, and had been known to torture terrorism suspects.²⁵ The U.S. held a standard which suggested that a state must know with near certainty that an individual will be tortured if extradited, rather than the international legal standard of proving that an extradited individual is only more likely to be tortured than not.

As Olof Hasselberg correctly asserts, the universality of the non-refoulement obligation is quite clear from a legal perspective. Refugees, asylum seekers, and even suspected terrorists are

²² Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p.4.

²³ Mayer, Jane. "Outsourcing torture." p. 1.

²⁴ *Ibid.* p. 2

²⁵ *Ibid.*

all equally protected from the threat of refoulement.²⁶ What is less clear, however, is the exact extent to which non-refoulement obligations apply. For example, some interpretations of Article 33(1) of the United Nations Convention Relating to the Status of Refugees (1951) suggest that chain-refoulement is also illegal under international law. Hasselberg endorses this interpretation in his own work:²⁷

The protection from refoulement also includes a responsibility not to transfer a person to a country if there is a risk of a subsequent transfer to another unsafe country. Thus, article 33 prohibits indirect removal, or 'chain refoulement', where a state otherwise would only be responsible for what would happen in the first receiving country.

These and other specifics of the non-refoulement obligation have led to substantive debates within the human rights community, though the widespread acceptance of the non-refoulement obligation makes it a rather unquestionable pillar of customary international law. Non-refoulement's universality and breadth reflect the important function it plays in preventing torture. Indeed, the debate surrounding diplomatic assurances is centered around the role and significance of these non-refoulement obligations. There is a direct relationship between the obligation not to torture, non-refoulement obligations, and diplomatic assurances. Each is the next step in a state's attempt to circumvent responsibility for terrorism suspects. Because powerful western states are aware that they cannot legally torture suspects for information, and because those states fear the political consequences associated with torturing suspects, they

²⁶ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 17-18

²⁷ *Ibid.* p. 19.

attempt to refole those suspects to states that are willing to torture them in secret. In order to circumvent their non-refoulement obligations, states pursue diplomatic assurances as a source of political and legal legitimacy. This begs the question: given the very nature of diplomatic assurances, can they ever be reliable mechanisms for protecting international human rights?

IV. Understanding Diplomatic Assurances:

A. What are Diplomatic Assurances?

Before a substantive discussion about the nature of diplomatic assurances can commence, we should first expand upon the constitutive dimensions of diplomatic assurances, and how to effectively identify and define them. No all-encompassing formal definition for diplomatic assurances has been accepted within the existing literature, though those definitions which have been proposed by various authors generally explain the same phenomenon in similar terms and with little variation. Diplomatic assurances are typically issued by executives and bureaucrats within a country's department of state. However, there are instances in which judicial bodies have issued what we could consider to be diplomatic assurances. In each of these cases, either written or verbal agreement was given that the refouled individual would not be subjected to torture or other cruel or inhumane punishment, and that fair proceedings would be extended to that individual, per the laws of the receiving state. However, the specific contents of an assurance can differ widely on a case-by-case basis. They may secure particular rights for an individual, such as the right to property, or arrange regular meetings with a representative of the sending

state to monitor the individual after their extradition.²⁸ Simply put, a diplomatic assurance is a promise or a collection of promises, but like all promises, diplomatic assurances can be broken.

Naturally, states find that the ability to seek or provide diplomatic assurances benefits them greatly. By maintaining this practice, states are able to exercise some degree of autonomy. Most sovereign states prefer limited oversight from the international community, for fear that they will fail to maintain their human rights obligations and suffer political backlash from other actors in the global system.²⁹ Hasselberg explains that diplomatic assurances also provide states with the flexibility necessary to balance their multiple conflicting responsibilities (e.g. human rights vs. national security interests).³⁰ Given this natural preference to continue using diplomatic assurances, the practice's survival seems inevitable: states will aspire to make diplomatic assurances effective to justify their continued use. Isman asserts that states will always seek to guarantee that diplomatic assurances achieve their intended effects, in order to satisfy human rights groups that would rather strip states of their sovereign power by institutionalizing supranational oversight.³¹

Indeed, there is a powerful incentive for states to make diplomatic assurances effective, but this hasn't stopped countless NGOs from actively seeking to ban the practice altogether. This tension between states and NGOs makes the very nature of diplomatic assurances an issue of

²⁸ Bernátová, Lucia. "Standards of Diplomatic Assurances? A Comparative Study of the Impact of Diplomatic Assurances Against Torture on Risk Assessment in Refoulement Cases" (2014). p. 7-8.

²⁹ See: Keck, Margaret E., and Kathryn Sikkink, *Activists Beyond Borders* (1998). p. 13.

³⁰ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 35.

