MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

EIMANTĖ LASTOVKAITĖ

(INTERNATIONAL LAW PROGRAMME)

DIPLOMATIC ASSURANCES IN INTERNATIONAL LAW AND EXPULSION OF FOREIGNERS

Master Thesis

Supervisor –

Prof. Dr. Lyra Jakulevičienė

Vilnius, 2015

TABLE OF CONTENT

LIST OF ABBREVATIONS 3
INTRODUCTION 4
1. THE LEGAL CHALLENGES OF DIPLOMATIC ASSURANCES 9
1.1. Historical legal analyses of the birth of Diplomatic Assurances 9
1.2. Legal basis for Diplomatic Assurances in International law 11
1.3. Legal basis for Diplomatic Assurances in Regional Law of Europe 15
1.4. Diplomatic Assurances in the context of foreigners expulsion 18
1.5. Status of Diplomatic Assurances in Human Rights law 22
2. APPROACH BY COURTS AND INTERNATIONAL HUMAN RIGHTS BODIES TOWARDS DIPLOMATIC ASSURANCES 27
2.1. The analyses of European Court of Human Rights case – law 27
2.1.1. Criteria of diplomatic assurances 27
2.1.2. Elements of diplomatic assurances 33
2.1.3. Procedural safeguards 44
2.2. The analyses of jurisprudence of the United Nations Human Rights bodies 48
2.2.1. Criteria of diplomatic assurances 49
2.2.2. Elements of diplomatic assurances 52
2.2.3. Procedural safeguards 57
2.3. National law and Jurisprudence 62
3. THE FUTURE OF DIPLOMATIC ASSURANCES 68
3.1. Possible future impact on the principle of *non – refoulement* 68
3.2. Possible legal status of DA's in International law 71
CONCLUSIONS AND RECOMMENDATIONS 74
LIST OF REFERENCES 76
ANNOTATION 90
ANOTACIJA 91
SUMMARY 92
SANTRAUKA 93
PATVIRTINIMAS APIE ATLIKTO DARBO SAVARANKIŠKUMĄ 94

LIST OF ABBREVATIONS

CAT/CAT Convention	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	United Nations Committee Against Torture
DA‘s	Diplomatic Assurances
ECHR/ Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR/ Strasbourg court	European Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDTP	Inhuman and degrading treatment or punishment
ILC	International Law Commission
ILC Articles	The Articles of State Responsibility for Internationally Wrongful Acts adopted by ILC
NGO	Non – governmental organization
SIAC	Special Immigration Appeals Commission
UK	The United Kingdom
UN	The United Nations
UNCHR	The United Nations Refugee Agency
UNHRC	The United Nations Human Rights Committee
US	The United States of America
VCLT	The Vienna Convention on the Law of Treaties

INTRODUCTION

Diplomatic Assurances in International Law and Expulsion of Foreigners

Issue

"Diplomatic assurances", whereby receiving states promise not to torture specific individuals if returned are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced."[1]

Could Diplomatic Assurances (DA's) be understood as guarantees that States well-known for gross human rights violations will ensure that the person concerned is not exposed to torture or ill-treatment, death penalty or other mistreatments, such as imprisonment, isolation or flagrant denial of justice. In recent years many countries increasingly rely on the diplomatic assurances, especially in the case of foreigners' expulsion to allegedly unreliable countries on the basis of 'national security'[2]. However, an absolute prohibition of torture and ill-treatment exists in international law, which is a cornerstone of human rights protection even in a situation of fear generated by acts of the terrorism. Therefore, the issue of diplomatic assurances to facilitate and legitimise the expulsion of foreigners to states with doubtful human rights records is controversial in public international law.

The master thesis is examining whether the diplomatic assurances related to aliens' expulsion could be seen as an effective safeguard against torture and other ill – treatment and reveals the challenging status and functioning of difficult and delicate instrument of DA. The researcher indicates the cases in which the courts and international human rights bodies have ruled on the adequacy of such assurances. Accordingly, the thesis attempts to analyse and later reveal, whether the assurances obtained in the specific cases of expulsion are sufficient to remove any risk of ill-treatment and if so, are there certain requirements to be met in order to reach the desired effect of DA's under international law.

[1]Hammarberg, T (CoE Commissioner for Human Rights). Torture can never, ever be accepted [interactive]. 2001. Retrieved on 4 February 2015 at: http://www.coe.int/t/commissioner/Viewpoints/060626_en.asp.

[2] Especially in the cases of terrorism, the national security suspects are expelled to countries in which they face a real risk of torture and other ill-treatment. See Report of Human Right Watch. Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances. 2008, p.1. Retrieved on 4 February 2015 at: http://www.hrw.org/sites/default/files/reports/uk1008web.pdf.

The relevance and practical value of the topic

Increased use of Diplomatic Assurances, the implicit tolerance of these assurances by the human rights bodies and their inaction to outlaw them, makes this topic interesting and relevant for international law community. This issue remains to be controversial as well as the main question, whether the diplomatic assurances are still eroding the effect of an absolute and non – derogatory principle of *non refoulement*, is not yet answered. Increasingly, the use of diplomatic assurances in the context of removal procedures such as expulsion and deportation is resorted.[3]

Furthermore, not only one eminent independent human rights expert has expressed his concern regarding the reliance on diplomatic assurances: Council of Europe Commissioner for Human Rights Alvaro Gil-Robles expressed concern in July 2004.[4] Also, in the same year Theo van Boven, the former U.N. Special Rapporteur on torture, and other cruel, inhuman and degrading treatment or punishment (IDTP) expressed concern about diplomatic assurances.[5] Later, U.N. Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Robert K. Goldman has expressed his opinion on this topic.[6] With the same concerns in mind is also current U.N. Special Rapporteur on IDTP Mr. Juan Ernesto Mendez.[7]

Therefore, in the light of expressed concerns and diverge opinions upon DA's, it is relevant to analyse the normative quality of DA's and to clear out if possible the extent and conditions under which diplomatic assurances are understood as being able to serve protective functions against torture and other ill – treatment.

Authors who wrote on the topic

There are numerous Human Rights organizations and observers who have tried to identify a variety of problems related to diplomatic assurances.[8] There is available literature which comes

[3] Expulsion and deportation are unilateral acts of the sending State and unlike extradition and does not require the formal acts of two States.

[4] Commissioner from Human Rights. Report by Mr. Alvaro Gil-Robles on his visit to Sweden. Strasbourg. 8 July 2004. CommDH (2004)13. Retrieved on 8 July 2004 at: https://wcd.coe.int/ViewDoc.jsp?id=758789&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[5] Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture", April 2005 Vol. 17, No. 3 (D), 2005. P.75. Retrieved on 21 May 2015 at: http://www.hrw.org/sites/default/files/reports/eca0405.pdf.

[6] Commission for Human Rights. Note by the United Nations High Commissioner for Human Rights on the Protection of human rights and fundamental freedoms while countering terrorism. 61st Session. 7 February 2005. E/CN.4/2005/103. Retrieved on 18 June 2014 at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=fasch_rpt.

[7] Human Rights Council. Office of the High Commissioner for Human Rights. Special Procedures Bulletin. 18th Issue: July – September 2010. P. 19. Retrieved on 15 May 2015 at: http://www.ohchr.org/Documents/HRBodies/SP/Bulletin18.pdf.

[8] Giuffre, M. An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom. International Human Rights Law Review 2 (2013), 266–293, 2012. Retrieved on 15 May 2015 at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406183.

from human rights watchdogs: Human Right Watch, UN Refugee Agency (UNCHR).[9] Besides the experts, some scholars have also written on the relevant topic: Cornelis (Kees) Wouters[10], Christopher Michaelsen[11], Elspeth Guild[12], Colin Harvey[13], Nigel Rodley and Matt Pollard[14], Julia Hall[15], Nisa Larsaeus[16], Constanze Alexia Schimmel[17], Jeffrey G. Johnson[18] and others.

However, the detailed and delicate analyses of the practice following the case-law and focusing on legal DA's status in cases of expulsion stated by different instances was never given in one paper. Moreover, never examined by Lithuanian researcher.

The purpose

The purpose of the thesis is to examine the use of diplomatic assurances and define its possible outcome for human rights, with a particular focus on expulsion of foreigners.

The object

The object of the thesis - the legal problems related to diplomatic assurances.

---

[9] Human Rights Watch. Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances. 2008. Retrieved on 21 December 2014 at: http://www.hrw.org/sites/default/files/reports/uk1008web.pdf; also see UN High Commissioner for Refugees (UNHCR). UNHCR Note on Diplomatic Assurances and International Refugee Protection. 2006. Retrieved 21 December 2014 at: http://www.refworld.org/pdfid/44dc81164.pdf.

[10] Wouters, C. Reconciling National Security and Non-Refoulement: Exceptions, Exclusion, and Diplomatic Assurances. Oxford: Counter-Terrorism International Law and Practice, 2012. P. 579-595.

[11] Mischaelsen, C. The Cross-border Transfer of Dangerous Persons, the Risk of Torture and Diplomatic Assurances. Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives. London and New York: Routledge. 2012. P. 211 – 230.

[12] Guild, E. Asymmetrical sovereignty and the refugee: Diplomatic assurances and the failure of due process: Agiza v Sweden and Alzery v Sweden' in J Simeon book. Critical Issues in International Refugee Law: Strategies towards Interpretative Harmony CUP. Cambridge. 2010. P. 119 – 142.

[13] Harvey, C. Is humanity enough: Refugees, asylum seekers and the rights regime. Contemporary Issues in Refugee Law, 2013. P. 68-88.

[14] Rodley, N. & Pollard, M. The Treatment of Prisoners under International Law. Oxford Press. 2009. P. 166-179.

[15] Human Rights Watch. Empty Promises: Diplomatic Assurances No Safeguard Against Torture. Vol.16 No.4 (D). April 2004. Retrieved on 15 May 2015 at: http://www.refworld.org/docid/415c039b4.html.

[16] Larsaeus, N. The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment. Queen Elizabeth House, Department of International Development, University of Oxford. 2006. Retrieved on 15 May 2015 at: http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp32-diplomatic-assurances-prevention-prohibited-treatment-2006.

