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# THE PRINCIPLE OF “NON-REFOULEMENT” IN THE FIGHT AGAINST TERRORISM

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## INTRODUCTION

States have the right to guarantee their security.<sup>1</sup> Since terrorist acts undermine human rights, States have the corresponding obligation to protect the population from terrorist acts (this stemming from the positive duty to protect the life of their citizens, to protect from torture, inhuman and degrading treatment), in some cases adopting preventive measures as part of a positive obligation scheme.<sup>2</sup> In a way, the fight against terrorism is, in itself, a human rights obligation.

Human rights, however, also put limits on State reaction. A wide range of human rights issues arise in the context of the fight against terrorism, concerning for instance the protection of the right to life, protection from torture, right to liberty, right to a fair trial, freedoms of expression, association, assembly and religion. Some human rights may be limited in certain circumstances. Generally, any restriction on civil and political rights must be prescribed by law, justified by one of the recognised aims, “necessary in a democratic society” and non-discriminatory. Others are absolute and non-derogable: torture, inhuman and degrading treatment or punishment are prohibited in absolute terms, without any exception, even in the fight against terrorism.

In an increasingly international context of prevention and prosecution of terrorist acts, the human rights issues become increasingly complex. The absolute nature of the prohibition on torture means that a State cannot ill-treat persons under its jurisdiction, but also that it can be held responsible for exposing persons to the serious risk of torture in other jurisdictions. Moreover, prohibiting any torture whatsoever but accepting evidence obtained through torture (even if not directly by a State’s agent and outside of its jurisdiction), effectively undermines the prohibition on torture and

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<sup>1</sup> See for instance Inter-American Court of Human Rights, *Velázquez Rodríguez v. Honduras*, 29 July 1988, para. 154 and *Castillo-Petruzzi v. Peru*, 30 May 1999, para. 89.

<sup>2</sup> ECtHR, *Osman v. UK*, 28 October 1998, para. 155; see also Council of Europe Guidelines on Human Rights and the Fight against Terrorism, 11 July 2002, Principle I.

is in breach of international human rights law.<sup>3</sup> Article 15 of UN Convention against Torture states that “...any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings”: on the one hand accepting this sort of “evidence” would implicitly condone the use of torture, on the other hand it is highly unreliable evidence. These are issues that are being grappled with in many different countries across the OSCE region and beyond.<sup>4</sup>

Against such wide a background, this paper will focus on the impact that counter-terrorism measures have on the prohibition of “refoulement”. The duty of “non-refoulement” is the duty on States not to return a person to another State where there is a serious risk she/he will be subjected to serious ill-treatment. The term “non-refoulement” is now used in a variety of contexts: mainly, refugee law, the law of extradition and the law of human rights.<sup>5</sup> Particular attention will be given to the use of diplomatic assurances.

### **THE PROHIBITION ON “REFOULEMENT” IN HUMAN RIGHTS LAW**

There are rights of free movement in the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup>, and in the 4<sup>th</sup> Protocol to the European Convention on Human Rights (ECHR)<sup>7</sup>, and there is express procedural protection around detention for extradition or deportation in the ECHR.<sup>8</sup> None of them amounts to substitute for a “non-refoulement” right. Protection against removal has arisen because of implied obligations found in human rights agreements by the bodies charged with their interpretations, notably protections for the right to life and against being ill-treated.<sup>9</sup> Article 3 ECHR reads:

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

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<sup>3</sup> See para. 3, where the big debate in the UK concerning the use of such evidence and the importance of the forthcoming “Law Lords” judgment on the issue is mentioned.

<sup>4</sup> For instance, see the mention of the intervening parties in the ECtHR case *Ramzy v. Netherlands* in para. 2 of this paper.