³¹ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 60.

critical importance in international human rights law. On the one hand, when a sending state has received special guarantees that an individual will not be tortured, that state may argue that it is not responsible for any violation of the returnee's protections from torture or refoulement, because it was the receiving state that violated the terms of the extradition. However, the NGO human rights community generally agrees that diplomatic assurances safeguarding against torture are not sufficient to guarantee the safety of a returnee, and that a sending state's willingness to accept diplomatic assurances from potential human rights offenders makes them complicit in the violation of existing international human rights laws. Human Rights Watch (HRW), Amnesty International (AI), and the International Helsinki Federation (IHF) have openly opposed diplomatic assurances for fear that they circumvent states' legal obligations to enforce human rights and to prevent torture.³² In fact, all three organizations have tried to initiate laws against using diplomatic assurances, though all efforts to date have failed.³³

Like most diplomatic meetings and agreements, discussions negotiating the details of diplomatic assurances are typically conducted in secret by representatives from each state. This is perhaps the greatest problem with thinking about diplomatic assurances as legally binding agreements.³⁴ Their inherent lack of transparency makes it impossible to know what it is exactly that states have actually agreed to behind closed doors. These secret talks cannot effectively safeguard against torture, especially considering that torture itself is often conducted in secret.

Diplomatic assurances require no formal paperwork or process. Diplomatic assurances differ in

³² Human Rights Watch; Amnesty International; International Helsinki Federation.

³³ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 63

³⁴ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 31.

their substance case-to-case, and from state interaction to state interaction. The lack of uniformity in various instances of diplomatic assurances can lead to problems with regards to standardized expectations for the consistent application of international human rights law. This variation also demonstrates that states have unique ideas about the best ways to apply international human rights laws domestically. When states issue diplomatic assurances, they may be drafted with broad and imprecise conditions. Such generalizations grant these states the greatest possible legal maneuverability in case they are forced to justify their behaviors to the international community. In unfortunate instances, such creatively written conditions may include loopholes for interrogation methods that do not fall under conventional conceptualizations of physical torture.

B. The Legal History of Diplomatic Assurances

There is disagreement as to how binding diplomatic assurances truly are under international law.³⁵ For example, Gregor Noll suggests that because non-binding agreements between states are inherently meaningless, we must consider diplomatic assurances as legally binding.³⁶ Meanwhile, Hasselberg's analysis of the Vienna Convention on the Law of Treaties (VCLT) questions the legitimacy of diplomatic assurances as a form of international law.³⁷ Academics also disagree about the effectiveness of diplomatic assurances as mechanisms to

³⁵ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 32.

³⁶ Noll, Gregor, "Diplomatic Assurances and the Silence of Human Rights Law" (2006). *Melbourne Journal of International Law* 6, 7(1); Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 32.

³⁷ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 32.

prevent torture. Manfred Nowak and Lena Skoguld continue to question their reliability, while Constanze Schimmel insists that diplomatic assurances prove very reliable under the right set of circumstances.³⁸ Little has been written about the legality of diplomatic assurances, but the literature that does exist is full of disagreement.

In order to understand the legality of diplomatic assurances, it is essential that we trace the practice's origins in greater detail. It is not surprising that the custom of seeking assurances has roots predating the UDHR and the UN, but reliable records documenting specific cases are in short supply. Diplomatic assurances were customarily used in cases in which one state that maintained the use of the death penalty would request the extradition of a person from a state in which the death penalty had been abolished. In these cases, states would guarantee that they would not use the death penalty in exchange for the extradition. Eric Metcalfe estimates that such special prosecutorial immunities have been sought in international criminal cases for well-over a century, though the informal practice of assurances is probably far older than that.³⁹ Metcalfe cites an instance from 1876, when Lord Derby of the United Kingdom refused to allow the extradition of his conational to the United States, despite an existing agreement binding him to do so. The accused, Ezra Winslow, allegedly committed forgery in Boston, and the U.S. wanted jurisdiction over his prosecution. Derby sought guarantees from the U.S. government that the

³⁸ Nowak, Manfred. "Challenges to the absolute nature of the prohibition of torture and other ill-treatment" (2005). *Netherlands Quarterly of Human Rights* 23, p. 688; Skoglund, Lena. "Diplomatic Assurances Against Torture – An Effective Strategy?" (2008). *Nordic Journal of International Law* 77, p. 362; Schimmel, Constanze. "Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment?" (2007). *Human Rights Law Commentary* 3, p. 27-29. [Reference: Bernátová, Lucia. "Standards of Diplomatic Assurances? A Comparative Study of the Impact of Diplomatic Assurances Against Torture on Risk Assessment in Refoulement Cases" (2014). p. 2-3.]

³⁹ Metcalfe, Eric. "The False Promise of Assurances Against Torture" (2009). *The Justice Journal*, 6(1). p. 64.

suspect in question would not be prosecuted for any offense other than the alleged forgery, but the U.S. was unwilling to accept these terms, arguing that the U.K. had no right to seek assurances beyond the terms of their existing bilateral treaty on extradition.⁴⁰ In response, Derby simply refused the extradition, and Winslow eventually fled after a successful habeas application in the United Kingdom.⁴¹

The turn of the century offered much sadder, but still more significant examples of states formally pursuing assurances for their extraditees. In the spring of 1942, approximately 17,000 Jews were transferred from Slovakia to Poland as workers. Shortly after, the workers' families were also permitted to relocate to Poland. Adolf Eichmann himself attended a conference with significant members of the Slovakian government to hammer out the details of his proposed relocation. At that time, he assured the Slovakian government that the Jews would be treated humanely and housed comfortably in the Polish ghettos, just as the Slovakian government had specifically requested as a mandatory condition of Jewish resettlement:⁴²

As a result of this assurance about 35,000 Jews were taken from Slovakia into Poland. The Slovakian Government... made efforts to see that these Jews were, in fact, humanely treated... Prime Minister Tuka repeatedly... expressed the wish that a Slovakian delegation be allowed to enter the areas to which the Slovakian Jews were supposed to have been sent... After a lengthy discussion Eichmann told me that this request to visit the Polish ghettos could not be granted under any circumstances whatsoever. In reply to my question "Why?" he said that most of these Jews were no longer alive.