[17] Schimmel, C., A. Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment? [Interactive]. 2007. Retrieved on 15 May 2015 at: https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/returningterroristsuspects.pdf.

[18] Johnson, J., G. The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11. International Criminal Law Review 11. 2011. P.1- 49. Retrieved on 15 May 2015 at: http://booksandjournals.brillonline.com/content/journals/10.1163/157181211x54391.

The aim of the research

To assess the legal status and functioning of Diplomatic Assurances and reveal solutions on their practice and possible status, in terms of these assurances being considered as influencing protection of human rights with a particular focus on expulsion of foreigners.

The tasks of the thesis are:

1. To analyse historical legal background and through the acceptance of an instrument in legal scene to find desired function and effect of it.
2. To define the challenges related with legal status of DA through the comparative analyses of laws of International and Regional legal systems.
3. To outline the main criteria, elements and procedural safeguards of Diplomatic Assurances that make Diplomatic Assurances adequate and reliable tool in expulsion context.
4. To demonstrate and determine the existing ambiguities and obstacles, going through regional and national case-law, focusing on expulsion cases.

Statements to be defended:

1. In expulsion cases Diplomatic assurances could only be accepted if they do enhance multilateral framework of human rights and never when diminish the system of protection.
2. Although the efforts towards the promotion of human rights and the eradication of torture and IDTP are on the ground, DA's could not be regarded as such as far they do not have clear criteria and standards for their use.
3. The present day use of DA's in expulsion cases threatens to erode the regional and international protection against *refoulement*.

Methodology

In the thesis the author uses linguistic method for formulation of definitions. Method of analysis is used for distinguishing certain features and elements of diplomatic assurances. Historical and comparative methods are used for comparing different opinions of legal authors as well as for determining differences among positions of States and their practice, also to compare the outcomes of jurisprudence of international and regional courts. The method of generalization was used for formulating conclusions. The empiric method was used for studying legal literature and case law. The thesis is based on international treaties, practice of States, case-law of

international and national courts and opinions of authors who analysed the topic as well as on criticism from NGO's and scholars.

Structure

Following the Introduction, the master thesis is divided into 3 sections. In the first Section the author describes the legal background of Diplomatic assurances, focusing on its legal implications. Further, the paper analyses the legal basis and consequently the status of Diplomatic Assurances. Since this is a paper of legal research in international law, the starting point is the legal analysis going through main relevant multilateral international law instruments. The main focus in this part is on the relevant sources and instruments where the legal basis are to be found for the DA's as such and their use in foreigner's expulsion. After that, the thesis elaborates on this point and going through the case-by-case examples defines the elements and criteria of diplomatic assurances. At the same time reveals the approaches of the Courts towards Diplomatic Assurances as such. Lastly, in the Section 3, the author discusses the legal consequences for principle of *non-refoulement* and the legal status of diplomatic assurances looking from various legal perspectives for future.

1. THE LEGAL CHALLENGES OF DIPLOMATIC ASSURANCES

As an initial matter for the master thesis to provide results oriented solutions, it is reasonable to clarify what does exactly mean to receive diplomatic assurances. This first Chapter is oriented to reveal a challenging character of DA's and provide a comprehensive examination of difficulties that are related with acceptance of diplomatic assurances as having legal value in international law. Therefore, firstly this Chapter will focus on historical emergence of assurances and legal approaches towards their acceptance. Secondly, to clarify issue even more, further sections will provide an analysis of challenges regarding legal status from different point of views, such as from the perspective of international, regional, human rights laws, with a particular focus on their acceptance under the laws, related with expulsion of foreigners.

1.1. Historical legal analyses of the birth of Diplomatic Assurances

Diplomatic Assurances have been initially introduced by European countries seeking to protect human rights, especially – the most fundamental right – the right to life. Everything started when Governments of the countries, where the death penalty was already outlawed, have been asking for guarantees against harshest punishment from states like US, before extraditing suspects. The second step taken was towards the prevention of torture. However, in this phase everything got confused. The employment of DA's, as a systematic tool in the case of prisoner transfer, in some cases began to justify the transfer of individuals to countries that have track records of implementing torture and other ill-treatment.

The term 'Diplomatic Assurances' is not as simple as it seems. Thus, now the researcher will go through historical legal challenges in order to find how Diplomatic Assurances did appear on the international legal scene. One of the most explicit definition given as far is provided by the United Nations Refugee Agency (UNHCR) only in 2006. It was defined as the concept referred to a practice of governments of the states which want to send an individual back to his country of origin imposing certain conditions on the governments of the receiving states in order to receive promises that secure treatment in accordance with the sending's states human rights obligations under international and regional laws[19]. Although, the term's definitions varies between countries and there are three main types of DA's: diplomatic notes, exchange of letters and Memoranda of

[19] UN High Commissioner for Refugees, *supra* note 9, para 1.
"[...] 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".

Understandings (MoUs), important is not that. The practice of DA's, which is rather old custom and not a new method, is important. On one hand – the use of assurances concerning the extradition practices lasts already over a century: usually were used to obtain the guarantees that individual would not face the death penalty or an unfair trial[20]. On the other hand, practice of seeking assurances against torture and other mistreatment in regards of other removal, such as expulsion has different history[21]. Basically, on this less developed history regarding expulsion the researcher is focused.[22] The well-known practises of seeking assurances in regards of expulsion and removals was known for drafters of 1951 Refugee Convention, 1984 United Nations Convention Against torture, but as far it is still not possible to find explicit reference to DA's use in these documents.

Even without precise and explicit legal documents, European countries have been employing DA's chiefly in extradition, expulsion and deportation cases. Nowadays, reliance on diplomatic assurances increasingly grow in the context of removal, such as expulsion. Specifically in the context of the fight with terrorism. After 9/11 attacks DA' started being used as safeguards in the cases against torture and other ill – treatment. However, it has to be emphasized that States do not have obligation to report about employing assurances and their use is rather unknown than precise and clear.

As an initial matter, there has been many concerns about legal nature of DA's. Many disagreements over the legal value of it occurred between States, experts and academia. In 2004 Human Rights Watch expressed their view stating that DA's can only be called as "a set of 'understandings' agreed between two governments. They have no legal effect and the person who they aim to protect has no recourse if the assurances are breached…"[23]Additionally, Thomas Hammarberg in 2006 reaffirmed this view by emphasizing that "the principle of *non-refoulement* should not be undermined by convenient, non-binding promises of such kinds".[24] Notwithstanding the fact, that some authorities were opposite to reliance upon DA's, there were the others, who

[20] Worster, W., T. Between a treaty and not: A case study of the legal value of Diplomatic Assurances. Minnesota Journal of International Law, Vol. 21, No. 2, 2012. 2011, p. 3. Retrieved on 4 January 2015 at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1940444.

[21] Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 1946 January 3, para 14. Retrieved on 4th February 2015 at: http://www.phdn.org/archives/www.ess.uwe.ac.uk/genocide/Wisliceny.htm.

[22]Expulsion and deportation, not like extradition, are unilateral procedures of the sending State. They have to have a legal basis in domestic law that do not confront international standards, thus giving an opportunity for individuals to challenge such procedures and their legality. See also UNHCR supra note 9, p.2.

[23] Human Rights Watch, *supra* note 5, p. 21.

[24] Europe and Central Asia Division, Executive Director Holly Cartner. Reply Letter to the Swiss Government Regarding the Swiss Government's Use of Diplomatic Assurances Against Torture for Extraditions to Turkey. 28 June 2007. Retrieved on 9 March 2015 at: http://www.hrw.org/legacy/backgrounder/eca/switzerland0607/#_edn8.

thought that DA's could be regarded as binding documents.[25] Also, it was very clear from *Mohamed Alzery v. Sweden* [26] case about Swiss opinion on DA's, expressed in 2005, where assurances were regarded as 'irrevocable' instrument which will be respected in its full content according to Swedish authorities.[27] Furthermore, in 2006, the Council of Europe called for guidelines setting minimum standards for the use of DA's to protect against torture, but proposal was opposed by human right organizations.[28] Council of Europe considered and rejected a proposal to draft a common instrument on DA's in expulsion procedures. This process has highlighted the inconsistency among States between the positions with this regard. Thus, the very old consideration amongst scholars and human rights activists is, whether the assurances could be considered as a promise – mutual understanding agreement with legal certainty, being legally binding or mere piece of paper without legal effects whatsoever? With this diverge positions in mind, the author next turns to legal basis for DA's by going through different legal contexts on the globe.

1.2. Legal basis for Diplomatic Assurances in International law

First of all, to delve more deeply into legal environment of DA's, it has to be kept in mind that neither international nor European law refers to the use of DA's in an explicit manner. As it was expressed by The Committee on International Human Rights of the association of the bar of the city of New York regulation regarding the DA's - it remains 'grey area of international law' – neither envisaged, nor prohibited by the international treaties.[29] Thus, in order to be able to examine the practise of DA's it is important to understand the challenging nature of DA's according to international law standards. To begin with, it is logical to start with Vienna Convention on the Law of the Treaties (VCLT).[30] The VCLT give some main terms for the

---

[25] UNHCR, *supra* note 9, para 21: *"This will depend, inter alia, on whether the undertaking provided is binding on those State organs which are responsible for implementing certain measures or providing protection, and whether the authorities of the receiving State are in a position to ensure compliance with the assurances given"*.

[26] Human Rights Committee. Decision on *Mohamed Alzery v. Sweden*. Eighty-eighth session. Communication No.1416/2005. CCPR/C/88/D/1416/2005. [2006]

[27] Human Rights Committee. Comments by the Government of Sweden on the concluding observations of the Human Rights Committee, U.N. Doc. CCPR/CO/74/SWE, 14 May 2003. P.3: "*It is the opinion of the Swedish Government that the assurances obtained from the receiving State are satisfactory and irrevocable and that they are and will be respected in their full content*". Retrieved on 9 March 2015 at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G03/417/70/PDF/G0341770.pdf?OpenElement.

[28] Particularly by the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), created in November 2001 by the Council of Europe's Steering Committee for Human Rights (CDDH).