<sup>5</sup> It is sometimes argued that the duty of “non-refoulement” is a duty under customary international law and, even, that it derives from a rule of *ius cogens*. As these matters are contested and complicated, this paper will take into account only the law of treaties. See for details Lauterpacht, E., *Bethlehem, D., The Scope and content of the principle of non-refoulement*, Opinion for UNCHR’s Global consultations, UNCHR, June 2001; Goodwin-Gill, G. S., *The refugee in international law*, Oxford 1996, spec. Pp. 167-70; Allain, J., *The ius cogens nature of non-refoulement*, in *International Journal of Refugee Law*, 2001, 13, p 522-58.

<sup>6</sup> Articles 12 and 13.

<sup>7</sup> Articles 2, 3 and 4.

<sup>8</sup> Article 5(1)(f), (4)

<sup>9</sup> ICCPR, Articles 6 and 7; ECHR Articles 2 and 3.

In this connection, the most significant authority is the judgment of the European Court of Human Rights (ECtHR) in the *Soering* case.<sup>10</sup> The case of *Soering v the UK* established the principle that a state would be in violation of its obligations under the ECHR if it extradited an individual to a state, in this case the U.S., where that individual was likely to suffer inhuman or degrading treatment or torture contrary to Article 3 ECHR.<sup>11</sup> The Court said:

*The question remains whether the extradition of a fugitive to another state where he would be subjected to or likely to be subjected to torture or to inhuman and degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3... It would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also intends to cases in which the fugitive would be faced in the receiving state by real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article.*

Decisions as to whether or not there is a risk of breach of human rights must be taken on the facts of each case rather than simply on a general view of a state’s record with regard to the protection of human rights. Though clearly, where there is a recognisable pattern of human rights abuses in a state’s system this is likely to increase the probability of a risk of a breach of human rights in a particular case. The argument which succeeded in *Soering* had been put before on several occasions involving removal from one Convention State to another but in each case the Commission had decided that the availability of Convention protection, in national law or, ultimately, in Strasbourg was an adequate guarantee that the fugitive’s Convention rights would be protected. However, there have been cases where a national court has declined to allow

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<sup>10</sup> ECtHR, *Soering v. UK*, 7 July 1989.

<sup>11</sup> *Soering v the UK*, (1989) 11EHRR 439.

the return of a person from one ECHR State to another because of what might happen to them in their return.<sup>12</sup>

While the ECtHR rapidly confirmed that the Soering principle did apply to deportation decisions, it was less quick to find that there was either sufficient evidence or sufficient risk of ill-treatment such as to prevent removal. The court put emphasis on the need for national decision-making which would satisfy Article 13 ECHR<sup>13</sup> and for evidence that the particular individual faced a real risk of ill-treatment,<sup>14</sup> appropriate, of course, to the victim based jurisdiction of the ECtHR. The most significant authority confirming the application of the Soering principle to deportation cases is *Chahal v UK*.<sup>15</sup> In that case the ECtHR found that there was sufficient evidence of a real risk of ill-treatment and underlined that to return a person in these circumstances would be a breach of Article 3. The application of Article 3 was absolute. It contained no exceptions within it, nor could it be derogated from in time of national emergency under Article 15:

*The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.*<sup>16</sup>

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<sup>12</sup> UK courts refused to allow extraditions to France in *Ramada* ([2002] EWHC 1278 (Admin) – admission of evidence obtained by torture) and to Russia in *Zakayev* (unreported – risk of ill – treatment of Chechen).

<sup>13</sup> ECtHR, *Vilvarajah and Others v. UK*, 30 October 1991.

<sup>14</sup> ECtHR, *Cruz varas and others v. Sweden*, 20 March 1991.

<sup>15</sup> ECtHR, *Chahal v. UK*, 15 November 1996. The case concerned the prospective deportation to India of a Sikh nationalist, who presented evidence of having being tortured by Indian authorities when he was there previously.

<sup>16</sup> *Chahal*, para. 80. Accordingly, the Court rejected the British government’s claim that the Soering obligation could be modified to take into account considerations of national security (*Chahal* was suspected of terrorist activity in the UK, though he had not been convicted), nor would it have been a relevant consideration if it had actually been shown that the complainant had engaged in terrorism, see *Chahal*, spec. para. 75-82.

