

## **Extradition and Human Rights**

### **Diplomatic assurances and Human Rights in the Extradition Context<sup>1</sup>**

Presentation by Mr Johannes Silvis, Judge at the European Court of Human Rights

Human rights issues occasionally pop up as additional grounds for refusal of extradition requests, most notably in terrorist-cases. *Additional*, of course, only in as far as such grounds for refusal may not already be implicated in traditional grounds for refusal. While traditional grounds for refusal of extradition often reflect the interest of the requested state, this is not always thought (or recognized) to be so when human rights come into play.<sup>2</sup> The interface of human rights and extradition is therefore widely experienced as a domain of “tension” between protective and cooperative functions of this form of international legal assistance.<sup>3</sup> Protective functions are evidently most important when risk of life or torture of a requested person is at stake. To what extent and under what conditions may ‘diplomatic assurances’ (DAs) serve to harmonize protective and cooperative functions of extradition?<sup>4</sup> That is the question I was asked to address here today from the perspective of a Judge in the Court of Human Rights. I will undertake do so on the basis of some key cases of the ECtHR and other publications regarding this matter.<sup>5</sup>

In considering decisions on extradition or the transfer of suspects, states cannot turn a blind eye to the potential for breaches of a number of rights including, among others the non-derogable right to freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial as well as the principle of legal certainty and freedom from discrimination in order to ensure that they meet their obligations under international human rights law.<sup>6</sup>

Extradition may be barred on different human rights grounds, following the Articles of the Convention<sup>7</sup>:

- i. Under Article 2, if the loss of life is shown to be a real risk;
- ii. Under Article 3, if there are strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to cruel, inhuman or degrading treatment;
- iii. Under Article 5, if the person risks suffering a flagrant denial of his right to liberty;
- iv. Under Article 6, if there is a serious risk a person will suffer or has suffered (in a conviction case) a flagrant denial of his right to a fair trial;
- v. Under Article 8, where the consequence of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition.<sup>8</sup>

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<sup>1</sup> Lecture presented 20 May 2014, PC-OC meeting in Strasbourg/F.

<sup>2</sup> The European Convention on Extradition (1957) does not contain a *general* provision that excludes extradition if there is a risk of infringement on the human rights of the requested person. Unlike the Framework Decision concerning the European Arrest Warrant (EAW), which has no direct effect, that does contain a general exception regarding violations of Human Rights.

<sup>3</sup> Michael Plachta, Contemporary Problems of Extradition: Human Rights Grounds for Refusal and the Principle *Aut Dedere Aut Punire*, 114th International Training Course Visitors’ Expets’ Papers.

<sup>4</sup> The term “diplomatic assurances”, as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law. See UNHCR Note on Diplomatic Assurances and International Refugee Protection, Protection Operations and Legal Advice Section Division of International Protection Services, Geneva, August 2006, p.2.

<sup>5</sup> For an extensive list of cases see PC-OC (2011) 21 REV 7. I do not claim originality in this paper in the analysis of the Court’s cases.

<sup>6</sup> See Background paper on Extradition and Human Rights in the Context of Counter-terrorism Workshop on Legal Co-operation in Criminal Matters Related to Terrorism. Vienna, 22- 23 March 2007, ODIHR.GAL/22/07 20 March 2007 OSCE+

<sup>7</sup> See the summary, C.89, p. 395. In: A Review of the United Kingdom’s Extradition arrangements. (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010)

Presented to the Home Secretary on 30 September 2011, available on <http://www.homeoffice.gov.uk/>

In extradition matters interim measures (Rule 39 of the Rules of Court of the European Court of Human Rights) play an important role. Applying this Rule the Court may prevent that extradition would occur before the Court is satisfied that the requested extradition would not cause an irreparable and serious violation of the human rights of the applicant, mostly concerning article 2 or 3.<sup>9</sup> Neglecting that Rule 39 is applied normally results in the Courts' finding of a violation of Article 34 by the respondent State.<sup>10</sup>

Although partially recalled, the leading authority in the jurisprudence of the European Court of Human Rights on extradition is still *Soering v. United Kingdom* (07/07/1989).<sup>11</sup> In this judgment, the European Court of Human Rights found for the first time that the State's responsibility could be engaged if it decided to extradite a person who risked being subjected to ill-treatment in the requesting country. That case concerned a decision by the UK Home Secretary to extradite the applicant to the Virginia

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<sup>8</sup> In *Lauder v. United Kingdom*, the applicant claimed that his extradition to Hong Kong would interfere with respect for his family life in violation of Article 8 of the Human Rights Convention and would be disproportionate to the proposed extradition's legitimate aim. On the issue of proportionality the European Commission stated:

"It is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life."

The decision in *Lauder* was followed by the Strasbourg Court in the admissibility decision in *King v. United Kingdom*. The Court emphasized the importance of extradition arrangements between States in the fight against crime, in particular crime with an international or cross-border dimension and stated:

".. that it will only be in exceptional circumstances that an applicant's private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition."

<sup>9</sup> Examples: *Nivette v. France* (no. 44190/98) 03.07.2001 : Rule 39 was applied in the case of a US citizen whom the USA wanted to have extradited on murder charges. The application of Rule 39 was lifted after the Court deemed sufficient the assurances obtained by the French Government from the US authorities to the effect that the applicant would not face the death penalty or whole life imprisonment.

*Babar Ahmad and Others v. the United Kingdom* (nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09) 10.04.2012 Rule 39 was applied in particular in the case of Abu Hamza, a stateless imam whose extradition was sought by the USA so that he could stand trial for hostage-taking and terrorism-related activities. The applicant complained, among other things, that he risked being sentenced to life imprisonment without parole. The application of Rule 39 was lifted after the Court found, in its judgment on the merits, that such a sentence was not disproportionate to the seriousness of the offences in question.

Rule 39 may also be applied in cases where Articles 5 (right to liberty and security) and 6 (right to a fair trial) are engaged, where there is a risk of a "flagrant denial of justice" in the event of expulsion/extradition.