[29] Committee of International Human Rights of the Association of the Bar of the City of New York & Centre for Human Rights and Global Justice. Torture by proxy: International and Domestic law applicable to "Extraordinary Renditions". New York: ABCNY & NYU School of Law. 2004. P. 85. Retrieved on 15 May 2015 at: http://chrgj.org/wp-content/uploads/2012/07/TortureByProxy.pdf.

[30] International Vienna Convention on the Law of Treaties, Vienna (concluded on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331 (VCLT), Art. 2(1) (a). Retrieved on 15 May 2015 at: https://treaties.un.org/doc/Treaties/1980/01/19800127%2000 52%20AM/Ch_XXIII_01p.pdf.

definition of a treaty, which has been recognised as a definition under customary international law according to ICJ.[31] Additionally, this definition applies to Diplomatic Assurances issue. To understand, whether diplomatic assurances can be qualified as a treaty, it has to be recalled, that the decisive element of the agreement is the intention of the parties to consider the agreement as legally binding document. It is known, that international law is supposed to proceed from the free will of States. This key factor was reaffirmed many times by International Court of Justice (ICJ).[32] However, is it enough to identify the intentions of the promises given by the parties to consider DA's as legally binding agreements? From the time of the Romans until now it is important to look not only to intention of the parties, but to reveal, whether the parties agreed to the same thing: *"<…> making of contracts depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing, but on their having said the same thing…"*[33]. Thus, to have a legally binding agreement in the issue of Diplomatic assurances, the precise assessment of this instrument has to be made. For the assurances to be seen as an obligation that, consequently, could be enforceable through the legal system, they must be individualized for particular individual or provide specific promises regarding procedures and potential sentences, by using mandatory language "will comply", "will be entitled to...", "will be allowed to..".[34] Therefore, only with the clear intention of the parties which is substantiated with the individualized wording in each particular case which leads to the idea on what exactly parties have agreed, DA's create a legally binding obligation. With such a statement, the Diplomatic Assurances could be seen as parties' obligations under international law. The ECtHR usually requires from the expelling State the additional commitments to be expressed in the assurances agreement to be able to render them valid and rely on them.[35] In general, DA's could be seen as an agreement in the sense of Vienna Convention if promises made are not mere restatement of general international law, but rather specific agreements with additional clearly expressed commitments and future treatment.[36]

---

[32] *New Zealand v. France*, 1974, December 20, General list Number 59, *"When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding",* para 46.

[33] Holmes, O., W. The Path of the Law. 10 Harvard Law Review. 1897, p. 457.

[34] Worster, W., T. *supra* note 20, p. 20.

[35] *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008. Retrieved on 15 May 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276.

[36] *Mahmoad Abdah v. George Bush. The United States* district Court for the District of Columbia. Declaration of Pierre – Richard prosper. Civil Action No. 04-1254 (HHK). 2005. P.6., para 8. Retrieved on 15 May 2015 at: http://www.state.gov/documents/organization/55821.pdf.

Furthermore, what is even more important and crucial to point out in this case – under international law there exists an obligation not to *refoule* or otherwise known as 'principle of *non-refoulement*'. [37] This particular principle implies prohibition for states to send refugees or detainees fleeing from persecution back to countries where they might face the risk of 'torture or crucial, inhuman or degrading treatment or punishment (IDTP). The ban against torture is most probably one of the best established peremptory norms of international human rights law, this means that States are obliged to guarantee for the aliens the protection from *refoulement*.[38] Under international law, States have positive and negative obligations to ensure such a protection which supposed to be effective. In regards of DA's, the negative obligations are at stake. These include: not to expel, deport, return, extradite in any direct or indirect ways the person to a country where he could be at a risk of being subjected to a serious harm.[39] It is beyond the discussion that DA's cannot be used to circumvent state's obligations under International Law. Thus, keeping in mind, that according to the Vienna Convention on the Law of Treaties (VCLT) and the International Court of Justice (ICJ), as noted above, with the intention of the parties to create legally binding rights and obligations, DA's are not only simply pieces of paper with political promises, but legally binding undertakings. [40] Accordingly, it would hardly be compatible with the obligations of the States under international laws, if DA's would breach such an existing legal obligations. Since the

[37] UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997. Retrieved on 12th January 2015 at: http://www.refworld.org/docid/438c6d972.html ; Geneva Convention Relating to the Status of Refugees 1951(Refugee Convention), Geneva, (adopted on 14 December 1950, entered into force 22 April 1954), 189 UNTS 150. Article 33 relating to the principle of 'non-refoulement': *"Article 33 prohibits states to 'expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his (or her) life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".* Retrieved on 15 May 2015 at: http://www.unhcr.org/3b66c2aa10.html; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York (concluded on 10 December 1984, entered into force on 26 June 1987), 1465 UNTS 85 (CAT Convention). Article 3: *"1.No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".* Retrieved on 15 May 2015 at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx. ;

[38]CAT Convention, *supra* note 36, Article 2(2): *"[…] no exceptional circumstances whatsoever may be invoked as a justification for torture*"; International Covenant on Civil and Political Rights, New York (concluded on 16 December 1966, entered into force on 23 March 1976), 999 UNTS 171 (ICCPR). Article 7 that contains a non-derogable ban on torture. Retrieved on 15 May 2015 at: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1951, entered into force on 3 September 1953), ETS 5; 213 UNTS 221 (ECHR). Article 3. Retrieved on 15 may 2015 at: http://www.refworld.org/docid/3ae6b3b04.html.

[39]Wouters, C. International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement, Intersentia, Mortsel, 2009, Chapter 6, p. 564 & 565. Retrieved on 15 May 2015 at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/13756/000-wouters-B-25-02-2009.pdf?sequence=2.

[40] Oppenheim, L & Lauterpacht, H. International Law: A Treatise. Vol. I –Peace. Second Edition. London.1995. P. 900. Retrieved on 15 May 2015 at: http://www.gutenberg.org/ebooks/41047.

prohibition of torture is an *erga omnes* obligation[41], any assurances that provide a lower level of protection than the multilateral treaty, would be considered as being unlawful.[42]

Some countries do agree, that this statement was not only a double – talk and that in such a case where DA's will assure lower protection than the international norms, they will actually be considered as void and will not be employed for the transfers to be justified. In December 2005, it was emphasized by the Joint Committee on Human Rights of the United Kingdom Parliament: "*On our reading of the case-law of both the European Court of Human Rights and the UN Committee against Torture, states are entitled to seek assurances against torture from other states [...] and such assurances are capable, in principle, of satisfying the State's obligation not to return an individual to a serious risk of torture"*[43]. However, not all the countries are alike the United Kingdom. The Netherlands has been the only European country that has stated that DA's will not be used. Austria has not used DA's, although the government seems to have made attempts to use them on two occasions (when attempting to extradite Abd al-Rahman Bilasi-Ashri to Egypt).[44] Sweden's rhetoric largely centres on allowing DA's only for a narrow margin of use. However, the *Agiza/Alzery cases* have damaged Sweden's reputation on this issue. Amnesty International argues that, as of yet, not enough restrictions have been implemented to ensure that similar mistakes do not happen again. Germany until recently did not have a uniform policy on DA's; the usage was decided on a case-by-case basis. However, the 2009 Residence Act stipulated guidelines for their use, which has subsequently drawn criticism from NGOs. Italy has in the past deported individuals deemed by the government to be a threat to national security without due process and has used DA's in the past.[45] To sum up, the European Court of Human Rights is heavily involved in cases of DAs, however, other EU bodies have generally remained in the periphery.[46]

The difficulty of DA's may be seen also in the principle of effectiveness of DA's because of non-existence of the enforcement mechanism under international law. Let us bring back to the Vienna Convention – it requires only that the agreement should be 'governed by international law',

---

[41] The prohibition of torture is part of what the ICJ termed the 'principles and rules concerning the basic rights of the human person' *cited from*: Barcelona Traction (Belgium v. Spain), Judgment, I.C.J. Reports. 1970, para 34. Retrieved on 15 May 2015 at: http://www.icj-cij.org/docket/files/50/5387.pdf.

[42] On this argument, see also Akhavi, A.S. Methods of Resolving Conflicts between Treaties. Nijhoff. 2003, p. 83.

[43] Joint Committee on Human Rights. House of Lords, House of Commons. Counter-Terrorism, Policy and Human Rights: Terrorism Bill and related matters. Session 2005 – 06. Third Report. 2005, para 143. Retrieved on 15 May 2015 at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf.

[44] The ECHR got involved in blocking his extradition. ECHR case of *Bilasi-Ashri v.Austria*, Application No. 3314/02, 26 November 2002.

[45] International Centre for Counter –Terrorism -The Hague. Use of Diplomatic Assurances in terrorism – related Cases: In search of a balance between Security concerns and Human Rights obligations. [Interactive]. 2011, p.4. Retrieved on 12th January 2015 at: http://www.icct.nl/download/file/ICCT-van-Ginkel-EM-Paper-Diplomatic-Assurances.pdf.

[46] *Ibid*., p.11.

but there is no word about requirement for the agreement to be enforced by international legal mechanisms. As noted above, following mentioned obligations, such as the effective protection against torture and prohibition of *refoulement* – the Committee Against Torture (CAT Committee) has expressed great concerns regarding the right to appeal for the individuals that are transferred, removed or expelled from the sending State. At the moment under international law it does seem that there is no any mechanism for the individual to seek the return, in violation of DA's, if consequently tortured. Accordingly, the UN High Commissioner for Human Rights together with UN Special Rapporteur on Torture in 2006 expressed their opinion by saying that DA's contain no mechanism for their enforcement and thus are not – binding.[47] The Articles of State Responsibility for Internationally Wrongful Acts (ILC Articles) establish only the 'basic rules of international law concerning the responsibility of States for their internationally wrongful acts'.[48] Thus, in regards of DA's, there are some suspects that decisions to apply them are not always regulated by a genuine belief in their effectiveness. And this argument is strongly supported because of the lack of internationally established enforcement mechanisms or remedies, this fact may give rise for the doubts, whether intentions of the States to form binding agreements were real. In all, the big question - how to construct an assurances which could ensure that 'none of the involved states violates their obligations and that the returnee's rights are properly respected'[49] – is seemed to be yet not solved by international law.