Moreover, in *Chahal* the ECtHR found that assurances from the Indian government about *Chahal*'s likely treatment were he returned did not sufficiently reduce the risk to him. About them, the ECtHR said:

*Although (it) did not doubt the good faith of the Indian government in providing the assurances... it would appear that, despite the efforts of the government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.*<sup>17</sup>

The realism of the ECtHR's judgment is worth highlighting: Article 3 did not only protect against State order torture, it protected where the State had limited control over the day-to-day practices of its security forces. The principle in *Chahal* has been extended to cover situations where the person to be removed fears ill-treatment in the hands of non-State actors. Although the ECtHR will not easily assume that a State is not capable of protecting persons within its jurisdiction against private violence, the Court has not ruled out that circumstances might be so serious that an individual might warrant protection against return. This jurisprudence has been substantially strengthened by the recent judgment in *Mamatkulov*,<sup>18</sup> in which the Grand Chamber decided that interim measures of protection requested by the Court are binding on States parties to the ECtHR. The *Chahal* principle has been extensively debated in the case of *Ramzy v. Netherlands*. The case is being brought by Mohammed Ramzy, who was accused, but acquitted, of involvement in a cell encouraging young Muslims to go on suicide missions. He unsuccessfully claimed asylum and is challenging a decision to deport him, arguing that he would face political persecution in Algeria. The Governments of Italy, Lithuania, Portugal, Slovakia and the UK will intervene in the proceedings, together with a number of human rights NGOs. The *Ramzy* case has been given priority and the Court could deliver a ruling by the end of 2006.<sup>19</sup>

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<sup>17</sup> *Chahal*, para. 105.

<sup>18</sup> ECtHR, *Mamatkulov and Askarov v. Turkey*, 4 February 2005.

<sup>19</sup> See Press release issued the ECtHR Registrar, 20 October 2005, and also Clare Dyer, Ministers seek to overturn torture rule in deportations, *The Guardian*, 3 October 2005 and *id.*, UK wins allies in challenging to torture ruling, *The Guardian*, 18 October 2005.

The Human Rights Committee (HRC) has addressed the “non-refoulement” principle in two of its General Comments.<sup>20</sup> There has been little practice before the HRC on the “non-refoulement” principle.

Instead, most of the jurisprudence has been before the UN Committee against Torture (CAT), where the “non-refoulement” duty should prevent torture in the State of destination.<sup>21</sup> The CAT has emphasised the strength of Article 3 as protection against removal to a State where there is a risk of torture. In May 2005, the CAT “expresse[d] its concern at [t]he failure of the Supreme Court of Canada, in *Suresh v. Ministers of Citizenship and Immigration*, to recognise at the level of domestic law the absolute nature of the protection of Article 3 of the Convention, which is not subjected to any exception whatsoever.”<sup>22</sup>

While the Committee has no binding powers of decision, it has decided that the right to an effective remedy, includes a right to an order against removal while any “non-refoulement” argument is being considered, something to which defendant states have taken objection. In *Brad v. France*, the Committee against Torture (CAT) found that:

*The State party’s action in expelling the complainant in the face of the Committee’s request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee’s final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.*<sup>23</sup>

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<sup>20</sup> General Comment 20, 10 March 1992, para. 9, and more interestingly General Comment 31, 26 May 2004, 12.

<sup>21</sup> The principle implied by the ECtHR in *Soering* had already been incorporated expressly into the UN Convention against Torture (UNCAT), Article 3, which says: “1. No State 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 purposes 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.”

<sup>22</sup> CAT/C/CR/24/CAN, 6 May 2005, 2005, para. 4a. In the criticized case, the national Court concluded that “Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state’s genuine interest in combating terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand, stands Canada’s constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere”, *Suresh v. Canada* (Minister of Citizenship and Immigration), para. 58 (the text is available in *The International Journal of Refugee Law*, Vol. 14, No 1, January 2002. pp. 96-140).