*Soering v. the United Kingdom* (no. 14038/88) 07.07.1989. In this case the Court indicated to the British Government under Rule 39 that it would be desirable not to extradite the applicant to the United States of America while the proceedings were pending before it. The Court explained in its judgment on the merits that "an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk."

Rule 39 has also been applied where the risk to the applicant's life and well-being stemmed from the expulsion/extradition measure itself or its effects. *Einhorn v. France* (no. 71555/01) 19.07.2001

Having been informed that the applicant had attempted to commit suicide, the Court requested the French Government to give it information on his state of health, and not to extradite him pending a new decision. The interim measure was lifted a week later after the French Government had provided a medical report confirming that Mr Einhorn could be transferred by plane to the USA under medical and police supervision.

<sup>10</sup> *Mamatkulov and Askarov v. Turkey* (nos. 46827/99 and 46951/99) 04.02.2005 (Grand Chamber). In this judgment the Court found a violation for the first time because of a State's failure to comply with an interim measure. The facts of the case show that the Court was prevented from examining the applicants' complaints appropriately because of their extradition to Uzbekistan, despite the fact that an interim measure had been indicated to Turkey to suspend the extradition. The Court pointed out that under the Convention system interim measures played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Article 34. The Court reiterated that under that Article, Contracting States undertook to refrain from any act or omission that might hinder the effective exercise of an individual applicant's right of application. A failure to comply with interim measures had to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34. See also *Al-Saadoon and Mufdhi v. the United Kingdom* - 61498/08 Judgment 2.3.2010 [Section IV] This case concerns a complaint by two Iraqi nationals that the British authorities in Iraq had transferred them to Iraqi custody in breach of an interim measure indicated by the European Court under Rule 39 of the Rules of Court, so putting them at real risk of an unfair trial followed by execution by hanging. The Court therefore finds a violation of Article 34.

<sup>11</sup> In *Saadi* the Court found that the concepts of risk and dangerousness did not lend themselves to a balancing test because they were "notions that [could] only be assessed independently of each other" (*ibid.* § 139). The Court finds that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: this too can only be assessed independently of the reasons for removal or extradition. Indeed in the twenty-two years since the *Soering* judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State. To this extent, the Court must be taken to have departed from the approach contemplated by paragraphs 89 and 110 of the *Soering* judgment. See *Babar Ahmad and Others v. the United Kingdom* - 24027/07, Judgment 10.4.2012 [Section IV], par. 172-173.

(US) to face charges of capital murder, allegedly committed in a symbiotic relationship, a 'folie à deux', with his girl-friend on her parents, for which the penalty could be death. It is important to note that the death penalty was at the time not precluded by the Convention. The applicant therefore complained pre-emptively that the manner in which the death penalty was executed, namely, after long delays in death row, was inhuman and degrading treatment and that his extradition would therefore be in violation of Article 3 of the Convention. The Court held that there would be a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights if the applicant were to be extradited to the United States on grounds of a real risk of being put on "death row", treatment going beyond the threshold set by Article 3. The responsibility of the extraditing/expelling State is engaged whether or not the receiving country is a State Party to the Convention if there are substantial grounds for believing that the applicant faces a "real risk" of ill-treatment in the receiving country. The Court stated in par. 88:

*"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 intention of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman and degrading treatment or punishment proscribed by that Article."*

The Court showed (in par. 89) explicit awareness of the interests of the nations in bringing requested persons to justice:

*"Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."*

### **Assessment of ill-treatment**

In its Cruz Varas judgment of 20 March 1991 the Court noted the following principles relevant to its assessment of the risk of ill-treatment in another State (Series A no. 201, pp. 29-31, paras. 75-76 and 83):

(1) In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu;

(2) Further, since the nature of the Contracting States' responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from

having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears;

(3) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case.

In *Vilvarajah and Others v. United Kingdom* 30/10/1991 the Court found that there were no such grounds regarding the removal of the applicants – including a member of the Tamil community – to Sri Lanka in 1988, and accordingly that there had been no violation of Article 3:

*“108. The Court’s examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 3) at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Soering judgment of 7 July 1989, Series A no. 161, p. 34, para. 88). It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka in the light of the general situation there in February 1988 as well as on their personal circumstances.*

*(...)*

*114. The Court also attaches importance to the knowledge and experience that the United Kingdom authorities had in dealing with large numbers of asylum seekers from Sri Lanka, many of whom were granted leave to stay, and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the current situation in Sri Lanka and the position of the Tamil community within it (see the above-mentioned Cruz Varas judgment, Series A no. 201, p. 31, para. 81, and paragraphs 5, 17, 34, 46, 57, 77-79 and 97 above).*

*115. In the light of these considerations the Court finds that substantial grounds have not been established for believing that the applicants would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 (art. 3) on their return to Sri Lanka in February 1988.*

*116. Accordingly, there has been no breach of Article 3 (art. 3).”*

### **The Chahal principle**

In *Chahal v. United Kingdom* 15/11/1996: the Court held that an advocate of the Sikh separatist cause who was served with a deportation order on grounds of national security faced a real risk of ill-treatment if he were to be deported to India (the Court was not satisfied by the assurances given by the Indian Government). Violation of Article 3 would occur if the deportation order to India were to be enforced.

*“96. (...) Indeed, in cases such as the present the Court’s examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 (art. 3) and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Vilvarajah and Others judgment mentioned at paragraph 73 above, p. 36, para. 108).*

*97. In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3 (art. 3), the Court will assess all the material placed before it and, if necessary, material obtained of its own motion (see the above-*

*mentioned Vilvarajah and Others judgment, p. 36, para. 107). Furthermore, since the material point in time for the assessment of risk is the date of the Court's consideration of the case (see paragraph 86 above*

*(...).*

*105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that 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 in India is a recalcitrant and enduring problem (see paragraph 104 above). Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.”*

As has been observed elsewhere, the ECtHR's judgment is worth emphasising - Article 3 did not only protect against State ordered 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 at 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.

### **Saadi: fixed threshold of ill-treatment, irrespective of dangerousness**

In *Saadi v. Italy* 28/02/2008 (Grand Chamber) the Court finds a violation of Article 3 if the applicant were to be deported to Tunisia (where he claimed to have been sentenced in absentia in 2005 to 20 years' imprisonment for membership of a terrorist organisation).