1.3. Legal basis for Diplomatic Assurances in Regional Law of Europe

Specifically focusing on the challenges faced in regards of legal basis that could be found in European context – there exist two relevant documents applicable to the issue of DA's: European Convention on Human Rights (ECHR) and the European Union's Council Framework Decision on European arrest warrant, where explicitly stated "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to

[47] UN High Commissioner for Human Rights, Chatham House. The Speech by Louise Arbour. [Interactive].15 February 2006, p.17. Retrieved on 12th March 2015 at: https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilparbour.pdf & Commission on Human Rights, Report of the Special Rapporteur on the question of torture, Manfred Nowak, 62nd Session, 23 December 2005, E/CN.4/2006/6, P.2. Retrieved on 12th March 2015 at: http://www.refworld.org/docid/441181ed6.html.

[48] United Nations. Materials on the Responsibility of Sates for Internationally Wrongful Acts. 2012, ST/LEG/SER B/25 , P.1, also see The ILC Articles were adopted by the International Law Commission on August 9, 2001, commended to governments by a resolution of the General Assembly on December 12, 2001, and are reproduced in full, together with the International Law Commission's Commentaries in Crawford, J. The International law Commission's articles on State Responsibility: Introduction, text and Commentaries. Cambridge University Press. 2002 (ILC Articles and Commentaries).

[49] Hasselberg, O. Diplomatic Assurances: A judicial and political analyses of the undermining of the principle of non – refoulement. [Interactive]. 2009, p.35. Retrieved on 15 May 2015 at: https://gupea.ub.gu.se/bitstream/2077/22053/1/gupea_2077_22053_1.pdf .

the death penalty, torture or other inhuman or degrading treatment or punishment". [50] The ECHR dos not contain article about *non- refoulement*, but Art 3 of the ECHR codifies the absolute prohibition of torture or IDTP and has been already interpreted by the ECtHR to prohibit *refoulement* to such treatment. European court of Human Rights in *Chahal v. United Kingdom* concluded that *non-refoulement* is an integral part of article 3 by adding that this prohibition is absolute.[51] Court made it clear, that prohibition against torture is based on: "one of the most fundamental values of democratic society" and could not be violated even in the context of terrorism or national security.[52] From the beginning there have been some attempts to circumvent an absolute nature of *non-refoulement,* which has been made by the European Commission, stating that there might be reasons to believe, that balancing act regarding the security of citizens and individual's rights is in a need. [53] Furthermore, in 2008 in *Ramzy case* notwithstanding the absolute character of the Art 3 of the Convention it was tried by the Contracting States to undermine the absolute character of *non - refoulement* principle. Case concerned removal of man to Algeria, who was allegedly suspected of involvement to terrorism in an Islamic extremist group in Netherlands. Contracting Parties that were threatened and that had right for observations presented arguments in favour to protect national security and to undermine absolute principle, Lithuania was also one of these states.[54]

On the other hand, some scholars believe, by looking at the fact that diplomatic assurances are still on the ground, that States found other way to circumvent this principle. In regards of DA's – even when they are not explicitly mentioned in ECHR, they are said to be implicated in Art 3 because States seeking to transfer individuals to another country have used assurances as means to demonstrate their compliance with their *non-refoulement* obligation.[55] At this point, the practise of DA's is supposed to be seen as reassurance to the removing State, that the individual will not be subjected to torture, or other serious harm. In such a way by re-ascertaining that it is safe to

[50] Council, Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (adopted on13 June 2002, entered into force 7 August 2002), Official Journal No. OJ L 190, 18-7-2002, para 13. Retrieved on 12 January 2015 at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from=EN.

[51] *Chahal v. The United Kingdom*, no. 22414/93, ECHR. Retrieved on 15 May 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004.

[52] *Ibid*., para 79.

[53] European Commission, Working Document on The relationship between safeguarding internal security and complying with international protection obligations and instruments, Brussels, 2001, COM/2001/0743 final. Retrieved on 15 May 2015 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0743.

[54] *Ramzy v. the Netherlands*, no. 25424/05, ECHR 2010. Retrieved on 15 May 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100032 ; also see Steering Committee for Human Rights (CDDH) and Group of Specialist on Human Rights and the fight against Terrorism (DH-S-TER), 1st Meeting Report, Strasbourg, 16 December, 2005, No. DH-S-TER (2005)018. Retrieved on 15 May 2015 at: http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2005_018_en.pdf.

[55]Izumo, A. Diplomatic Assurances against torture and ill-treatment: European Court of Human Right Jurisprudence. Columbia University School of Law. Columbia Human Rights Law Review. 2011, p. 256. Retrieved on 16th January 2015 at: http://www3.law.columbia.edu/hrlr/hrlr_journal/42.1/Izumo.pdf.

expel/remove the individual concerned – States would use Diplomatic Assurances without breaching its obligations. However, the compliance is hard to establish, because States face an absence of an accepted set of minimum standards in European legal context while determining legal criteria of DA's. As it happened to Sweden in the cases of *Agiza and Alzery*[56], where Egypt assured that two man's human rights would be respected, but unfortunately story turned out to different angle. The controversy that occurred after *Agiza and Alzery* called for a quite quick reaction of Council of Europe institutions. At that time The Council of Europe has been already adopted the Guidelines on HR against Terrorism in 2002[57], later, starting from 2004 other guidance on the practise of seeking and relying on DA's was produced by some core institutions of Council of Europe and European Union. First, The Parliamentary Assembly of the Council of Europe (PACE) – has offered some guidance in Resolution 1433, related with terrorism in Guantanamo.[58] Later, the Commissioner for Human Rights in his several reports has recalled the issue and outlined the minimum requirements that have to be met when employing DA's regarding judicial review, monitoring, protection from state and non- state parties, the receiving country's human rights records.[59]

Furthermore, from the point of view of European Union, Sweden case evoke some concerns too. The Resolution concerning the violation of fundamental European and international rights since 11 September 2001 was the outcome of that.[60] In this Resolution European Parliament reiterated the call of the Council in 2006 in its Resolution, by inducing to adopt a common position regarding DA's. The Resolution Preamble states: "*the obligation to protect against, investigate, and sanction torture is an obligation owed by all states*", accordingly: "*the use of diplomatic assurances is incompatible with this obligation*".[61] However, the story repeated itself and disagreement between Parliamentary members again has hindered the progress of an attempt to adopt a common instrument on diplomatic assurances. [62]

---

[56] *Mohamed Alzery v. Sweden*, *supra* note 26.

[57] Committee of Ministers of the Council of Europe, Guidelines on human rights and the fight against terrorism, 804th Meeting, Strasbourg, 11 July 2002, No. H (2002) 4. Retrieved on 13th March 2015 at: http://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf .

[58] Parliamentary Assembly, Resolution 1433 on Lawfulness of detentions by the United States in Guantánamo Bay, 10th Sitting, 26 April 2005. Retrieved on 13th March 2015 at < http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm#_ftn.

[59]Commissioner for Human Rights, supra note 4, para 19. Also see Izumo, A., *supra* note 54, p. 245.

[60] European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, Strasbourg, 14 February 2007, (2006/2200(INI), para 21. Retrieved on 13th March at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-32.

[61] *Ibid.* Para G.

[62] Press Release, European Parliament. Report. CIA activities in Europe: European Parliament adopts final report deploring passivity from some Member States. [Interactive]. 2007. This report deplores the passivity of some Member States in the face of illegal CIA operations, as well as the lack of co-operation from the EU Council of Ministers, was approved with 382 votes in favour, 256 against with 74 abstentions. Retrieved on 13th March at:

About at the same time, in 2005, the group of Specialists on Human Rights and Fight against Terrorism (DH-S-TER) established the Council of Europe's Committee for Human Rights (CDDH).

After the effects of the assurances in *Agiza and Alzery* case, Sweden was one of the states initiating an inquiry to the Council of Europe Steering Committee for Human Rights, in order to establish common guidelines for the use of diplomatic assurances.[63] It would be important to have such standards for many reasons: most importantly, persons to be removed on assurances could claim the protection, in assessing, whether the assurances are capable of ensuring the protection; States could be guided by standards while using the DA's; reviewing bodies could apply them. However, to date, the proposals for the creation of such standards have been unsuccessful. In 2006, the Council of Europe called for guidelines setting minimum standards for the use of DA's to protect against torture, but proposal was opposed by human right organizations.[64] Council of Europe considered and rejected a proposal to draft a common instrument on DA's in expulsion procedures. This process has again highlighted the inconsistency among States with this regard. Accordingly, Members gave various reasons to support rejection: too little national practice exist on which to draw; no common position between States on the use of DA's itself, such an instrument could be seen as weakening an absolute prohibition of torture or Council of Europe's legitimization of DA's; etc.[65] Thus, the rejection of a common instrument has demonstrated that the positions of national governments regarding DA's diverge at a fundamental level.

To sum up, it remains clear, that even knowing the fact that the experience in examining DA's already shown great concerns, these concerns remains sharply divided between the representatives of European States.

1.4. Diplomatic Assurances in the context of foreigners expulsion

To understand the essence of the topic it is necessary to reveal the meaning of an expulsion itself. We have to start from the term 'foreigner', which is going to be used as an adequate term to 'alien', that is commonly used in international sources. An 'alien' indicates "individual who does not have the nationality of the State in whose territory that individual is

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM PRESS+20070209IPR02947+0+DOC+XML+V0//EN

[63] Hasselberg, O., *supra* note 49, p.36.

[64] The Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), created in November 2001 by the Council of Europe's Steering Committee for Human Rights (CDDH).