⁴⁰ See: The "Webster-Ashburton Treaty" (1842): Article 10. [This was the first formal extradition treaty between the United States and the United Kingdom.]

⁴¹ See: Wu, Tim. "Treaties Domains" (2007). *Virginia Law Review* 93. p. 572-649; p. 624-625

⁴² Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 3 January 1946.

As Metcalfe faultlessly demonstrates, the framers of significant human rights legislation in the immediate aftermath of WWII were keenly aware of the possibility that states could break their explicit humanitarian promises to other states.⁴³ This is made evident by the 1951 Refugee Convention, which was the first to introduce the obligation of non-refoulement to protect against the risks of political prosecution, torture, and death.⁴⁴ However, the issue of diplomatic assurances was not explicitly addressed at this time, leading to disagreement about the legality of accepting them as a human rights practice. Sovereign states naturally began adopting unique approaches to diplomatic assurances, further convoluting their appropriate role in the international human rights framework.

In part, this confusion was exacerbated by the numerous institutional differences between sovereign states and the development of their respective legal precedents. While U.S. courts have typically deferred the authority to transfer an individual suspected of terrorism to the corresponding executive political branch (federal or state-level), the European Court of Human Rights (ECtHR) developed an earlier custom of assessing diplomatic assurances in cases involving the risk of capital punishment in common non-political crimes.⁴⁵ Because the death penalty has effectively been banned in Europe for decades, with the notable exception of Russia, European countries considering extradition requests routinely sought guarantees safeguarding against state executions, generating precedent for the legality of diplomatic assurances by European legal standards. In 1957, the Council of [the] European Convention on Extradition

⁴³ Metcalfe, Eric. "The False Promise of Assurances Against Torture" (2009). *The Justice Journal*, 6(1). p. 65.

⁴⁴ United Nations Convention Concerning the Status of Refugees (1951): Article 33.

⁴⁵ Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). p. 234.

explicitly permitted the use of these assurances to protect against the death penalty, institutionalizing diplomatic assurances as a legitimate practice.⁴⁶ When these assurances were not provided or were insufficient, the ECtHR consistently refused to allow extradition.⁴⁷

In *Soering v United Kingdom* (1989), the ECtHR made a landmark judgement determining that the extradition of a capital murder suspect to the United States violated Article 3 of the European Convention of Human Rights (ECHR). Soering faced the risk of being placed on death row in Virginia, and while the death penalty is not illegal under international human rights law, *Soering v United Kingdom* determined that the mental and emotional anguish of waiting indefinitely on death row (also known as the “death row phenomenon”) does indeed amount to a degree of torture sufficient to invoke the obligation of non-refoulement, regardless of the presence of diplomatic assurances.⁴⁸ This case is of particular importance, because while there was a legal precedent justifying the use of diplomatic assurances in capital cases, the ECtHR determined that such assurances did not warrant the violation of the non-refoulement principle when there was no mechanism to enforce that those diplomatic promises would be kept.⁴⁹ In many ways, *Soering v United Kingdom* marked the beginning of a more substantive debate on the legality of diplomatic assurances. It became clear that simple cases of extradition, which

⁴⁶ Metcalfe, Eric. “The False Promise of Assurances Against Torture” (2009). *The Justice Journal*, 6(1). p. 65.

⁴⁷ Izumo, Alice. “Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence” (2010). p. 237.

⁴⁸ *Soering v United Kingdom* 161 Eur. Ct. H.R. (ser. A) (1989)

⁴⁹ Note: This was especially true given that the United States government, which formally offered these diplomatic assurances against the death penalty, had only modest influence in determining the Soering’s punishment. The Commonwealth of Virginia, which had jurisdiction in the case, made no such assurances. Indeed, there was no guarantee that these assurances would be honored.

were never issues of major legal contention, were now subject to a broader debate about the nature of criminal rights in a world of evolving human rights standards.

This was merely the first in a long line of cases that would further convolute the acceptability of diplomatic assurances. In *Chalal v United Kingdom* (1996), a Sikh militant accused of terrorism faced deportation to India, where he claimed that he would be subjected to torture and ill-treatment. The United Kingdom responded by arguing that while the protections against torture and non-refoulement irrefutably extended to refugees and extraditees, human rights laws did not extend to those who were deemed a risk to a sovereign state's national security. Chalal was considered an enemy militant, and human rights law had not yet been confronted with the question of how to treat individuals suspected of terrorism in cases of refoulement. The Indian government offered diplomatic assurances promising to treat Chalal with the same legal protection as any other Indian citizen, but the ECtHR remained unconvinced, siding with Chalal.⁵⁰ It was believed that Chalal did indeed face the credible threat of torture in India, and that diplomatic assurances were not sufficient to protect against his possible mistreatment. This is the first major terrorism case in which diplomatic assurances safeguarding against torture were rejected on the basis of the non-refoulement obligation. It was decided that human rights do indeed apply to suspected national security threats, just as they apply to refugees and extraditees. Diplomatic assurances, however convenient for states seeking to outsource terrorists, failed to legally circumvent existing international human rights expectations.