The applicant, Nassim Saadi, is a Tunisian national who was born in 1974 and lived at the time in Milan (Italy). He is then the father of an eight-year-old child whose mother is an Italian national. The application concerns the possible deportation of the applicant to Tunisia, where he claims to have been sentenced in 2005, in his absence, to 20 years' imprisonment for membership of terrorist organisation acting abroad in peacetime and for incitement to terrorism. In December 2001 the applicant was issued with an Italian residence permit, valid until October 2002, "for family reasons".

On 29 May 2007 the Italian embassy in Tunis asked the Tunisian Government to provide a copy of the alleged judgment convicting the applicant in Tunisia, as well as diplomatic assurances that, if the applicant were to be deported to Tunisia, he would not be subjected to treatment contrary to Article 3 of the European Convention on Human Rights, that he would have the right to have the proceedings reopened and that he would receive a fair trial. In reply, the Tunisian Minister of Foreign Affairs twice sent a note verbale to the Italian Embassy in July 2007 stating that he "accepted the transfer to Tunisia of Tunisians imprisoned abroad once their identity had been confirmed", that Tunisian legislation guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions".

Contrary to the argument of the United Kingdom as third-party intervener, supported by the Italian Government, the Court considered that it was not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if not sent back. The prospect that he might pose a serious threat to the community did not diminish in any way the risk that he might suffer harm if deported.

As regards the arguments that such a risk had to be established by solid evidence where an individual was a threat to national security, the Court observed that such an approach was not compatible with the absolute nature of Article 3. It amounted to asserting that, in the absence of evidence meeting a higher standard, protection of national security justified accepting more readily a risk of ill-treatment for the individual. The Court reaffirmed that for a forcible expulsion to be in breach of the Convention it

was necessary – and sufficient – for substantial grounds to have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country.

The Court noted that in Italy Mr Saadi had been accused of international terrorism and that his conviction in Tunisia had been confirmed by an Amnesty International statement in June 2007. The applicant therefore belonged to the group at risk of ill-treatment. That being so, the Court considered that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 if he were to be deported to Tunisia.

*“147. The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian government asked the Tunisian government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (see paragraphs 51-52 above). However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad (see paragraph 54 above). It was only in a second note verbale, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners’ rights and that Tunisia had acceded to “the relevant international treaties and conventions” (see paragraph 55 above). In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.*

*148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”*

### **Unreliable assurances**

In *Baysakov and Others v. Ukraine* 18/02/2010 the Court finds a violation of Article 3 if Kazakh opposition activists were to be extradited to their home country; the Court considered that the assurances given by the Kazakh authorities were unreliable and that it would be difficult to ensure that they were honoured given the lack of an effective system of torture prevention.

*“51. Finally, the Court considers that the assurances that the applicants would not be ill-treated given by the Kazakh prosecutors cannot be relied in the present case, for the same reasons as in *Soldatenko* (cited above, § 73). In particular, it was not established that the First Deputy Prosecutor General of Kazakhstan or the institution which he represented was empowered to provide such assurances on behalf of the State and, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected.”*

In *Klein v. Russia* 01/04/2010: the extradition from Russia to Colombia of an Israeli “mercenary” convicted in criminal proceedings would be contrary to Article 3.

The Court took account of the reports on Colombia produced by international sources, statements made by the Colombian Vice-President in respect of the applicant and the vague nature of the assurances given by the Colombian authorities.

The applicant, Gal Yair Klein, is an Israeli national who was born in 1943 and lived in Tel-Aviv. He was detained in a remand prison in Moscow. In 2001, the Colombian criminal courts convicted him of

teaching military and terrorist tactics committed together with accomplices and sentenced him to ten years and eight months' imprisonment combined with a fine.

On 27 August 2007, the applicant was arrested at Domodedovo Airport, Moscow on the basis of an Interpol notice for his arrest with a view to extraditing him to Colombia. The Interpol notice was issued following an arrest order handed down by the Colombian courts. Mr Klein was then placed in custody until his transfer to Colombia. I cite:

*“55. The Court notes that the Government invoked assurances from the Colombian Ministry of Foreign Affairs to the effect that the applicant would not be subjected to ill-treatment there (see paragraph 16 above). However, the Court observes that the assurances in question were rather vague and lacked precision; hence, it is bound to question their value. The Court also reiterates that diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see Saadi, cited above, §§ 147-148). 56. Lastly, the Court will examine the applicant's argument that the Russian authorities did not conduct a serious investigation into possible ill-treatment in the receiving country. It notes in this respect that the applicant informed the Russian courts about poor human-rights situation in Colombia referring to the fact that there had been a lengthy internal armed conflict between State forces and paramilitaries and citing the UN General Assembly's Resolution and the materials of the meeting of the Human Rights Committee (see paragraph 18 above). Furthermore, the applicant brought to the authorities' attention the fact that the Colombian Vice-President had threatened to have him rot in jail. The Supreme Court of Russia limited its assessment of the alleged individualised risk of ill-treatment deriving from Vice-President Santos's statement to a mere observation that the Colombian judiciary were independent from the executive branch of power and thus could not be affected by the statement in question (see paragraph 21 above). The Court is therefore unable to conclude that the Russian authorities duly addressed the applicant's concerns with regard to Article 3 in the domestic extradition proceedings.”*

### **Othman (Abu Qatada) v. the United Kingdom**

I now turn to the case of Othman (Abu Qatada) v. the United Kingdom - 8139/09 Judgment 17.1.2012 [Section IV].