[65] Steering Committee for Human Rights (CDDH) and Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), 2nd Meeting Report, Strasbourg, 3 April 2006, No. DH-S-TER (2006)005. Retrieved on 15 May 2015 at: http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf.

present".[66] Thus, accordingly, the definition of 'expulsion' is defined as "a formal act or conduct of an action or omission attributable to State, by which the foreigner is compelled to leave the territory of a State".[67] At the same time it is worth to mention that expulsion differs from and does not include such forms as: "extradition to another state, surrender to an international criminal court, or even the non – admission of an alien, other than a refugee to a State".[68] However, even though such a right to expel does exist, it is important to highlight the idea that under international law, even in times of war, this right is not unlimited.[69] Principally, the foreigner is entitled to treatment that is no less favourable than it is required by international law, by minimum standards. The expulsion of foreigners, in times of peace in International law basically refers to international human rights law.[70] All relevant its instruments set minimum standards for the treatment of foreigners while expulsion procedure and for lawful expulsion itself. In regards of Refugee Convention, it contains the provision of *non – refoulement* and minimum due process guarantees for foreigners who face persecution. [71] Accordingly, the ICCPR and Stateless Persons Convention set quite the same guarantees for aliens as can be found in Refugee Convention. As regards ECHR, it does not express the provision on expulsion, but ECtHR has already interpreted it through the prohibition against torture and inhumane treatment that is enshrined in article 3 of the Convention.[72] However, indeed, it has to be admitted that unifying guidelines on proper use of the right to expel were not on the ground, until the International Law Commission (ILC) has begun

[66] International Law Commission, Report on Draft articles on the expulsion of aliens, New York, 66th session, 2014, NO. A/69/10, Art. 2(b). (Report on Draft articles 2014). Retrieved on 15 May 2015 at: http://legal.un.org/ilc/sessions/66/2014Report%28A_69_10%29-advance.pdf.

[67]Report on Draft articles2014, *supra* note 65, Art. 2(a).

[68] Sean D. Murphy. Current Developments: The Expulsion of Aliens and other topics: The sixty – fourth session of the International Law Commission. American Journal of International Law (2013). 2013, P. 165. Retrieved on 15 May 2015 at: http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1910&context=faculty_publications

[69]International Law Commission, Memorandum by the Secretariat on Expulsion of aliens, Geneva, 58th session, 10 July 2006, No. A/CN.4/565, P. 84, para 105. Retrieved on 15 May 2015 at: http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf .

[70] ICCPR, *supra* note 38, Art. 12 & Art. 13; Refugee Convention, *supra* note 36; Convention Relating to the Status of Stateless Persons (Stateless Person Convention), New York (concluded on 28 September 1954, entered into force 6 June 1960), 360 UNTS 117. Retrieved on 15 May 2015 at: http://www.ohchr.org/Documents/ProfessionalInterest/stateless.pdf; CAT Convention, *supra* note 36; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Rights Convention), New York (concluded on 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3. Retrieved on 15 May 2015 at: http://www2.ohchr.org/english/bodies/cmw/cmw.htm; American Convention on Human Rights (ACHR), San Jose (concluded on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123. Retrieved on 15 May 2015 at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf; ECHR, *supra* note 38.

[71] Refugee Convention, *supra* note 36, Art. 33(1): *"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.*".

[72]Hailbronner, K. EU Immigration and Asylum Law: Commentary on EU Regulations and Directives, Hart Publishing. Germany. 2010. P. 15-17. Retrieved on 15 May 2015 at: http://www.beck-shop.de/fachbuch/inhaltsverzeichnis/INH_HailbronnerEUImmigrationan_978-3-406-60017-3_1A_Inhaltsverzeichnis.pdf.

the process of drafting them.[73] The drafts clarifies a few general rules relating to the right of expulsion, the requirements for conformity with the law and the grounds for expulsion. Some specific categories such as aliens enjoying specific protection under international law: refugees, stateless persons and migrant workers are also not excluded from these rules governing the expulsion process. Delving more deep into expulsion procedures, one of the conditions to expel is the adoption of an expulsion decision and it is necessary that the decision would be in 'accordance with law'. This requirement was recently confirmed by ICJ in 2010, by stating that requirement for conformity with the law shows the lawfulness of an expulsion in question[74]. Further, the duty of expelling state to indicate the grounds for an expulsion is already well established in international law.[75] Furthermore, there is a great importance on the assessment of the grounds that have to be confirmed in order to have a right to expel. The main purpose of it is clearly a need to remind for the States that there exists prohibition against expelling the foreigner on aground that could be contrary to the expelling State's obligations under international law.[76] It is of a big importance because there are cases in which expulsion is not possible and not allowed to be commenced. It could be situations that are related with refugees. They do obtain higher protection in all terms that are recognised by the rules of international law relating to refugees. The very alike rules that are also more favourable, comparing with those that are for ordinary foreigners, are placed for stateless persons.[77]

Very much related article with our topic from Draft articles is the article 13, paragraph 2, which is saying that the expelling State is required in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it, concerning the protection of human rights, both – by virtue of international conventions to which it is a party and by virtue of general international law.[78] Specifically to diplomatic assurances in expulsion cases refers Article 23, which states the clear prohibition not to expel an alien to a State where his or her life would be threatened, unless an assurance would be obtained. Notwithstanding a fact of assurances acceptance we still further in Draft Articles see the bunch of procedural rights accorded to foreigners subject to expulsion. These are: right to receive notice of the expulsion, challenge the decision of it, the right of access

[73]International Law Commission, Sixth Report on Expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur, Geneva, 19 March 2010, No. A/cn.4/625. Retrieved on 15 May 2015 at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/281/25/PDF/N1028125.pdf?OpenElement; also see: International Law Commission, supra note 68; Report on Draft articles 2014, *supra* note 65.

[74] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports. 2010, P. 639, according p. 663, para. 65 - Referring to the procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the Court concluded that the expulsion of Mr. Diallo had not been decided "in accordance with law".

[75] Report on Draft articles 2014, supra note 65, p. 25, para 2.

[76] *Ibid*., p. 27;

[77] *Ibid*., p. 29;

[78] *Ibid*., p. 38;

to effective remedies to challenge it, etc. The formulation of the provision regarding suspensive effect of an appeal against an expulsion is of particular importance in the researchers view. It shows that the unlawfulness of an expulsion act should be revealed and tested yet before forced removal of foreigner. Parliamentary Assembly of the Council of Europe has confirmed this approach in its Recommendation.[79]

Many considerations relating to diplomatic assurances has occurred in expulsion cases. As mentioned above, currently expulsion of foreigners suspected of terrorist attacks has increased in number since the attack on the World Trade Centre in New York on 11 September 2001. Concerns from Security Council shows that it has been recalled audibly already several times that: *"States […] must ensure that any measures taken to combat terrorism comply with all their obligations under international law […]"*[80]. Thus, even using it's right to expel the suspect to another State on the basis of assurances as to that's foreigners treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion. [81] From these observations it is clearly seen that assurances as such are not out of legal life, however, the loud inducement for States is heard. The exhortation to seek for a system to monitor treatment of aliens, to be sure that they are treated with full respect of their human dignity and their fundamental human rights are not undermined, are now seen as tacit obligations, to put their assurances in accordance with law. The Special Rapporteur on torture, Manfred Nowak, expressed its anxiety over assurances in cases of removal to States where systematic practise of torture occurs. According to him, it is almost impossible for a country to be sure that DA's would comply with international obligations, thus it should be absolutely prohibited practice.[82] Also, unlike in article 23 of Draft Articles of the International Law Commission, in article 24, concerning torture and other inhumane or degrading treatment, we do not see reference to diplomatic assurances which allows to expel persons in such a situation by obtaining some guarantees from receiving state. However, at the same time it is nowhere explicitly said that such assurances are not allowed. According to United Nations High Commissioner for Human Rights, Robert K. Goldner, it is much harder to monitor assurances regarding treatment

[79]Parliamentary Assembly of the Council of Europe, Recommendation 1624 (2003) on Common policy on migration and asylum, 29th Sitting, 30 September 2003, para. 9. Retrieved on 15 May 2015 at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1624.htm#_ftn1.

[80]Security Council Resolution 1566 (2004) at its 5053rd Meeting, 8 October 2004, No. S/RES/1566 (2004), para. 2. Retrieved on 15 May 2015 at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1566%20(2004).

[81] Human Rights Committee. Concluding Observations, Fifth periodic Report of Sweden, U.N. Doc. CCPR/CO/74/SWE, [2002], para. 12. Retrieved on 15 May 2015 at: http://www1.umn.edu/humanrts/hrcommittee/sweden2002.html.

[82]United Nations. Yearbook of the United Nations. Sixteenth Anniversary Edition, Volume 59. New York. 2005, p. 818.

concerning torture[83]. Therefore, does it leads us to the conclusion, that States might give tacit admission for transferred person to be actually at risk of being tortured?

In case of *Agiza v. Sweden*, the Committee against Torture has concluded that Sweden's obligation under article 3 of the ECHR not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected by Egyptian authorities to torture, was breached. First of all, in this case no appeal was provided and possible because of foreigner's implications in terrorist activities and according to such, being a threat to national security. Later, no mechanism for DA's enforcement was provided, assurances has been accepted by Sweden as sufficient to expel person and consequently DA's came into practise. Such an action constituted a breach of State's international obligation.[84]

On the other hand, there are separate opinions regarding Sweden expulsion case, expressing views, that because of the fact that DA's were obtained in good faith they did not breach mentioned obligation.[85]

A summary of DA's related expulsion cannot express common opinion. However, what is clear from the above mentioned –States gave many positive and negative obligations under international law, which has been accepted by genuine will of the States itself. As it is shown from various international instruments, in order to proceed with expulsion procedure, there has to be lawful ground for it, procedural guarantees according to human rights has to be followed and most importantly, the obligations that are upon States, cannot be forgotten and later breached, by using diplomatic assurances. In general, it has to be kept in mind, that either in good faith or without some knowledge of facts – the fundamental rights cannot be put in danger.

1.5. Status of Diplomatic Assurances in Human Rights law

Human right treaties and human right law itself has a special character of protection. It is oriented towards individual person, especially when it is related to absolute rights. The main object and purpose of human right treaties is the protection of human rights. The main questions in this sub – paragraph is to understand, who do DA's assure, do they have accepted status under human rights law and what are the interpretations given from the human rights community point of view?