After September 11, 2001, the ECtHR was confronted with a barrage of cases relating to the removal of suspected terrorists. Governments, intergovernmental organizations, NGOs, and

⁵⁰ *Chalal v United Kingdom* 23 Eur. Ct. H.R. 413 (1996). para 105.

human rights lawyers responded by turning their attention to diplomatic assurances and their unreliability in a period of heightened security concerns.⁵¹ In 2004, specialized bodies of the Council of Europe and of the European Union outlined principles that offered guidance on the practice of seeking and accepting diplomatic assurances against torture.⁵² Perhaps the most significant of these bodies was the Committee for the Prevention of Torture (CPT). The Committee supported the right of member states to make case-by-case analyses of diplomatic assurances and determine their credibility given each case's context, but the Committee also consistently noted the inherent unreliability of diplomatic assurances as a mechanism to prevent torture.⁵³ In 2004, the CPT also recommended that states adopt practices of post-transfer monitoring, though the Committee cynically acknowledged the inviability of such an idea in the months that followed.⁵⁴ These annual reports by the CPT were frequently cited by the ECtHR when they drafted their judgements and directly influenced judicial attitudes regarding diplomatic assurances. However, while such guidelines reenforced that diplomatic assurances were an acceptable consideration for whether or not to extradite an individual, the cases that followed presented a host of legal questions challenging diplomatic assurances again.

In *Agiza v Sweden* (2005), an Egyptian national accused of terrorism was returned to the custody of his home country despite claiming that there was a risk that he would be tortured. Sweden sought and obtained assurances from Egypt that Agiza would be treated humanely, and

⁵¹ Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). p. 237-238

⁵² *Ibid.* p. 241

⁵³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *15th General Report on the CPT's Activities Covering the Period 1 August 2004 to 31 July 2005*. (2005). para. 39.

⁵⁴ *Ibid. supra* note 55, para. 40.

chose to refole him despite alleged torture risks. Sadly, Agiza was indeed tortured by the Egyptian government, and brought a claim against Sweden. The Committee Against Torture determined that Sweden should have known at the time of Agiza's removal that he would be at a legitimate risk of torture if extradited, especially when considering both the details of Agiza's case and Egypt's history of human rights abuses.⁵⁵ The Committee formally determined that the diplomatic assurances offered by Egypt were not sufficient to eliminate the risk of torture, and that Sweden was in violation of its non-refoulement obligation for accepting such assurances.⁵⁶ It was highlighted that Sweden's acceptance of diplomatic assurances was especially problematic because those assurances "provided no mechanism for their enforcement."⁵⁷ However, Committee Member Alexander Yakovlev offered the following dissenting opinion:⁵⁸

It is clear that [Sweden] was aware of its obligations under article 3 of the Convention, including the prohibition on refoulement. Precisely as a result, it sought assurances from the Egyptian government, at a senior level, as to the complainant's proper treatment... the former Special Rapporteur of the Commission on Human Rights on Torture... accepted in his 2002 report to the Commission on Human Rights the use of such assurances in certain circumstances... which is precisely what the State party did... I would thus come to the conclusion, in the instant case, that the complainant's expulsion did not constitute a violation of article 3 of the Convention.

Human rights committees and courts were becoming increasingly aware of the inconsistent acceptability of diplomatic assurances, especially when *Mamatkulov and Askarov v Turkey*

⁵⁵ *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture (May 24, 2005). para 13.4.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* Separate Opinion of Committee Member Mr. Alexander Yakovlev (dissenting, in part).

(2005) was decided that same year. The Grand Chamber of the ECtHR held that the extradition of two suspects from Turkey to Uzbekistan did not violate Article 3 of the ECHR, in part because Turkey sought diplomatic assurances against torture. Judges Nicolas Bratza, G. Bonello, and J. Hedigan offer the following criticism of this ruling in their joint dissenting opinion:⁵⁹

The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time. The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants' surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety... widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants' arrest and surrender.

The conflicting rulings in *Agiza v Sweden* and *Mamatkulov and Askarov v Turkey* compounded the confusion over the legality of diplomatic assurances. It became increasingly unclear whether or not diplomatic assurances should be considered in determining whether to extradite an individual accused of terrorism. After all, states with impeccable human rights records have no reason to offer diplomatic assurances. Assurances are only necessary when a receiving state must alleviate the concerns of the extraditing state or extraditee. If the human rights practices of the receiving state are subject to scrutiny, can any form of diplomatic assurance override a state's non-refoulement obligation? As these cases were decided, attitudes about diplomatic assurances began to change.

⁵⁹ *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99 (4 February 2005). "Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan." p. 44.

The Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), established by the Council of Europe's Steering Committee for Human Rights (CDDH), sought to resolve these existing inconsistencies. In fact, they were considering a Council of Europe common instrument to standardize and improve diplomatic assurances with supranational oversight and broad enforcement capabilities, but the hard-line views of some human rights advocates rejected the notion that diplomatic assurances are ever acceptable, regardless of the specific circumstances.⁶⁰ Thomas Hammerberg argued that diplomatic assurances are always unreliable, and that the non-refoulement obligation should not be conveniently undermined by the use of non-binding promises.⁶¹ Of course, other members of the DH-S-TER found this position extreme, and the Committee could not reach a consensus on the reliability of diplomatic assurances. Alice Izumo notes that these members' differences in rationale could be divided in to four basic groups:⁶²

- (1) Those who considered diplomatic assurances concerning torture and inhuman or degrading treatment in the context of expulsion procedures to be inherently unreliable;
- (2) Those who asserted that diplomatic assurances can be effective and therefore should be given significant weight in a real risk assessment;
- (3) Those who were unwilling to reject diplomatic assurances in principle for all future cases, but did not believe assurance were in practice necessarily effective;
- (4) Those who found it very difficult to arrive at a firm position on the issue because the States they represented had never used assurances.

⁶⁰ Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). p. 245.

⁶¹ *Ibid.*

⁶² *Ibid.* p. 252.

From 2005 to 2006, representatives from European countries met to discuss diplomatic assurances at the bequest of the Council of Europe. During this time, they “considered and rejected a proposal to draft a common instrument on diplomatic assurances.”⁶³ However, whereas the intergovernmental organization rejected the notion of the common instrument because of infighting over the very acceptability of diplomatic assurances, the rejection by the national representatives signified state disinterest in institutionalizing an oversight committee to regulate the use of diplomatic assurances. This second rejection of the common instrument “highlighted the inconsistency among States’ practices and the divergence between the outlooks of European intergovernmental organizations and certain national governments.”⁶⁴

This fragmentation of opinion reflects the current state of the debate surrounding diplomatic assurances. There are precedents demonstrating both the unreliability of assurances and the effectiveness of assurances. There is also tension between the interests of national governments and the interests of intergovernmental organizations. For the last decade, the ECtHR has played a principle role in determining the acceptability of an assurance on a case-by-case basis. The Court did not singularly endorse the view that diplomatic assurances were harmful, neither did it endorse the view that diplomatic assurances are effective. It simply assessed each case as it came, placing considerable weight on the human rights record of the receiving country, and suggesting new principles for consideration between cases.⁶⁵ As a matter of international law, it remains the case that diplomatic assurances, especially those with

⁶³Izumo, Alice. “Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence” (2010). p. 250.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* p. 253-54.

monitoring mechanisms, clear expectations, and open channels of communication, can “conceivably assess and mitigate the risk of return to such a degree that transfer is made permissible.”⁶⁶ However, there has been very little written about how to resolve the discrepancies between successful and unsuccessful examples of diplomatic assurances in action. The following sections seek to resolve this tension by identifying the problems of diplomatic assurances, and by offering remedies to those problems.

VI. Addressing the Problems of Diplomatic Assurances:

1. Force of Law: As it stands currently, diplomatic assurances are not recognized as legally binding arrangements between states. As Isman, Hasselberg, Izumo, and others have correctly indicated, an assurance is inherently meaningless if it does not carry the same weight as a bilateral treaty.⁶⁷ While human rights leaders such as Robert K. Goldman and Manfred Nowak agree that diplomatic assurances cannot be considered legally binding agreements between states because of the absence of an enforcement mechanism, I argue that states’ inherent interest in making diplomatic assurances effective as a means of preserving their autonomy and decision-making capacities serves as such a mechanism.⁶⁸ Hasselberg agrees with my reasoning, noting

⁶⁶ Horowitz, Jonathan. "Transferring Wartime Detainees and a State's Responsibility to Prevent Torture" (2012). *American University National Security Law Brief* 2, no. 2. p. 61.

⁶⁷ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 60; Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 35; Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). p. 248.

⁶⁸ UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2005/103, February 7, 2005. para. 57; UN Commission on Human Rights, Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, December 23, 2005. para. 31(d).

that governments have an inherent interest in making diplomatic assurances effective so that they can better balance their human rights and security concerns.⁶⁹ While there is no real repercussion for violating a diplomatic assurance, granting diplomatic assurances the legal credibility of other binding agreements will make their violation even more politically problematic within the current international human rights framework.⁷⁰ When the violation of a diplomatic assurance can be considered a violation of a legal bilateral agreement, states will take the prospect of drafting and negotiating effective assurances more seriously. Furthermore, breaking a legally binding agreement with a state carries the increased risk of diplomatic retaliation from that state. Kate Jones argues that such non-compliance would seriously damage the relationships between states, and that states may actually be more motivated by their obligations to each other than by their obligations to the broader international community.⁷¹ In this sense, diplomatic assurances may prove to be a positive catalyst that expands international human rights norms to countries with troubling histories of human rights violations.