The applicant, a Jordanian national, arrived in the United Kingdom in 1993 and was granted asylum. He was detained from 2002 until 2005 under the Anti-terrorism, Crime and Security Act 2001. Following his release, the Secretary of State served the applicant with a notice of intention to deport. Meanwhile, in 1999 and 2000 the applicant was convicted in absentia in Jordan of offences of conspiracy to carry out bombings and explosions. The crucial evidence against the applicant in each of the trials that led to those convictions were the incriminating statements of two co-defendants, who had subsequently complained of torture. In 2005 the United Kingdom and Jordanian Governments signed a Memorandum of Understanding (MoU) which set out a series of assurances of compliance with international human-rights standards to be adhered to when an individual was returned to one State from the other. It also provided for any person returned to have prompt and regular visits from a representative of an independent body nominated jointly by the two Governments. The Adaleh Centre for Human Rights Studies later signed a monitoring agreement with the UK Government to that effect. In the applicant's case additional questions as to any possible retrial were put to, and answered by, the Jordanian Government. The applicant appealed against the decision to deport him but his claims, after careful examination by the domestic courts, were ultimately dismissed.

*“142. In its 2006 concluding observations on the United States of America, the UN Committee against Torture recommended that diplomatic assurances should only be relied upon in regard to States which do not systematically violate UNCAT's provisions, and after a thorough examination of the merits of*

each individual case. It recommended clear procedures for obtaining assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.

143. In a February 2006 address to the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), Louise Arbour, then United Nations Commissioner for Human Rights stated:

*“Based on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do.”*

144. In his “viewpoint” of 27 June 2006, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, stated that diplomatic assurances were pledges which were not credible and had turned out to be ineffective in well-documented cases. His view was that the principle of non-refoulement should not be undermined by convenient, non-binding promises.

145. Concerns as to the United Kingdom’s Government’s policy of seeking assurances have also been expressed by the United Kingdom Parliament’s Joint Committee on Human Rights (in its report of 18 May 2006) and the House of Commons Select Committee on Foreign Affairs (in its report of 20 July 2008).

146. Human Rights Watch has strongly criticised the use of assurances. In an essay in its 2008 World Report entitled “Mind the Gap Diplomatic Assurances and the Erosion of the Global Ban on Torture”, it argued that the problem with assurances lay in the nature of torture itself, which was practised in secret using techniques that often defied detection. The essay also considered the arrangements between in the United Kingdom and Jordan. It characterised Adaleh as a small NGO and questioned whether, with little experience, questionable independence and virtually no power to hold the Government to account, it was able to ensure the safety of a person returned under the MOU.”

Reports by the United Nations and various NGOs indicated that torture in Jordan remained “widespread and routine” and the parties accepted that without assurances of the Jordanian Government there would have been a real risk of ill-treatment of the applicant, a high profile Islamist. In that connection, the Court observed that only in rare cases would the general situation in a country mean that no weight at all could be given to assurances it gave. More usually, the Court would assess, firstly, the quality of the assurances given (whether they had been disclosed to the Court, whether they were specific, whether they were binding on the receiving State at both central and local levels and whether their reliability had been examined by the domestic courts of the sending/Contracting State) and, secondly, whether in the light of the receiving State’s practices they could be relied upon (whether the receiving State was a Contracting State, whether it afforded effective protection against torture and outlawed the conduct to which the assurances related, whether it had strong bilateral relations with the sending State and had abided by similar assurances in the past, whether the applicant had previously been ill-treated there and whether adequate arrangements were in place in the receiving State to allow effective monitoring and unfettered access for the applicant to his or her lawyers).

The Court stated:

*“1. General principles*

183. *First, the Court wishes to emphasise that, throughout its history, it has been acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights (see, inter alia, Lawless v. Ireland (no. 3), 1 July 1961, §§ 28–30, Series A no. 3; Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, Öcalan v. Turkey [GC], no. 46221/99, § 179, ECHR 2005-IV; Chahal, cited above, § 79; A and Others v. the United Kingdom, cited above, § 126; A. v. the Netherlands, no. 4900/06, § 143, 20 July 2010). Faced with such a threat, the Court considers it legitimate for Contracting States to take a firm stand against those*



who contribute to terrorist acts, which it cannot condone in any circumstances (*Boutagni v. France*, no. 42360/08, § 45, 18 November 2010; *Daoudi v. France*, no. 19576/08, § 65, 3 December 2009).

184. Second, as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. It is no part of this Court's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his or her rights under the Convention (see also *Ismoilov and Others*, cited above, §126).

185. Third, it is well-established that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion (*Saadi v. Italy [GC]*, no. 37201/06, §§ 125 and 138, ECHR 2008-...).

186. Fourth, the Court accepts that, as the materials provided by the applicant and the third party interveners show, there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security (see paragraphs 141- 145 above and *Ismoilov and Others*, cited above, §§ 96-100). However, it is not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment. Before turning to the facts of the applicant's case, it is therefore convenient to set out the approach the Court has taken to assurances in Article 3 expulsion cases.

187. In any examination of whether an applicant faces a real risk of ill-treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (see *Saadi*, cited above, § 148).

188. In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances (see, for instance, *Gaforov v. Russia*, no. 25404/09, § 138, 21 October 2010; *Sultanov v. Russia*, no. 15303/09, § 73, 4 November 2010; *Yuldashev v. Russia*, no. 1248/09, § 85, 8 July 2010; *Ismoilov and Others*, cited above, §127).

189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, *inter alia*, to the following factors:

(i) whether the terms of the assurances have been disclosed to the Court (*Ryabikin v. Russia*, no. 8320/04, § 119, 19 June 2008; *Muminov v. Russia*, no. 42502/06, § 97, 11 December 2008; see also *Pelit v. Azerbaijan*, cited above);

(ii) whether the assurances are specific or are general and vague (*Saadi*, cited above; *Klein v. Russia*, no. 24268/08, § 55, 1 April 2010; *Khaydarov v. Russia*, no. 21055/09, § 111, 20 May 2010);

(iii) who has given the assurances and whether that person can bind the receiving State (*Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 344, ECHR 2005-III; *Kordian v. Turkey (dec.)*, no. 6575/06, 4 July 2006; *Abu Salem v. Portugal (dec.)*, no. 26844/04, 9 May 2006; cf. *Ben Khemais v. Italy*, no. 246/07, § 59, ECHR 2009-... (extracts); *Garayev v. Azerbaijan*, no. 53688/08, § 74, 10 June 2010; *Baysakov and Others v. Ukraine*, no. 54131/08, § 51, 18 February 2010; *Soldatenko v. Ukraine*, no. 2440/07, § 73, 23 October 2008);