---

[83] Commission on Human Rights. Note by the United Nations High Commissioner for Human Rights, Goldman, R., K. 61st session E/CN.4/2005/103. 2005, para 56. Retrieved on 15 May 2015 at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=fasch_rpt.

[84] Committee against Torture. Decision on *Agiza v. Sweden*, Thirty-fourth session, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, 2005, para 13.3 & 13.4.

[85] Committee against Torture. Decision on *Agiza v. Sweden*, Separate Opinion of Committee Member Mr. Alexander Yakovlev, U.N. Doc. CAT/C/34/D/233/2003, 2003 (dissenting in part).;

To begin with, the above mentioned interpretations in paragraph 1.2., relating to legal status of DA's according to Vienna Convention will be helpful for this paragraph legal analyses. Firstly, in order to answer to the three questions, it must be asked, whether the DA's were exchanged with the intention to create legally binding obligations under international law? Secondly, does the suspect matter that is regulated by DA's overlaps with multilateral human rights treaties, such as ICCPR, CAT, ECHR? This relationship should reveal much. Bearing in mind that the prohibition of torture usually is prime and most probably principal to DA's – the relationship between DA's and States obligation not to *refoule* to torture or other inhumane or degrading treatment, must be consequently assessed.

Having presumed that intention to create legally binding agreement was found, the further observation on the two separate legal norms in different forms has to be compared. For instance, what is the coherence between legal norm on torture which is established in multilateral human rights treaty and legal norm on torture that is set up in diplomatic assurance? As it is clear, DA's bounds two States when multilateral Conventions – many of them. In order to avoid the irregularities by using DA's, that could be not in conformity with the norms which are commonly accepted in Conventions, article 41 of the Vienna Convention comes into help.[86] The changes, derogations made by modifications from the norm against torture would be most probably incompatible with the object and purpose of CAT or ICCPR. By meaning, that it would rather diminish than enhance the legal protection provided for by the multilateral treaties.[87] On the other hand, States usually do not agree with this opinion and call itself promoters of human rights by employing the DA's. Often they are with an opinion that their DA's reiterates relevant human rights norms, related to torture. In one or another way, it has raised ambiguity as to the content to human rights norm. All in all, does that ambiguity raise some doubts, whether the assurance is provided in order to protect human being or merely to assure for the State itself and all the international community that the act of expulsion would not be understood as a breach of international obligations?

The touchstone of the legal obligations accorded to States comes from article 3 of CAT as well as article 7 of ICCPR. The legal obligation not to expel, return or extradite from the territory of one State to a country where there are substantial grounds for believing that person would be subjected to torture. One of those, calling itself rather a promoter than State which diminish human rights are United States of America. It is more than important to mention that this obligation in

[86] VCLT *supra* note 29, Art. 41.
[87] Noll, G. Diplomatic Assurances and the silence on Human Rights Law. Melbourne Journal of International Law. 2006, p.116. Retrieved on 15 May 2015 at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=883347; also see VCLT *supra* note 29, Article 41(1)(b)(ii).

United States is to be understood as 'more likely than not' that person would be in danger of being subjected to torture. For instance, when State is confronted with a threat to national security, such as terrorist or serious criminal activities – from the first glance, the best option for the State could be simply to send a foreigner back to his country. However, the idea of article 3 is completely different. It clearly expresses the prime purpose of human rights instruments – the protection of individual. No matter how dangerous the individual is, he could not be sent from the United States to any country if it is 'more likely than not' that the alien will face torture there.[88] According to US credible assurances from the receiving State could even reduce the risk of torture. By obtaining them US can be sure that foreigner will be safely and appropriately transferred. According to them, this is the way how United States can actually weigh and decide, whether person would not be more likely than not subjected to torture by the receiving country if transferred. In this case, the essential matter is credibility of the assurances. The efficacy of them must be assessed constantly and each time very accurately on a case – by – case basis. In such a way US is trying to convince the human rights community that assurances are certainly dedicated for the promotion of human rights system as such.[89] To sum, if it is assessed that DA's are credible, they could be regarded as critical and valuable tool in human rights law and would assure the protection of human right, and not the authority of States itself. According to Andrea Prasow, senior counterterrorism counsel in Human Rights Watch's US Program, statement in 2011: *"it is high time for the Obama administration to renounce the practice of relying on diplomatic assurances when transferring detainees to governments with known records of detainee abuse"*, however, suggestions for establishing better mechanisms for monitoring once a detainee is transferred failed to enumerate how those mechanisms could actually work. It was ordered for the task force to make recommendations specific to immigration and military transfers, but it has been failed to state what those recommendations were. Thus, without procedural safeguards, it is hardly could be seen how DA's could be sufficient tool to satisfy obligations under the CAT Convention.[90]

However, there is other side of the coin. Academic and human rights organizations, who do not agree with opinion provided by United States. Not once it has been underlined, that DA's could be legally permissible and could possibly reduce the *non-refoulement* risk in principle, but only if – the effectiveness and credibility would be strictly assessed. As far practice does not show that it is going towards the right direction. Sufficient protection against the risk of torture has to

[88]Wilcox E., R. Digest of United States Practice in International Law. Office of the Legal Adviser, United States Department of State. Oxford University Press. 2008, p. 369. Retrieved on 16 May 2015 at: http://www.state.gov/documents/organization/138513.pdf

[89] *Ibid*., p. 370.

[90] Prasow, A. Human Rights Watch News Report - Diplomatic Assurances: Empty Promises Enabling Torture. [Interactive]. October 6, 2011. Retrieved on 17 March 2015 at: http://www.hrw.org/news/2011/10/06/diplomatic-assurances-empty-promises-enabling-torture. Also see CAT Convention, *supra* note 36.

be complemented by adequate safeguards. Various NGO's such as Human Rights Watch, Amnesty International, European Union Network of Independent Experts on Fundamental human rights[91] share negative thoughts towards the practice of DA's. They see clear violation of the *non – refoulement* principle: *"Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture. The practice should stop"*[92]. Moreover the report of the Eminent Jurists Panel on Terrorism, Counter terrorism and Human Rights expressed their very categorical view against reliance on DA's: "*In principle, reliance on diplomatic assurances is wrongly being used as a way of "delegating" responsibility for the absolute prohibition on torture to the receiving country alone. That undermines the truly international nature of the duty to prevent and prohibit torture"*[93]. According to them, many times the problem is that DA's till now do not have strong or sometimes have none enforcement mechanisms of DA's or the receiving countries are not legally liable for respecting them. Furthermore, after events in *Arar's case*, Julia Hall, council in Human Rights Watch's Europe and Central Asia division, has provided expert testimony on June 7th in 2005. In her view, diplomatic assurances provide no effective safeguard against torture; are unreliable and unenforceable.[94]All these NGO's and independent experts at the same time questions, why the States that are very well known for the abuse of human rights are trusted to honour their obligations not to engage in human rights violations?[95]

To summarise, in order to be able to answer to the question, who do DA's assure, it would be very helpful to understand all the political peculiarities on the globe. This reality of relying on this doubtful type of assurances, where torture is systematic was questioned already too many times. The Special Rapporteur on torture Manfred Nowak pointed out that "there is no or very little possibility of the sending country to actually - as soon as the person is in the other country –

---

[91] The EU Network of Independent Experts on Fundamental Rights also stated in May 2006 that: *"the only acceptable position under international law" is that "states cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return."* Human Rights Watch. News [interactive]. 10 November 2006. Retrieved on 17th March at: http://www.hrw.org/news/2006/11/10/diplomatic-assurances-against-torture#_What_do_international.

[92] Human Rights Watch, *supra* note 5, p.3.

[93]International Commission of Jurists, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. Assessing Damage, Urging Action. Geneva. 2009, p. 105. Retrieved on 15 May 2015 at: http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf.

[94]Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Report of the Events Relating to Maher Arar: Factual Background. Volume II, Ottawa. Ontario. 2006, p. 526. Retrieved on 17 March at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf.

[95]Giuffre, M. An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012). International Human Rights Law Review 2, 2013: "*However, even if assurances are phrased in very specific terms with the activation of mechanisms to monitor compliance, I believe they cannot be considered reliable in those contexts where torture is pervasive",* P. 282. Also see Schmid, E., supra note 109, p. 229.

to make sure that this type of DA's are complied with"[96]*. The same was agreed even by the US Central Intelligence Director MR. Porter J. Goss: "Of course, once they are out of our control, there is only so much we can do […]"*[97]*. On the other hand, it is quite clear from the given observations, that DA's should assure human being – the foreigner – to be properly transferred and treated according to commonly accepted international and regional human rights standards and in any case not to be subjected to torture or other inhumane or degrading treatment in receiving country or elsewhere. Notwithstanding the diverge opinions on the true effect of DA's – human rights activists are still searching how to make it sure, that the individuals in any case would not be sent to places where they risk torture or other serious harm. As far, it is obvious, that any tools that are introduced to human rights system – have to enhance the system of protection: "We believe that human rights transcend boundaries and must prevail over State sovereignty"*[98]*.*

[96] Human Rights Watch, supra note 5, p.

[97] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Report of the Events Relating to Maher Arar: Factual Background. Volume II, Ottawa. Ontario. 2006, p. 526. Retrieved on 17 March at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf.

[98] Carlos Filipe Ximenos Belo, Nobel Price, Nobel Lecture, 10 December 1996. Retrieved on 17th March 2015 at: http://www.nobelprize.org/nobel_prizes/peace/laureates/1996/ramos-horta-lecture.html .

2. APPROACH BY COURTS AND INTERNATIONAL HUMAN RIGHTS BODIES TOWARDS DIPLOMATIC ASSURANCES

This Chapter will explore the use of DA's and particular focus will be put on the conditions and requirements that are considered by Courts and International Human Rights Committees when dealing with DA's in expulsion cases. As a result of findings that will come up examining the jurisprudence, the conditions for assessment of DA's (as being sufficient instrument under international law to provide a protection), will be categorized as: criteria, elements and procedural safeguards of DA's. Furthermore, in order to compare and reveal if existing assessment is sufficient, different national jurisprudence, that is significant for comparison, will be revealed in the third section of this Chapter.