2. Transparency: The negotiations surrounding diplomatic assurances are a very secretive practice. There is no accountability for the actors involved in drafting the agreement, and no means by which the concerned individual can refute or challenge aspects of the arrangement. However, if assurances are drafted as a matter of public record, and if these assurances are drafted with the input of the would-be detainee or their legal representative, states

⁶⁹ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 35

⁷⁰ See: Keck, Margaret E., and Kathryn Sikkink, *Activists Beyond Borders* (1998). p. 13.

⁷¹ Jones, Kate. "Deportations with Assurances: Addressing Key Criticism" (2008). *The International and Comparative Law Quarterly* 57(1). p. 188.

would be accountable not only to the individual's expectations, but to the international community as well.⁷² As it stands currently, the secrecy surrounding diplomatic assurances makes it impossible to consider them binding legal arrangements.⁷³ Transparency is the most fundamental requirement to promote basic levels of state accountability.

3. Risk Assessment: States typically conduct risk assessments prior to the extradition of the individual in question. Such assessments typically place considerable weight on the human rights records of the country.⁷⁴ However, there is currently no standard for evaluating the receiving state's record of complying with previous assurances, nor are there standards for evaluating the receiving state's physical capacity to comply with the specifics of a diplomatic assurance.⁷⁵ For example, when two states negotiate for the specific conditions of the individual's room of confinement, I argue that the sending state must independently investigate whether or not such conditions are within the receiving state's capacity to maintain. Isman also takes issue with the reality that most risk assessment takes place prior to the acceptance of a diplomatic assurance.⁷⁶ This is problematic because the political climate of a receiving country is always subject to change. Instead, I propose that states conduct risk assessment procedures after the acceptance of a diplomatic assurance. Following this timeline guarantees that the assessment of the receiving state is always current when an individual is extradited.

⁷² Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 60.

⁷³ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 31.

⁷⁴ Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). p. 253-54.

⁷⁵ *Ibid.* p. 62.

⁷⁶ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 61.

4. Standardized Paperwork: Because diplomatic assurances have traditionally been reached through informal processes, no state has yet implemented a standardized procedure for drafting or documenting them. I propose that states adopt their own concrete processes and systems of documentation. Such processes should regulate the composition and archival of diplomatic assurances. Maintaining such practices will also help to eliminate discrepancies between individual cases. A standardized procedure helps to ensure equal treatment under international human rights law. However, I certainly acknowledge that standardizing the process in any way inherently contradicts the very advantages states seek by using diplomatic assurances. For states, flexibility in negotiating the details of assurances is key.⁷⁷ This is why states should have the freedom to draft their own unique standards. Each state can focus on what it believes should be the common considerations of its extradition cases. In other words, states should have the freedom to standardize their processes only as much as they deem appropriate. Even minimum standardization could be helpful, as there is currently no consistent process for officially enacting or even documenting diplomatic assurances. Such a proposal not only protects states from accusations of bias between individual cases, but also contributes to the transparency of state practices, making it more difficult for detainees to claim that they were treated unfairly.

5. Reparations: When states are accused of human rights violations, the victims are able to seek reparations in regional or international courts. However, if the approximate amounts of potential reparations were agreed to during the assurance negotiation process, sending states would be further incentivized to monitor and protect the extradited individual while they're abroad. The notion may sound bizarre, but such an arrangement could serve as a civil contract

⁷⁷ Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009). p. 35.

between the sending state and the individual in question. Offering a calculated financial award in the event of torture abroad not only demonstrates the sending state's confidence that the individual in question will not be tortured, but will alleviate the extraditee's persistent fears of being abandoned by the sending state. When the sending state has skin in the game, the extraditee can be more certain that his or her human rights will be enforced. A similar arrangement could be contracted between the extraditee and the receiving state.

This proposal also has benefits for bilateral diplomacy. The two participating states will see this financial investment as an exercise of faith between the two governments. In other words, such a financial investment doubles as a diplomatic investment. Following Kate Jones' logic, this could heighten the sense of obligation that a receiving state feels to ensure the extraditee is treated fairly upon arrival, and strengthen the human rights standards of those states with histories of poor human rights application.⁷⁸

6. Legal Procedure: There are currently no standards for the legal procedures afforded to an individual once they have entered the receiving country. The returned person may be taken away with little or no indication of what they are being accused of, or what laws they may have broken in the receiving state. As Isman suggests, "he [or she] should... have the general rights to be brought promptly before a judge, to know the reasons for his [or her] detention, and to receive a fair and un-delayed trial or re-trial if he [or she] was sentenced *in absentia*."⁷⁹ The right to face one's accuser (the state) and the right to fair and transparent criminal proceedings are not necessarily guaranteed under international human rights law, but they are inherently necessary

⁷⁸ Jones, Kate. "Deportations with Assurances: Addressing Key Criticism" (2008). *The International and Comparative Law Quarterly* 57(1). p. 188.

⁷⁹ Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005). p. 61.

for transparent legal procedures to be rendered. Anyone sent to another state on criminal suspicions should have immediate access to courts upon their arrival.