- (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them (*Chahal*, cited above, §§ 105-107);
- (v) whether the assurances concerns treatment which is legal or illegal in the receiving State (*Cipriani v. Italy* (dec.), no. 221142/07, 30 March 2010; *Youb Saoudi v. Spain* (dec.), no. 22871/06, 18 September 2006; *Ismaili v. Germany*, no. 58128/00, 15 March 2001; *Nivette v. France* (dec.), no 44190/98, ECHR 2001 VII; *Einhorn v. France* (dec.), no 71555/01, ECHR 2001-XI; see also *Suresh and Lai Sing*, both cited above)
- (vi) whether they have been given by a Contracting State (*Chentiev and Ibragimov v. Slovakia* (dec.), nos. 21022/08 and 51946/08, 14 September 2010; *Gasayev v. Spain* (dec.), no. 48514/06, 17 February 2009);
- (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State’s record in abiding by similar assurances (*Babar Ahmad and Others*, cited above, §§ 107 and 108; *Al-Moayad v. Germany* (dec.), no. 35865/03, § 68, 20 February 2007);
- (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers (*Chentiev and Ibragimov and Gasayev*, both cited above; cf. *Ben Khemais*, § 61 and *Ryabikin*, § 119, both cited above; *Kolesnik v. Russia*, no. 26876/08, § 73, 17 June 2010; see also *Agiza, Alzery and Pelit*, cited above);
- (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible (*Ben Khemais*, §§ 59 and 60; *Soldatenko*, § 73, both cited above; *Koktysh v. Ukraine*, no. 43707/07, § 63, 10 December 2009);
- (x) whether the applicant has previously been ill-treated in the receiving State (*Koktysh*, § 64, cited above); and
- (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State (*Gasayev; Babar Ahmad and Others*, § 106; *Al-Moayad*, §§ 66-69).”

<b>Checklist DAs</b>
Transparency
Specificity
Authoritatively given
Legally binding
Effective control
Legal status treatment
Quality interstate relation
Verifiability in practice
Acceptance international monitoring
History of ill-treatment requested person
Domestic judicial appraisal reliability

In the applicant’s case, the UK and Jordanian Governments had made genuine efforts to obtain and provide transparent and detailed assurances to ensure that he would not be ill-treated upon his return to Jordan. The MoU reached as a result of those efforts was superior in both its detail and formality to any assurances previously examined by the Court. Furthermore, the assurances had been given in good faith and approved by the highest levels of Jordanian Government, whose bilateral relations with the UK had historically been very strong. The MoU clearly contemplated that the applicant would be deported to Jordan, where he would be detained and retried for the offences for which he had been convicted in absentia. The applicant’s high profile would likely make the Jordanian authorities careful to ensure his proper treatment, since any ill-treatment would not only have serious consequences on that country’s bilateral relationship with the UK, but would also cause international outrage. Finally, in accordance with the MoU, the applicant would be regularly visited by the Adaleh Centre, which would

be capable of verifying that the assurances were respected. Consequently, the applicant's return to Jordan would not expose him to a real risk of ill-treatment. The court unanimously found no breach of Article 3.

Why did the Court find a breach of Article 6 in the Qatada judgment? It should be remembered that in Soering the Court reasoned in obiter dicta that (the perspective of) a serious and flagrant breach of fair trial rights under Article 6 ECHR could have relevant consequences in extradition cases. Soon after, in Drozd and Janousek v. France and Spain<sup>12</sup> the Court, dealing with the lawfulness of detention following a conviction, again addressed the issue of flagrant denial of fair trial rights by a party requesting extradition. The Court showing deference to Government assurances, stated in that case in par. 110:

*“The Court takes note of the declaration made by the French Government to the effect that they could and in fact would refuse their customary co-operation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 (art. 6) or the principles embodied therein. It finds confirmation of this assurance in the decisions of some French courts: certain indictments divisions refuse to allow extradition of a person who has been convicted in his absence in a country where it is not possible for him to be retried on surrendering to justice (see, for example, the decision of the Limoges Court of Appeal, 15 May 1979, cited in the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 10, para. 18), and the Conseil d’État has declared the extradition of persons liable to the death penalty on the territory of the requesting State to be incompatible with French public policy (see, for instance, the Fidan judgment of 27 February 1987, with submissions by Government Commissioner Jean-Claude Bonichot, Recueil Dalloz Sirey 1987, jurisprudence, pp. 305-310, and the Gacem judgment of 14 December 1987, Recueil Lebon 1987, tables, p. 733).*

*In the Court’s opinion, it has not been shown that in the circumstances of the case France was required to refuse its co-operation in enforcing the sentences.”*

I continue on the Qatada case. The applicant Qatada complained that, if returned to Jordan, his retrial would amount to a flagrant denial of justice because, inter alia, of the admission of evidence obtained by torture. The Court observed that a flagrant denial of justice went beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What was required was a breach of the principles of fair trial which was so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. In that connection, it noted that admission of torture evidence would be manifestly contrary not only to Article 6 of the Convention, but also to the basic international-law standards of fair trial. It would render a trial immoral, illegal and entirely unreliable in its outcome. The admission of torture evidence in a criminal trial would therefore amount to a flagrant denial of justice. The incriminating statements in the applicant's case had been made by two different witnesses, both of whom had been exposed to beating of the soles of their feet commonly known as falaka, the purpose of which could have only been to obtain information. The Court had previously examined this form of ill-treatment and had no hesitation in characterising it as torture. Furthermore, the use of torture evidence in Jordan was widespread and the legal guarantees contained under Jordanian law seemed to have little practical value. While it would be open for the applicant to challenge the admissibility of the statements against him that had been obtained through torture, he would encounter substantial difficulties in trying to do that many years after the events and before the same court which routinely rejected such claims. Having provided concrete and compelling evidence that his co-defendants had been tortured into providing the case against him, and that such evidence would most likely be used in his retrial, the applicant had met the high burden of proof required to demonstrate a real risk of a flagrant denial of justice if he were deported to Jordan. Thus the Court found a violation of Article 6 if the UK would extradite Abu Qatada.