2.1. The analyses of European Court of Human Rights case – law

This paragraph analyses and examines the case law of European Court of Human Rights (ECtHR) in regards of Diplomatic assurances and outlines recent position on reliability of DA's. Contrary to the small scale case – law available under UNCHR and UNCAT, the ECtHR jurisprudence is much more developed and recent.

In the first part of sub - section researcher will go through Court's jurisprudence relating to DA's and will reveal the criteria that emerged from case law to assess the factual value of assurances by examining each, in the context of individual risk assessment. In second part of sub – section the researcher will address the weight of assurances itself going through ECtHR case – law by determining specific elements that prevailed and were determinative at a material time of each case. Further, in the third part of this sub - section, the researcher will turn to the procedural safeguards and their significance for the Court in the risk assessment procedure.

2.1.1. Criteria of diplomatic assurances

First of all, it has to be reminded that the foregoing review of legal framework and jurisprudence suggest that diplomatic assurances *per se* do not assure itself that an individual/ foreigner will not be tortured if expelled. Thus, every instance and each situation in which DA is being used must be carefully and individually considered. This is general recalling of proposition under international law, that any removal to torture requires impeccable assessment of the

particular circumstances of each case. [99] In the DA's case it could be explained by re - presenting the procedure before the ECtHR for the applicant. An Applicant has to convince the Court that there are essential or in other words – substantial grounds to believe that the foreigner subjected will be tortured or will face IDTP, if expelled. But how to prove future events; what degree of probability is sufficient; where the threshold of 'real risk' is considered to be overpassed? These questions lead to difficult test of individual risk assessment and the main question to be answered – whether specific assurance sufficiently reduce the risk posed to the foreigner facing prohibited treatment?

Now the three key criteria of an individual risk assessment that emerged from European Court's case – law will be examined to determine in which cases DA's were deemed to be or were deemed not to be sufficiently reducing the risk posed to the foreigner.

The first criteria in the individual risk assessment procedure is 'adequacy' criteria, because from the beginning, cases such as *Saadi v. Italy*[100] and *Soering v. United Kingdom*[101] were deemed to be inadequate in altering the risk assessment. Therefore it is worth to determine what could be regarded as an adequate protection that would meet this criteria. After review of the case – law, the researcher thinks that the question, whether the assurances are specific or general and vague, has to be answered positively in order to satisfy adequacy criteria and proceed further. Therefore, the following cases will show, why this criteria is significant and how this question has emerged. Starting from *Saadi case*, in which the Strasbourg court has found that in the context of *jus cogens* nature of prohibited treatment enshrined under article 3 of ECHR, the assurance in this case did not satisfy it. The main issue was the inadequacy of the guarantees provided knowing the dangerous situation in the receiving country. Applicant has claimed that it was a "common knowledge" that the persons detained on the basis of terrorist activities were subjected to serious harm and persecution in Tunisia.[102] Therefore, he has claimed he would face real risk if exposed to Tunisia. ECtHR in this case of Saadi did not find Government's representation as being sufficient to consider DA's as means being able to satisfy state's obligations under article 3 of ECHR. Accordingly court emphasized that the diplomatic note – assurance – outlined the domestic law and existing prohibition of torture under it. However, it only restated the fact that Tunisia has acceded to human rights instruments, but did not ensure adequate protection which would

[99]Wissbrodt, D. & Hortreiter, I. The principle of non - refoulement: Art.3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non - Refoulement provisions of Other International Human Rights Treaties. Human Rights Law Review 1. 1999, p.13. Retrieved on 2nd April 2015 at: http://heinonline.org/HOL/Page?handle=hein.journals/bufhr5&div=5&g_sent=1&collection=journals#7 .
[100] *Saadi v. Italy*, *supra* note 35.
[101]*Soering v. the United Kingdom*, no. 14038/88, ECHR 1989.
[102] Saadi v. Italy, *supra* note 35, para 98.

specifically protect an individual in question. [103] On the other hand, even though it was stressed that the assurance in this case did not satisfy the right under article 3 of ECHR, at the same time court did not state that it could never be sufficient, rather said that the promise itself was simply inadequate bearing in mind all the situation in Tunisia.[104]

Going further with this criteria examination, another well – known case appears as an example that has strongly touched the adequacy criteria. *Soering v United Kingdom* was the case regarding DA's in extradition context. However, it clearly showed the inadequacy in altering the future risk. The assurances that United Kingdom has obtained from United States federal Government did not contain anything specific for the individual. Assurance was understood more like a wish of UK that the treatment should not be imposed or carried out, but did not explain in the statement anything in particular for an individual that he would not in fact be subjected to prohibited treatment.[105] Thus, it demonstrated the need to check, whether the promise was specific and it was agreed on the protection or it was merely the wish that did not create any guarantees. Continuing, there was one more attempt to rely on inadequate DA's and remove foreign national to country where he could be at risk of torture and other ill –treatment. It has happened in Belgium, In *Zarmaev v. Belgium* case[106], where an ethnic Chechen, despite the suggestions from court of Appeals in Belgium not to allow the removal of foreigner because of the lack of adequate guarantees (human rights might be not respected in Russia), was still decided to be removed to Russia – a request was granted by the minister of Justice to extradite a foreigner. In this case ECtHR has applied an interim measure for more than 2 years since 2011 asking Belgium not to extradite applicant until judgement will be concluded. Court has recalled that DA's in themselves are not sufficient to ensure adequate protection against the risk of abuse, the practical application of theirs must be checked as well as all the circumstances prevailing at a material time that have to be taken into account in determining if there are sufficient guarantees for a particular applicant in each case separately.[107] What is more, Amnesty International before the State Council of Belgium has argued that given the general situation of flagrant violations of human rights in Chechnya, DA's received from Russian authorities did not add any weigh to guarantees and specifically pointed that the minister had received no assurance particularly stating that the applicant would be detained in prison in line with the standards set by European Committee for

[103] *Ibid*., para 147.
[104]Londras, F. Shannon, Saadi and Ireland's reliance on Diplomatic Assurances under article 3 of the ECHR. Irish Yearbook of International Law. Oxford. 2009, p.9. Retrieved on 3rd April 2015 at: http://ssrn.com/abstract=1228342.
[105] *Soering v. United Kingdom*, *supra* note 100, para 97.
[106]Registrar of the Court of ECHR, Press Release. Judgments concerning Belgium, Croatia, Russia and Slovenia. No. ECHR 058 (2014) [Interactive]. 2014, p. 2. Retrieved on 15 May 2015 at: http://hudoc.echr.coe.int/webservices/content/pdf/003-4683706-5681336.
[107] Zarmayev v. Belgium, no. 35/10, ECHR 2014, para 92. Retrieved on 8th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-141672.

Prevention of Torture (CPT). [108] Therefore, this case again has shown that adequacy criteria is very significant and decisive in determining, whether the DA's could be used in the specific case, because general and vague nature guarantees are usually not sufficient for the protection of foreigner.

Second criteria that has to be considered while assessing the factual value of DA's is the 'effective control'. The government of receiving state is required to be able in fact to exercise a sufficient degree of control over its agencies, security forces. Furthermore, it must, in general, be in a position to ensure the compliance domestically with the assurances agreed. In some cases, assurances were rejected by ECtHR because the promisor was not deemed to have effective control over the surroundings that encircles the foreigner and affects it negatively. Starting point for the explanation is *Chahal case*[109] which concerned a Sikh activist (an independent movement) who was subjected to return to India by a decision of United Kingdom government. Applicant asserted that his return to Punjab would be of reasonable chance to be arrested and subjected to prohibited treatment. Although Strasbourg court did not question the good faith of Indian government in giving the assurances, but it has noted that ill – discipline was common within Indian security services. Furthermore, it concluded that bearing in mind that such a prohibited treatment was relatively regular in Punjab for those who attended the Sihk independence movement demonstrated insufficient control of the government of India over its security forces. Thus, it simply meant that Indian government did not have effective control to ensure the promise given to United Kingdom.[110] But what about generally dangerous situation to determine the insufficient degree of effective control in the country, does it constitute the lack of effective control? For this issue there is one more recent case of *Sufi and Elmi v. United Kingdom*[111] in which Strasbourg court ruled that the level of violence in the Somalia city was of sufficient intensity to reach itself the article 3 threshold. Although, the ECtHR stressed the significance of the general situation in Mogadishu, it further recalled the significance of foreseeable consequences for the applicants in questions. This case has delved into deeper explanations to show which situation could be regarded as being sufficient in intensity to state that receiving government is in a lack of effective control in the country to protect the person subjected to removal. In this case ECtHR decided that United Kingdom cannot expel two Somalians to Somalia because of the level of violence in Mogadishu is of sufficient intensity to pose real risk to treatment reaching the article 3 threshold of the

[108] *Ibid.*, para 53.
[109] Chahal v. The United Kingdom, *supra* note 51.
[110] *Ibid.* Para 93, 121. Also see Schmid, E. The End of the Road on Diplomatic Assurances: The Removal of Suspected Terrorists under International Law. 8(1) Essex Human Rights Review. 2011, p. 226. Retrieved on 15 May 2015 at: https://ius.unibas.ch/uploads/publics/41678/20141221144101_5496cded3d975.pdf
[111] *Sufi and Elmi v. The United Kingdom*, nos. 8319/07 and 11449/07, ECHR 2011.

Convention to anyone in the capital: *"the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict"*.[112] It further stated that generally dangerous situation in the receiving country would be sufficient criteria only 'in most extreme cases' where simply exists the risk of ill –treatment by virtue of an individual being exposed to such a violence on return, otherwise – it has to be substantiated with a 'certain level of personal risk'.[113] At this case it was substantiated by the known possibility that only *"certain individuals who were exceptionally well-connected to "powerful actors" in Mogadishu might be able to obtain protection and live safely in the city"*[114] that meant clear personal risk for the foreigners in question. Thus, even though this case did not contain diplomatic assurances it has explained the significance of the 'effective control' criteria. Therefore, from the above mentioned cases, the generally dangerous, insecure or abusive situation in country alone does not automatically transmute the expulsion decision into unlawful and the 'real risk' for an individual in question must be assessed. What basically is most important for the criteria 'effective control' fulfilment is to answer to the question, whether the state authority that is providing DA's has actual capacity to ensure their effective implementation within the country and whether local authorities can be expected to abide by them.