7. Monitoring: One of the most important means of enforcing a diplomatic assurance is the capacity of the sending state to regularly monitor the status of the extraditee, even while they remain under the care of the receiving state. Many previous diplomatic assurances have instituted their own monitoring provisions. These have typically been limited to scheduled visits with the individual, planned in advance by the sending and receiving states. There are obvious problems with these monitoring strategies. In *Agiza v Sweden*, two individuals extradited from Sweden to Egypt claimed that they were treated “excellently” when they were visited by Sweden’s ambassador to Egypt. The ambassador reported that the men “seemed well-nourished and showed no external signs of physical abuse.” One of the men, al-Zery, denied that he had ever been tortured, although his attorney maintained that al-Zery was “speaking under coercion” during his time in Egypt, and that he had in fact been tortured.⁸⁰ When monitoring is regularly scheduled and the detainee’s responses to the sending state’s representatives are tainted by coercion, sending states are unable to accurately assess the condition of the detainee’s treatment. Holding states can easily hide that they are torturing and mistreating their detainees when they know the dates of visitation. This is why sending states must have the ability to show up unannounced at their own discretion to conduct interviews with their extraditees. This will make it much more difficult for receiving states to hide their practices from the sending state. It may also be beneficial for representatives of the sending state to have permanent direct channels of communication with the extraditee.

⁸⁰ Hawkins, Katherine R. "The promises of torturers: diplomatic assurances and the legality of rendition" (2005). *Georgetown Immigration Law Journal* 20. 247-248

8. Oversight by Domestic Courts: While states have an inherent interest in making diplomatic assurances effective, it cannot be said that they consistently prioritize international human rights over their own national security. As we learned throughout the “War On Terror,” politics have the capacity to weaponize diplomatic assurances as a vehicle to promote torture abroad. While state governments will necessarily be involved in the drafting and enforcement of diplomatic assurances, we must moderate their influence with domestic courts. Sending states must implement legal processes by which these courts can monitor government compliance with the conditions of the diplomatic assurance. For example, these courts can ensure that their national department of state has complied with its monitoring obligations, or that predetermined reparation settlements are paid when the terms of a diplomatic assurance are violated. Of course, it is extremely unlikely that a state government will knowingly grant courts the authority to regulate its behavior. Still, some oversight is necessary, and states would likely prefer their own courts over the expansive regional and international courts of international human rights network.

9. The Capacity for States to Sue: If diplomatic assurances are granted the force of law, they will need to employ some kind of interstate enforcement mechanism. If a receiving state violates the terms of a diplomatic assurance, perhaps the sending state should also have the capacity to take that state to court as a means of shaming them. Monetary reparations needn't necessarily be considered, though some financial penalty would certainly be symbolic. Perhaps the sending state could sue for the amount it must pay in reparations to the refouled individual? This would, at least narratively, demonstrate that the receiving state was guilty for violating the

terms of the diplomatic assurance, and that the suffering of the refouled individual is still primarily the fault of the torturing state.

VII. Conclusion:

States in the international system are bound by international human rights treaties not to torture. This obligation extends to the obligation of non-refoulement. Because states have to effectively balance their national security and international human rights obligations, diplomatic assurances have become a preferred method of circumventing the obligation not to extradite an individual accused of terrorism to a state with questionable human rights practices. On the surface, diplomatic assurances appear to be a means by which states legitimize the violation of international human rights. However, there is reason to believe that diplomatic assurances can actually have a positive influence on international human rights. When states engage in diplomatic negotiations to arrive at mutually agreeable human rights expectations, the pressure of such bilateral agreements may actually hold states with histories of subpar human rights practices directly accountable for the enforcement of international human rights.⁸¹ Regardless of the costs or benefits of diplomatic assurances, the European attempt at the adoption of a common instrument to oversee diplomatic assurances has failed. Since the decline of the “War On Terror,” debates concerning the effectiveness of diplomatic assurances have fallen out of public and academic discourse. The debate remains unresolved.

There is precedent suggesting that diplomatic assurances are acceptable given the right set of circumstances, but leading human rights practitioners and NGOs have tirelessly argued

⁸¹ Jones, Kate. “Deportations with Assurances: Addressing Key Criticism” (2008). *The International and Comparative Law Quarterly* 57(1). p. 188.

that diplomatic assurances inherently contradict the obligation of non-refoulement. As it stands currently, courts typically consider the acceptability of a diplomatic assurance on a case-by-case basis, placing considerable weight on the human rights history of the receiving country, but little else. While it is still possible to secure diplomatic assurances under international law, such assurances are not legally binding agreements in their own right. This is problematic, because states that violate the terms of a diplomatic assurance are only held to the standard of breaking a diplomatic promise, not to the standard of violating a bilateral agreement between two states. The latter has the potential to harbor more serious political and legal consequences.