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<sup>12</sup> Application no. 12747/87, ECtHR 26 June 1992 (judgment).

Whilst Abu Qatada has always challenged the reliability of diplomatic assurances negotiated under the MoU, he was prepared to leave the UK for Jordan once the two countries 'enshrined in law' their bilateral agreement through the ratification of a fair trial treaty.<sup>13</sup> Therefore, to overcome the objections of the British Courts, the Home Secretary decided to conclude a new 'mutual legal assistance agreement', which entered into force in June 2013.

The Treaty comprises a number of fair trial guarantees for deportees and a stringent ban on the use of torture-obtained evidence. It places the onus on the prosecution to prove beyond any doubt that the statement has been obtained out of free will and choice and has not been extrapolated by torture or ill-treatment. mutual legal assistance agreement by Jordan would not be enough. Only after its entry into force would the treaty override any of the rulings by the Jordanian courts. Thus, following a formal approval of the Treaty by Jordan's King Abdullah, on 7 July 2013 Abu Qatada 'agreed' to return to Jordan. British papers, a few days later: Abu Qatada touches ground in Jordan.

### **Prison conditions and assurances**

A recent extradition case concerned with conditions in prisons is *Babar Ahmad and Others v. the United Kingdom - 24027/07*, Judgment 10.4.2012 [Section IV]. The court concludes that conditions of detention in super-max US prison would not constitute a violation in case of extradition. The applicants were indicted on various charges of terrorism in the United States, which requested their extradition. They complained before the European Court about the risk of serving their prison term in the US in ADX Florence, a super-max prison, where they would be subjected to special administrative measures, and of being sentenced to irreducible life sentences.<sup>14</sup>

(a) Prison conditions at ADX Florence: Although the applicants' detention at ADX Florence would not be inevitable, the Government accepted that there was a real risk of their detention there if they were extradited and convicted in the US. It seemed undisputed that the physical conditions at ADX Florence – the size of the cells, the lighting and sanitary facilities – met the requirements of Article 3. However, the applicants complained of a lack of procedural safeguards before their placement there and the ADX's restrictive conditions and lack of human contact. As to the first complaint, the US authorities had shown that not all inmates convicted of international terrorism offences were serving time at ADX Florence. Instead, the Federal Bureau of Prisons seemed to apply accessible and rational criteria when deciding whether to transfer an inmate to that facility. Moreover, a hearing was held before such transfers were made and the inmates could bring a claim in the federal courts under the due process clause of the Fourteenth Amendment to the US Constitution. As regards the second complaint, even though the applicants were not physically dangerous, the US authorities would be justified in considering them as posing a significant security risk justifying limitations on their ability to communicate with the outside world. It further seemed that well-established procedures were in place for reviewing an inmate's security classification. It was undisputed that conditions at ADX Florence, in particular in the special security unit, were highly restrictive as they sought to prevent all physical contact between the inmates and with staff. However, a great deal of in-cell stimulation was provided

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<sup>13</sup> I follow here Mariagiulia Giuffrè, 'An Appraisal of Diplomatic Assurances One Year after

*Othman (Abu Qatada) v United Kingdom* (2012)', in: *International Human Rights Law Review* 2 (2013) 266–293.

<sup>14</sup> The case of *Aswat*, who was among the applicants in this case, was adjourned and later dealt with separately. In *Aswat v. the United Kingdom - 17299/12*, Judgment 16.4.2013 [Section IV], the Court concluded that uncertainty over conditions of detention in the event of extradition to the United States of this applicant as a suspected terrorist suffering from serious mental disorder would constitute a violation of Article 3. The Court:

"57. While the Court in *Babar Ahmad* did not accept that the conditions in ADX Florence would reach the Article 3 threshold for persons in good health or with less serious mental health problems, the applicant's case can be distinguished on account of the severity of his mental condition. The applicant's case can also be distinguished from that of *Bensaid v. the United Kingdom*, no. 44599/98, (ECHR 2001-I) as he is facing not expulsion but extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends. Therefore, in light of the current medical evidence, the Court finds that there is a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold (see *Bensaid v. the United Kingdom*, cited above, § 37)."

through television and radio channels, frequent newspapers, books, hobby and craft items and education programmes. Indeed, the range of activities and services provided went beyond what was provided in many prisons in Europe. Moreover, even the inmates under special administrative measures had the right to regular telephone calls, social visits and correspondence with their families. While in their cells, inmates could only communicate with other inmates through the ventilation system, but during recreation periods they were free to communicate without impediment. All of these factors showed that the isolation experienced by ADX inmates was partial and relative. No violation.

(b) Possible life imprisonment: It was not certain that, if extradited, the applicants would be convicted or that a discretionary life sentence would be imposed on them. However, even if such a sentence was imposed on the applicants, given the gravity of their charges, the Court did not consider that they would be grossly disproportionate. Moreover, as the Court had observed in previous cases, in respect of a discretionary life sentence, an Article 3 issue would only arise when it could be shown: (i) that the applicant's continued incarceration no longer served any legitimate penological purpose; and (ii) the sentence was irreducible *de facto* and *de iure*.<sup>15</sup> Since none of the applicants had yet been convicted or started serving their sentence, the Court considered that they had not shown that, upon extradition, their incarceration in the US would not serve any legitimate penological purpose. It was further uncertain whether, should that point ever be reached, the US authorities would refuse to avail themselves of mechanisms available in their system to reduce the applicants' potential sentences. Therefore the Court found no violation on this account.