<sup>23</sup> *Brada v. France*, CAT/C/34/D/195/2002, 24 May 2005, para. 13.4. The case concerned the deportation of an Algerian citizen from France. On the importance of procedural guarantees against expulsions, see also Human Rights Committee, *Mansour Ahani v. Canada*, CCPR/C/D/1051/2002, 29 March 2004, spec. para. 10.8

In one of its most recent views, *Agiza v. Sweden*, the CAT has addressed the impact of diplomatic assurances on the risk assessment. The case concerned the expulsion in December 2001 of Ahmed Agiza and Mohammed al-Zari, suspected of terrorist activities, from Sweden to Egypt. A US airplane was used for the removal, the Swedish government relying on diplomatic assurances issued by the Egyptian government that the suspects would not face death penalty, torture or ill-treatment and that they would be granted fair trial upon return. The memorandum of understanding between the two governments provided regular visits by Swedish diplomatic officials to Mr. Agiza. Having concluded that there was a risk of sufficient magnitude that the applicant would be tortured when he was returned from Sweden to Egypt, the CAT said:

*The procurement of diplomatic assurances, which moreover, provided no mechanism for their enforcement, did not suffice to protect against manifest risk.*<sup>24</sup>

The CAT reaches no conclusion in principle that diplomatic assurances might never tip the balance in favour of the State but it would appear that some monitoring element will be required and that the sending State must make full use of it. To speak about the “enforcement” of assurances must be understood in this way. It is impossible to see how a non-binding understanding could be more “enforced” than the treaty which forbids the torture. Finding a violation in *Agiza*, the CAT was doubtless helped by Sweden’s recognition that it had found it hard to obtain the co-operation it expected from the Egyptian government.<sup>25</sup> Prof. Manfred Nowak, the UN Special Rapporteur in Torture, commented on the case:

*The Agiza case is the first case of extraordinary rendition to provide us with a statement of law at the international level. In this case the diplomatic assurances procured were insufficient to protect against the manifest risk of torture and were therefore unenforceable. It is the opinion of the Special Rapporteur that post-return monitoring mechanism do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.*<sup>26</sup>

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<sup>24</sup> *Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, para. 13.4.

<sup>25</sup> *Agiza*, para. 11.4.

<sup>26</sup> UN/A/60/316, para. 45-46. In July 2004 the CoE Commissioner for Human Rights, stated that “The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains”, see report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, 21-23 April 2004, Council of Europe, document Comm DH (2004) 13, 8 July 2004, para. 9.

## 2. THE USE OF DIPLOMATIC ASSURANCES

Diplomatic assurances are understandings between administrations. They may be expressed in normative or descriptive terms or a combination of both: they may refer to the destination State’s treaty duties or they may use general terms like “not to ill-treat” or “to give a fair trial to” the person. In some cases, these substantive conditions will be supplemented by procedural ones, allowing officials of the removing State to monitor the treatment of the person returned.

There are a number of reasons why the use of diplomatic assurances is inherently unreliable in relation to cases of torture or ill-treatment.

Firstly, assurances are not binding and operate between administrators rather than States. Accordingly, they weaken the normative regime of human right, which should be strengthened and not circumvented. Usually assurances are not requested from countries that abide by their human rights obligations. The very fact that assurances are requested means that in the receiving country a problem of torture exists. Furthermore, if both the sending and the receiving states are bound by UNCAT and ICCPR the risk here is the application of double standards, because the “refouling” state is asking its counterpart to make an exception in a specific situation. The receiving state most probably violates the absolute prohibition of torture, so this practice may look like a general acceptance of torture, apart from specific and tailored cases. The right approach to persons who may not be removed from a country on these circumstances is that they should be prosecuted or set free.