I argue that banning diplomatic assurances altogether is not a feasible endeavor. Similarly, establishing an international mechanism to regulate and monitor diplomatic assurances would be unacceptable to most states, as the negotiations in Europe have proven. Our best chance at preserving human rights in the immediate future is to address the inherent problems of diplomatic assurances with the hope that states will seek to improve them in accordance with their own interests. I have proposed that future diplomatic assurances must take the form of legally binding agreements between states, similar to bilateral treaties, in order to be effective in the international system. I have also indicated that the lack of transparency surrounding diplomatic assurances makes them a secretive and concerning practice, and that states should publish the contents of their negotiations whenever possible. The individuals in question should have the opportunity to offer input at the time of the assurance's negotiation. The timing and scope of a sending state's risk assessment must reflect a complete commitment to ensuring that the individual will not be tortured if extradited. Within states, there must be standardized processes of documentation to demonstrate the consistent application of certain fundamental

human rights considerations, regardless of the nature of each individual case. Reparations should be at least partially negotiated in advance to demonstrate a clear commitment to monitor and safeguard the individual as is necessary. Extraditees must have the right to know the substantive reasons for their detainment, as well as have the opportunity to receive a timely trial once they arrive at the receiving state. Monitoring mechanisms must include the ability for a state representative to visit at any time, unannounced, and to have direct channels of communication with the extraditee whenever they desire. Domestic courts must be consistently involved in the processing and enforcement of diplomatic assurance obligations in order to balance their state's potential conflicts of interest. Finally, states should consider an enforcement mechanism, such as the capacity to sue, to hold each other accountable for their diplomatic assurances. If these suggestions are taken in to consideration, I am certain that diplomatic assurances can become vehicles for the enforcement of human rights, rather than mechanisms to circumvent human rights obligations.

Works Cited:

Bernátová, Lucia. "Standards of Diplomatic Assurances? A Comparative Study of the Impact of Diplomatic Assurances Against Torture on Risk Assessment in Refoulement Cases" (2014).

Hasselberg, Olof. "Diplomatic Assurances - A judicial and political analysis of the undermining of the principle of non-refoulement." (2009).

Hawkins, Katherine R. "The promises of torturers: diplomatic assurances and the legality of rendition" (2005). *Georgetown Immigration Law Journal* 20. p. 213-268.

Horowitz, Jonathan. "Transferring Wartime Detainees and a State's Responsibility to Prevent Torture" (2012). *American University National Security Law Brief* 2, no. 2

Isman, Sara. "Diplomatic Assurances – Safeguard against Torture or Undermining the Prohibition of Refoulement?" (2005).

Izumo, Alice. "Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010). *Columbia Human Rights Law Review* 42.

Jones, Kate. "Deportations with Assurances: Addressing Key Criticism" (2008). *The International and Comparative Law Quarterly* 57(1).

Keck, Margaret E., and Kathryn Sikkink. *Activists beyond Borders* (2001). Cornell University Press.

Mayer, Jane. "Outsourcing torture" (2005). *The New Yorker* 14, no. 2: 05.

Mearsheimer, John J. *The Tragedy of Great Power Politics* (2001). New York: Norton.

Metcalfe, Eric. "The False Promise of Assurances Against Torture" (2009). *The Justice Journal*, 6(1).

Noll, Gregor, "Diplomatic Assurances and the Silence of Human Rights Law" (2006). *Melbourne Journal of International Law* 6, 7(1).

Nowak, Manfred. "Challenges to the absolute nature of the prohibition of torture and other ill-treatment" (2005). *Netherlands Quarterly of Human Rights* 23.

Schimmel, Constanze. "Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment?" (2007). *Human Rights Law Commentary* 3.

Skoglund, Lena. "Diplomatic Assurances Against Torture – An Effective Strategy?" (2008). *Nordic Journal of International Law* 77.

Sotir, Grayon W. "In Defense of National Partiality: An Argument Refuting Liberal Claims of Nationalism's Immorality" (2017).

Waltz, Kenneth Neal. *Theory of International Politics* (1979). Long Grove (Illinois, Estados Unidos): Waveland Press, 2010.

Wendt, Alexander. *Social Theory of International Politics* (1999). Cambridge, UK: Cambridge University Press.

Wu, Tim. "Treaties Domains" (2007). *Virginia Law Review* 93. p. 572-649; p. 624-625

Legal:

African Charter on Human and Peoples' Rights (1981): Article 5.

Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture (May 24, 2005).

American Convention on Human Rights (1969): Article 5.2.

Chahal v United Kingdom 23 Eur. Ct. H.R 413 (1996).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984): Article 3.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *15th General Report on the CPT's Activities Covering the Period 1 August 2004 to 31 July 2005*. (2005).

"In War On Terror, Many Countries Violating Human Rights Standards, Third Committee Told; Meetings Coverage and Press Releases." United Nations. October 26, 2005. Accessed March 17, 2018. <https://www.un.org/press/en/2005/gashc3830.doc.htm>.

Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abouz-Elmaati and Muayyed Nureddin (2009).

International Covenant on Civil and Political Rights (1976): Article 7.

Mamatkulov and Askarov v. Turkey, Application Nos. 46827/99 and 46951/99 (4 February 2005).

SC Resolution 1456 (2003), S/RES/1456(2003), 20 January 2003.

Soering v United Kingdom 161 Eur. Ct. H.R. (ser. A) (1989).

Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 3 January 1946.

The Parliamentary Assembly of the Council of Europe: Resolution 1433. “Lawfulness of detentions by the United States in Guantánamo Bay” (2005).

Universal Declaration of Human Rights (1948): Article 5.

United Nations Convention Concerning the Status of Refugees (1951).

“Webster-Ashburton Treaty” (1842): Article 10.

UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2005/103, February 7, 2005.

UN Commission on Human Rights, Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, December 23, 2005.