The General principles in *Babar and Others vs. UK* reveal an evolution in the Court's reasoning in extradition matters since *Soering*:

*"167. The Court further notes that the House of Lords in Wellington has identified a tension between Soering and Chahal, both cited above, which calls for clarification of the proper approach to Article 3 in extradition cases. It also observes that the conclusions of the majority of the House of Lords in that case depended on three distinctions which, in their judgment, were to be found in this Court's case-law. The first was between extradition cases and other cases of removal from the territory of a Contracting State; the second was between torture and other forms of ill-treatment proscribed by Article 3; and the third was between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context. It is appropriate to consider each distinction in turn.*

*168. For the first distinction, the Court considers that the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State. The Court's own case-law has shown that, in practice, there may be little difference between extradition and other removals. For example, extradition requests may be withdrawn and the Contracting State may nonetheless decide to proceed with removal from its territory (see *Muminov v. Russia*, no. 42502/06, § 14, 11 December 2008). Equally, a State may decide to remove someone who faces criminal proceedings (or has already been convicted) in another State in the absence of an extradition request (see, for example, *Saadi v. Italy*, cited above, and *Bader and Kanbor v. Sweden*, no. 13284/04, ECHR 2005-XI). Finally, there may be cases where someone has fled a State because he or she fears the implementation of a particular sentence that has already been passed upon him or her and is to be returned to that State, not under any extradition arrangement, but as a failed asylum seeker (see *D. and Others v. Turkey*, no. 24245/03, 22 June 2006). The Court considers that it would not be appropriate for one test to be applied to each of these three cases but a different test to be applied to a case in which an extradition request is made and complied with.*

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<sup>15</sup> See also *Ramirez Sanchez v. France* [GC], no. 59450/00, 4 July 2006, Information Note no. 88; and *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012.

169. For the second distinction, between torture and other forms of ill-treatment, it is true that some support for this distinction and, in turn, the approach taken by the majority of the House of Lords in *Wellington*, can be found in the *Soering* judgment. The Court must therefore examine whether that approach has been borne out in its subsequent case-law.

170. It is correct that the Court has always distinguished between torture on the one hand and inhuman or degrading punishment on the other (see, for instance, *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25; *Selmouni v. France* [GC], no. 25803/94, §§ 95-106, ECHR 1999-V). However, the Court considers that this distinction is more easily drawn in the domestic context where, in examining complaints made under Article 3, the Court is called upon to evaluate or characterise acts which have already taken place. Where, as in the extra-territorial context, a prospective assessment is required, it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe as to qualify as torture. Moreover, the distinction between torture and other forms of ill-treatment can be more easily drawn in cases where the risk of the ill-treatment stems from factors which do not engage either directly or indirectly the responsibility of the public authorities of the receiving State (see, for example, *D. v. the United Kingdom*, 2 May 1997, Reports of Judgments and Decisions 1997-III, where the Court found that the proposed removal of a terminally ill man to St Kitts would be inhuman treatment and thus in violation of Article 3).

171. For this reason, whenever the Court has found that a proposed removal would be in violation of Article 3 because of a real risk of ill-treatment which would be intentionally inflicted in the receiving State, it has normally refrained from considering whether the ill-treatment in question should be characterised as torture or inhuman or degrading treatment or punishment. For example, in *Chahal* the Court did not distinguish between the various forms of ill-treatment proscribed by Article 3: at paragraph 79 of its judgment the Court stated that the “Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment”. In paragraph 80 the Court went on to state that: “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 ...”

Similar passages can be found, for example, in *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I and *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008-... where, in reaffirming this test, no distinction was made between torture and other forms of ill-treatment.

172. The Court now turns to whether a distinction can be drawn between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context. The Court recalls its statement in *Chahal*, cited above, § 81 that it was not to be inferred from paragraph 89 of *Soering* that there was any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State’s responsibility under Article 3 was engaged. It also recalls that this statement was reaffirmed in *Saadi v. Italy*, cited above, § 138, where the Court rejected the argument advanced by the United Kingdom Government that the risk of ill-treatment if a person is returned should be balanced against the danger he or she posed. In *Saadi* the Court also found that the concepts of risk and dangerousness did not lend themselves to a balancing test because they were “notions that [could] only be assessed independently of each other” (*ibid.* § 139). The Court finds that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: this too can only be assessed independently of the reasons for removal or extradition.

173. The Court considers that its case-law since *Soering* confirms this approach. Even in extradition cases, such as where there has been an Article 3 complaint concerning the risk of life imprisonment without parole, the Court has focused on whether that risk was a real one, or whether it was alleviated by diplomatic and prosecutorial assurances given by the requesting State (see *Olaechea Cahuas v. Spain*, no. 24668/03, §§ 43 and 44, 10 August 2006; *Youb Saoudi v. Spain* (dec.), no. 22871/06, 18 September 2006; *Salem v. Portugal* (dec.), no. 26844/04, 9 May 2006; and *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII). In those cases, the Court did not seek to determine whether the Article 3 threshold has been met with reference to the factors set out in paragraph 89 of the *Soering* judgment. By the same token, in cases where such assurances have not been given or have been found to be inadequate, the Court has not had recourse to the extradition context to determine whether there would be a violation of Article 3 if the surrender were to take place (see, for example, *Soldatenko v. Ukraine*, no. 2440/07, §§ 66-75, 23 October 2008). Indeed in the twenty-two years since the *Soering* judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State. To this extent, the Court must be taken to have departed from the approach contemplated by paragraphs 89 and 110 of the *Soering* judgment.

(...)

176. The Court therefore concludes that the *Chahal* ruling (as reaffirmed in *Saadi*) should be regarded as applying equally to extradition and other types of removal from the territory of a Contracting State and should apply without distinction between the various forms of ill-treatment which are proscribed by Article 3.

177. However, in reaching this conclusion, the Court would underline that it agrees with Lord Brown's observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States (see, as a recent authority, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, 7 July 2011). This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment for HIV/AIDS in *Aleksanyan v. Russia*, no. 46468/06, §§ 145–158, 22 December 2008 with *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008).