Secondly, assurances are at odds with the very nature of human rights. In many cases in which diplomatic assurances are sought the “non-refoulement” principle may apply to an individual. As an absolute human right, it should not be jeopardized by non-binding agreements between States, in which the individual has no part. The remedial side of human rights protection plays a vital role here, as shown in the past section. In *Soering*, the complainant was able to challenge his extradition to the US and the evidence of the risk to him was in the open and assessed by a court, the ECtHR. The ECtHR has moreover decided that its requests for interim measures (i.e. not to remove the applicant until his case is determined) are binding. The CAT pointed out in *Agiza* that the State’s obligation of “non-refoulement” under Article 3 UNCT carries an implicit emptive remedy to challenge any removal decision and, in the appropriate case, a right to a pre-emptive remedy.<sup>27</sup> The crucial role played by effective (and available) national remedies cannot be stressed enough. States have



in fact taken two lines, often cumulatively, about diplomatic assurances: the first is that the assessment of their significance is not for tribunals and the second is that, even if it were, details of the cases cannot be revealed on grounds of national security or protection of international relations, so that the pronouncement of a government that there is no substantial risk of ill-treatment where there are assurances from the destination State effectively decides the matter. The essential characteristics of human rights, that there should be an effective national remedy for their protection, is denied. There are some examples of vital function of courts in this connection: the judgement in the UK case of *Yousseff*<sup>28</sup> is particularly revealing. Informed about some of the manoeuvres that had gone on, the UK court refused to allow the return of the individual to Egypt, despite the determination of the UK to deport him and the anxiety of Egypt to have him back.

Thirdly, no remedies are contemplated in case of violation of the substantive provisions contained in the memoranda of understanding between sending and receiving states, which may not have any common interest in finding torture allegations true. In this respect, post-return monitoring mechanisms have proved not to be effective.

*Indeed, it has been argued that monitoring one or a few designated detainees (as opposed to systematic and generalized monitoring) actually could make those detainees and members of their families more vulnerable to abuse. Periodic visits simply cannot protect an isolated detainee. They may confront a detainee who has been tortured or otherwise ill-treated with a very serious dilemma: forcing him or her to choose between, on the one hand, pretending he or she was never mistreated, denying the shattering experience of torture, or, on the other hand reporting his or her mistreatment, knowing the account will be traced back to him or her and that, in retaliation, he or she might be tortured again. It is precisely to protect detainees from such situations that the International Committee of the Red Cross (ICRC) insists on monitoring an entire prison population—it preserves the anonymity of the person reporting ill-treatment.<sup>29</sup>*

Fourthly, diplomatic assurances do not work. NGOs evaluate the use of diplomatic assurances in cases involving torture and ill-treatment and those given about the

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<sup>27</sup> *Agiza*, para. 13.8.

<sup>28</sup> *Youssef v. Home Office* ([2004] EWHC 1884 (QB))

<sup>29</sup> Amnesty International, Human Rights Watch and the International Commission of Jurists: *Reject rather than regulate: Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment*, December 2, 2005, p. 14.

death penalty, which are acknowledged to have a degree of efficacy. Death penalty assurances refer to a single, lawful and acknowledged action by the destination state: the imposition of a capital sentence after a fair trial. On the contrary, torture is not lawful and may be carried out over long periods by officials over whom the high authorities of the State have no effective control.<sup>30</sup> Irregular visits by diplomatic personnel of the returning State cannot prevent ill-treatment which is a well-known attribute of the destination State’s detention system. Moreover, it is not quite in the interest of a returning State to participate in a process which would make public that the assurances against that risk had been unsuccessful.