178. Equally, in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:

- the presence of premeditation (*Ireland v. the United Kingdom*, cited above, § 167);
- that the measure may have been calculated to break the applicant's resistance or will (*ibid*, § 167; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 446, ECHR 2004-VII);
- an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority (*Jalloh v. Germany* [GC], no. 54810/00, § 82, ECHR 2006-IX; *Peers v. Greece*, no. 28524/95, § 75, ECHR 2001-III);

- *the absence of any specific justification for the measure imposed (Van der Ven v. the Netherlands, no. 50901/99, §§ 61-62, ECHR 2003-II; Iwańczuk v. Poland, no. 25196/94, § 58, 15 November 2001);*
- *the arbitrary punitive nature of the measure (see Yankov, cited above, § 117);*
- *the length of time for which the measure was imposed (Ireland v. the United Kingdom, cited above, § 92); and*
- *the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (Mathew v. the Netherlands, no. 24919/03, §§ 197-205, ECHR 2005-IX).*

*The Court would observe that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.*

*179. Finally, the Court reiterates that, as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention. It has only rarely reached such a conclusion since adopting the Chahal judgment (see Saadi, cited above § 142). The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law.”*

### **Skepticism on diplomatic assurances**

It appears that diplomatic assurances, governmental assurances, assurances of prosecutors or other actors in the criminal justice system play an important role in the case-law of our Court in extradition cases. There are diplomatic assurances in many forms, like

- (1) Note Verbale;
- (2) Memorandum of Understanding
- (3) Aide-Memoire; An informal summary of a diplomatic interview or conversation that serves merely as an aid to memory.
- (4) Pro Memoria;
- (5) Note Diplomatique;
- (6) Note Collective; and
- (7) Circular Diplomatic Note.

The observed weakness inherent in the practice of diplomatic assurances lies in the fact that where there is an apparent need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment.<sup>16</sup> Perhaps the same could be said of the Convention. But skepticism may not be very helpful. True there are worrying accounts of the weakness of diplomatic assurances. Examples of the weakness of diplomatic assurances concern Maher Arar and Ahmed Agiza and Mohammed al-Zari.<sup>17</sup>

<sup>16</sup> M. Giuffré / International Human Rights Law Review 2 (2013) 266–293, p.284. See also Gregor Noll, Diplomatic Assurances and the Silence of Human Rights Law, in: Melbourne Journal of International Law, Vol 7, 2006. David Rangaviz, Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr, in: Harvard Civil Rights-Civil Liberties Law Review [Vol. 46, 2011]

<sup>17</sup> See Bibi van Ginkel and Federico Rojas, 'Use of Diplomatic Assurances in Terrorism-related Cases. In Search of a Balance Between Security Concerns and Human Rights Obligations.' Expert Paper International Centre for counter-Terrorism, The Hague, 2011. For more information, check Arar's lawsuit against the United States in: United States District Court for the Eastern District of New York, Maher Arar v. Ashcroft, 414 F.Supp.2d 250 (E.D. N.Y. 2006). The case of Agiza v. Sweden (communication no. 233/2003, decision of 20 May 2005, UNCAT), was explicitly addressed by the ECtHR in the Abu Qatada case. So was Mohammed Alzery v. Sweden, CPR/C/88/D/1416/2005, 10 November 2006.



Maher Arar a Syrian-born Canadian citizen who moved to Canada with his parents when he was 17 years old. In 2002, Maher was living in Canada, where he had been a citizen since 1991, and worked as a consultant with The MathWorks, Inc. He was a suspected member of Al Qaeda, apprehended by US authorities in September 2002 at JFK airport while on his way home to Canada.<sup>18</sup> Arar had dual Syrian/Canadian citizenship and allegedly told American authorities that he would be tortured in Syria if returned and should therefore be sent to Canada. Despite his warnings, Arar was sent to Syria after 2 weeks in detention. He was released from custody after 10 months of being detained without charge, during which he was allegedly tortured repeatedly, despite the fact that Canadian authorities were allowed to conduct several visits to his Syrian prison. The US authorities claimed they received assurances from the Syrian government that Arar would not be subjected to torture upon return. The Department of State has refused to disclose information based on “state’s secrets”, and refuses to cooperate with Canadian authorities as well. Upon release, Arar discussed why he did not reveal he was being tortured during visits from Canadian officials:

*“I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again ... The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there.”*

Ahmed Agiza and Mohammed Alzery

Agiza and Alzery were Egyptian asylum seekers that were forcibly returned to Cairo in December 2001 after being captured on Swedish soil. US officials have been accused of conducting the transfer, making it one of the first major cases of extraordinary rendition. The Egyptian government’s DAs included promises that the detainees would not be tortured nor sentenced to death, as well as granting access for Swedish officials to monitor their situation. Subsequent visits by Swedish officials took place but always in the presence of Egyptian officials. Human Rights Watch claims there are strong suspicions they have been tortured. SIAC noted that the case of Agiza stands as a clear warning of the dangers of simple reliance on a form of words and diplomatic monitoring.<sup>19</sup> The Committee concluded in the Agiza case that “the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.” In the Alzery case it concluded: “the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author’s expulsion thus amounted to a violation of article 7 of the Covenant.”

## Concluding

Without entering in an analysis of different forms of diplomatic assurances it may be said in general terms that the exchange of aide-mémoires or a written Memorandum of Understanding must be seen as a binding instrument of international law, falling within the ambit of the Vienna Convention on the Law of Treaties.<sup>20</sup> States generally intend to create binding obligations when giving and receiving such diplomatic assurances. That is a relevant matter in assessing risks concerning extradition. In the jurisprudence of the European Court of Human Rights it is essential that assurances are not part of a trade off in balancing national security interests, human rights protection and international cooperation. Whether such assurances can be accepted as relevant facts for the assessment of a risk is a delicate

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<sup>18</sup> See The Story of Maher Arar. Rendition to Torture. Center for Constitutional Rights. <https://ccrjustice.org/files/rendition%20to%20torture%20report.pdf>.

<sup>19</sup> United Kingdom Special Immigration Appeals Commission (SIAC) as cited by the ECtHR in par. 29 of Othman (Abu Qatada) v. the United Kingdom - 8139/09, Judgment 17.1.2012 [Section IV].

<sup>20</sup> The Vienna Convention on the Law of Treaties opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (“VCLT”). See for an analysis of the legally binding nature of diplomatic assurances from the perspective of the VCLT: Gregor Noll, Diplomatic Assurances and the Silence of Human Rights Law, in: Melbourne Journal of International Law, Vol 7, 2006.

exercise. As it was stated in *Abu Qatada vs. the UK*, it not for the Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.