Finally, the use of diplomatic assurances has also been criticised at the national level and extended to assurances regarding fair trial rights: on 12 October 2005, the President of the Regional Court of The Hague denied extradition of Mohammed A. to the United States. The diplomatic note issued by the American embassy was considered not to offer sufficient guarantees. First of all, the Court stated that the general phrasing of the diplomatic note (“that persons extradited to the United States are accorded, at their trial, the full panoply of rights under United States law, including under the United States Constitution”) did not exclude the possibility of application of the US Military Order and related legislation. Secondly, the diplomatic note did not contain any concrete assurances that M.A. would not be detained or punished for other facts than stated in the extradition request. For this reason, the Court prohibited extradition of M.A. by the Dutch State.<sup>31</sup>

### **AUT DEDERE AUT IUDICARE: A HUMAN RIGHTS PERSPECTIVE**

As mentioned, international law is quite clear: a state may return a person only on the condition that he will not be at risk of ill-treatment in the country of return. But if this is the case, the natural alternative is either to prosecute him or to set him free. In front

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<sup>30</sup> The UN Special Rapporteur on Torture, Prof. M. Nowak, said that: “The fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subject to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk” (UN Press Release, 23 August 2005). See also Human Rights Watch, Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and ill-treatment, 30 August 2005 and *Ibid.*, Still at Risk: Diplomatic Assurances no Safeguard against Torture, April 2005, vol. 17, No. 4, (D).

<sup>31</sup> Mohammed A’s primary claim was to prohibit his extradition to the US by the Dutch State; his subsidiary claim was to prohibit his extradition to the US without ensuring a number of specific guarantees. On 8 August 2005 an interim ruling was delivered in which the primary claim was rejected and in which the US, having regard to the subsidiary claim was requested to provide guarantees that the rights of M.A. would be respected by the US authorities and that M.A. would not be detained, tried or prosecuted for facts other than stated in the extradition request. See also Court blocks extradition to America, *The Times*, 13 October 2005.

of this obligation and because of perceived difficulties in prosecuting non-nationals suspected of involvement in terrorist activities, above all in the aftermath of 9/11, states have tried to escape this obligation in several ways.<sup>32</sup>

One example of this is the UK government’s adoption of the Anti-terrorism, Crime and Security Act 2001 (ATCSA). Here one can see the importance of human rights law: the UK had in fact to derogate from its obligation under ECHR and ICCPR<sup>33</sup> in order to adopt the law. Under its Part 4,<sup>34</sup> the Home Secretary making use of a wide power of certification could indefinitely detain “suspected international terrorists” without charge or trial.<sup>35</sup> The House of Lords found the derogation incompatible with the UK’s obligation under the ECHR, because the detention power applied only to non-nationals and because the detainees’ only choice to avoid detention would have been to leave the country with possible risk of abuses in their countries of origin.<sup>36</sup>

Another serious concern arising from the UK practice relates to the admissibility of evidence in criminal proceedings. Article 15 of the Un Convention against Torture states that “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” On 29 October 2003, the SIAC ruled that evidence obtained under torture of third party was admissible and reliable for reaching judgement.<sup>37</sup> The Court of Appeal of England and Wales on 11 August 2004 specified that evidence obtained by torture of third party cannot be admissible only if directly procured by UK agents or if UK agents had connived in its procurement.<sup>38</sup> The Appellate Committee of the House

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<sup>32</sup> For instance, attempting to narrow the definition of torture; holding persons incommunicado or limiting severely the right to challenge the detention or to access counsel; transferring of persons by irregular or clandestine procedures to places where there is a reliable evidence that torture is used; the reliance on memoranda of understanding as a guarantee from the authorities is such places that persons returned will not be tortured, the willingness of tribunals and officials to rely on evidence obtained by torture.

<sup>33</sup> The new Act provided for detention standards incompatible with Article 5 ECHR and Article 9 ICCPR.

<sup>34</sup> See for detailed analysis C. Warbrick, *The European response to terrorism in an age of human rights*, in “*European Journal of International Law*”, 15, 2004, spec. pp. 1009-1015.

<sup>35</sup> The judicial review of the decision was exercised by the Special Immigration Appeal Commission (SIAC), further on by the Court of Appeal and the House of Lords. In reviewing the procedure, the SIAC heard secret evidence provided by the intelligence services, in secret hearings. The detainee would be allocated a security-cleared Special Advocate nominated by the government, who could not communicate with the detainee about the evidence nor receive instructions from him.

<sup>36</sup> The House of Lords ruled that Part 4 of ATCSA violated detainees’ rights in a disproportionate and discriminatory way in December 2004 [*A. v. Home Secretary*, 2004, UKHL 56]. The Act was not renewed in March 2005.

<sup>37</sup> *A. v. Home department*, 29 October 2003.

<sup>38</sup> The majority in the Court of Appeal ruled that because the Torture Convention is not part of British domestic law, the Home Secretary has no obligation to enquire about how information from third countries was obtained when he certifies foreign nationals as suspected international terrorists, see *A. v. Home department* (2004) EWCA 1123.

of Lords (“Law Lords”) concluded its hearing on 19 October 2005: the judgement on such delicate an issue is expected for December 2005 or January 2006.<sup>39</sup>

The perceived difficulties in prosecuting those suspected of involvement in terrorist activities may be overcome in several ways. For instance, one solution is to develop systems of translating intelligence evidence into criminal intelligence so that states can prosecute those genuinely involved in terrorism instead of deporting them. It is worth taking into consideration the UK state of affairs concerning the admission of evidence in trials. At present recordings from telephone intercepts carried out by the police and the security service can only be used for intelligence purposes. Members of the intelligence community have in the past expressed concern that the disclosure of phone tapping evidence is generally admitted in courts, under certain conditions (in particular, the authorisation by judge). This is one way for states to get out of the current predicament imposed by the duty *aut dedere aut iudicare*.

## CONCLUSION AND OUTLOOK

The human right version of “non-refoulement” is an extremely strong rule. It does not admit any exception or derogation. Diplomatic assurances do not affect the existence of the “non-refoulement” obligation though they may be relevant to its application by providing evidence which reduces the risk. The practice suggests that any claims for the reduction should be treated sceptically. Moreover, the deportation of terrorist suspects does not seem to be the right solution. While it can certainly relieve the burden of police, intelligence, security and prison services on the state concerned, on the other hand it does not help in diminishing threats to the deporting country or to the world communities. Nor is it an efficient method to pursue the fight against terrorism: terrorists should be arrested, not left free to travel around (with even the potential risk to return to the deporting state without it being aware of it).

Deportation might be the right solution if the deportees are likely to face in the country of return a fair trial according to international human rights law and if the country in issue does not violate the absolute prohibition of torture and inhuman

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<sup>39</sup> Upon its examination of the UK’s report of its implementation of the Convention against Torture, the CAT expressed concern that UK domestic legislation had been “interpreted to exclude the use of evidence extracted by torture only where the state party’s officials were complicit”. With respect to this, the CAT recommended that the UK authorities should not “rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture”. It also recommended that the UK authorities should “provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture”, CAT/C/CR/33/3, 10 December 2004, para. 4 (a)(i).

or degrading treatments. Moreover, from a prosecutorial point of view (evidence gathering, for example) the country of return may offer concrete advantages. In the long term, this is an opportunity to actively promote the protection of human rights in third countries. This is already on the agenda of the OSCE, the European Union, other international organisations and in bilateral relations among states. However, these efforts urgently need to be strengthened.

Human rights standards envisage one type of society, and that is a society rooted in human rights standards, at the heart of which are the rule of law and democratic values. Therefore the prospect of using acts of terrorism, which violate human rights standards, to bring about a society that is premised on human rights standards is a contradiction in terms. Counter-terrorism mechanisms and enforceable human rights standards are therefore intimately linked. Arguably human rights will have only limited value if they, and the society upon which they are premised, can be destroyed by those engaging in terrorism. At the same time counter-terrorism measures, which do not have as their aim the ultimate guarantee of human rights will have defeated the purpose of those measures. As a consequence, counter-terrorism laws and practice that end up undermining, even destroying, human rights have no place in the human rights lexicon.