Thirdly, there is one more general yardstick which helps to estimate the value of DA's in the individual risk assessment – this is credibility of the promisor. 'Credibility' criteria is based on the promisor's credibility itself. The State which has provided assurances could be trusted only if it is able to satisfy the obligations as a promising state. How to weight the ability is the main question here. On this point we have several examples from Strasbourg court case - law, where DA's were rejected because the receiving state had previously breached its obligations agreed in DA's. Such undertakings have been breached in *Agiza v. Sweden* case[115] - Sweden has claimed that they received assurances from the senior Egyptian officials which made their DA of the high value, meaning that assurances received from senior officials will be respected. However, at that time a variety of other circumstances were also surrounding the situation of Mr. Agiza which ought to be taken into account when estimating the value of DA's. For instance, court concluded that Egypt has already previously breached a clause from DA regarding fair trial which proves the inability to trust the State and holds the State as being not credible for respecting the assurances as a whole. [116] Therefore, the State was considered to be not sufficiently credible. Later in 2009 and

[112] *Ibid*., para 248.
[113] I*bid*., para 249.
[114] *Ibid.*, para 218.
[115] *Agiza v. Sweden*, supra note 84 (will be further dissected in paragraph 2.3.).
[116] *Ibid.*, para 13.5.

2011 ECtHR has expressed its opinion on this issue of credibility. The ECtHR decision regarding DA's in *Toumi v Italy*[117] case was another example of removal that has happened notwithstanding the Court's indications and the risk of ill – treatment. This decision was based on previous similar cases such as *Saadi v. Italy* and *Ben Khemais v. Italy*. Case *Toumi v. Italy* was about a Tunisian national who has lived in Italy, been convicted of terrorist activities, then was released because of his sentence being remitted and just after release the foreigner was issued with a deportation order and with Italian authority's obtainment of DA's he was sent to Tunisia and there unfortunately ill –treated. Court especially reiterated the facts and their significance which were known or ought to have been known for the sending state at the time of removal. Although Tunisian authorities have been trying to substantiate their assurances, Court observed that reliable international sources noted that often allegations of ill –treatment have been not investigated by the competent authorities in Tunisia. Moreover, it was said that Tunisian authorities were reluctant to cooperate with independent international organizations. The decision was also substantiated by the fact that applicant's Italian lawyer was not able to get access to visit his client in the Prison and it was known practise in Tunisia. Thus, ECtHR has found incredible that Tunisia could respect DA's and thus again stressed the credibility criteria's significance.[118] Another case which were supposed to be as the guidance for Italy before the latter is the *Ben Khemais v. Italy*[119] – where DA's were not deemed to be credible according to ECtHR. Case concerned deportation of Tunisian national to Tunisia from Italy with respect of containment of diplomatic assurances. In this case Court has strongly concluded that after *Saadi v Italy* judgement and various international reports which reiterated numerous regular examples of torture and other serious harm to persons that been convicted or being suspected being guilty of terrorism activities - is unable to accept Italy's argument that the assurances given by the Tunisian authorities could be considered as credible. ECtHR has recalled facts such as: Tunisian authorities had failed to carry out investigations; Tunisian authorities failed to bring the alleged perpetrators to justice; applicant's representatives to courts were unable to visit their clients; prisoners of Tunisia faces difficulties in gaining access to have a foreign independent lawyers; known impossibility of Italian government to undertake in Tunisia after removal; Italian ambassador is not being let to see the prisoners that were removed.[120]

---

[117] *Toumi v. Italy* [GC], no. 25716/09, ECHR 2011. Retrieved on 7th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":["884040"],"itemid":["001-104381"]}.

[118] *Ibid*. Para.53. Also see Registrar of the Court of ECHR, Press Release. Another removal of a terrorist from Italy to Tunisia notwithstanding the Court's indications and the risk of ill-treatment. No. 299 05.04. (2011) [Interactive]. 2011, p. 3. Retrieved on 7th April 2015 at: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-3496485-3940839#{"itemid":["003-3496485-3940839"]}.

[119] *Ben Khemais v. Italy* [GC] no. 246/07, ECHR 2009. Retrieved on 7th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["001-91489"]}

[120] Registrar of the Court of ECHR, Press release. Case of *Ben Khemais v. Italy*. 142 24.2.2009 [Interactive]. 2009, para 3. Retrieved on 7th April 2015 at: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2644455-2889373#{"itemid":["003-2644455-2889373"]} .

Thus, the Strasbourg court has restated the significance of credibility factor. Also, it has to be noted that notwithstanding the fact that applicant in this case was not immediately posed to ill - treatment - it does not mean that it will not happen at all and in this regard all the previous practices and credibility factor has to be assessed.[121] This case as the previous ones has shown that attention must be paid to factual assumptions and previous practices when determining if 'credibility' criteria has been met. Consequently it helps to assess, whether a specific assurance could eliminate the risk for an individual to be posed to prohibited treatment.

To sum up, these three criteria keynote and strengthen the idea that DA's itself cannot eliminate or reduce the risk automatically only by being present. Adequacy, effective control and credibility criteria are three considerations that must be determined in the first place of every case in order to determine whether DA's could have legal value in altering the risk assessment. Further, if these criteria are fulfilled, DA's reliability in a particular case is being examined by looking to their practical application and trying to find out, whether the specific elements that were prevailing at a material time are satisfied.

2.1.2. Elements of diplomatic assurances

In assessing the reliability of diplomatic assurances ECtHR has expressed its desire to examine the assurances itself already in many cases that will be reviewed in this sub – section. Since court has affirmed its competence to review diplomatic assurances – case by case analyses will reveal the elements that are significant in evaluating given DA's depending on the circumstances prevailing at a material time. The researcher will go through the factors that were of some significance, significant, and been determinative in deciding, whether the assurances in question could be considered as being capable to provide a real and practical protection against prohibited treatment and will indicate the key elements that are of the biggest significance.

To begin with, the first issue that arose is to understand how court is evaluating different cases and whether the evaluation process significantly differs. Due to the fact that the researcher is focused on the foreigners expulsion rather than on extradition, it is worth to mention that for the court's examination of assurances that were provided in expulsion, deportation or extradition cases, it does not appear to have any meaningful weight in determining the reliability of DA's. For instance, both cases *Boumediene and Others v. Bosnia & Herzegovina*[122] (deportation case) and

[121] *Ben Khemais v. Italy*, *supra* note 119, para 64.
[122] *Boumediene and Others v. Bosnia & Herzegovina*, nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, ECHR 2008 (*Boumediene and Others v. Bosnia & Herzegovina*);

Ismoilov and Others v. Russia[123] (extradition case) were evaluated without giving any preference or giving more or less weight to assurances. Because of this observation, the researcher will not stick only to expulsion cases but will provide the analyses within the broader range of examples which outcomes (elements) could be adjusted to expulsion cases while considering the reliability of DA's. Thus, the first element which is currently considered as not decisive is the 'cause of the transfer'. The main outcome is the idea that it does not matter, whether the removal resulted from an extradition or from an expulsion, an individual cannot be posed to prohibited treatment. Second element is the 'form' of an assurance. As it was mentioned above in Section 1, diplomatic assurances could be called and named differently and it's known that its definition varies between countries. From the practice of the court it seems that the form in which diplomatic assurances were concluded does not change the evaluation process. The same is with an oral and written assurances. ECtHR has evaluated both forms without giving strong negative observations relating to it. Court has only noted that oral assurances are relevant as evidence if supplemented by written ones.[124] Therefore, it has been established by the court that the form of an assurance is of very little significance.

Delving more deep into determination of the weight of DA's, it seems that court appears to attach importance to the content and consistency of assurances. In considering decisions on the transfers of foreigners firs two elements from the checklist on DA's that are significant are seemed to be 'transparency' and 'specificity'. Those two are very closely related in examination of the content and consistency of DA's in order to determine the weight of them. Already in several cases ECtHR has raised the question on the lack of specific, explicit and individualized guarantees against torture and other ill –treatment as a ground not to accept assurances as being sufficient to alter the risk. Starting from the extradition case *Kaboulov v. Russia*[125] – court has observed that it was not able to conclude that applicant would in fact not be sent to risk of ill – treatment. Assurances that were provided by Kazakhstan General Prosecutor's Office were deemed to be not specific enough to consider them as evidence that applicant would not face the treatment contrary to article 3 of the Convention. Although the applicant has provided sufficient ground to his fear for a serious risk without any particular purpose if held in custody, Kazakhstan has provided assurances only regarding his prosecution and death penalty for the offences referred to in the extradition request, but they has not given any that particularly would assure that applicant would not be subjected to torture or IDTP in custody or elsewhere.[126] This case shows lack of specificity

[123] *Ismoilov and Others v. Russia*, no. 2947/06, ECHR 2008;

[124] *Shamayev and 12 Others v. Georgia and Russia*, no. 36378/02, ECHR 2005, para 184, 343.
[125] *Kaboulov v. Russia*, no. 41015/04, ECHR 2009.
[126] *Ibid.*, para. 112, 113.

for the content of DA's to be considered as evidence for altering the risk against prohibited treatment. Therefore, in this case the element of 'specificity' was not fulfilled in order to consider the DA's as an evident proving the abrogation of risk. Another case that has developed and supplemented the need to examine these elements is *Khaydarov v Russia*[127] case. Court again did find itself in a lack of specific reference to the protection of a particular applicant from the treatment prohibited by the Convention that might be faced in Tajikistan. This time court has described DA's as mere restatement by the government of the fact that country of Tajikistan has acceded to CAT Convention and did not find that assurances add specific reference that could reduce the risk for an applicant. [128] Thus, through the established need to have specific reference, the element of 'specificity' was again stressed by the court as being significant for the assessment. Further, ECtHR has found itself bound to question DA's value in the case of *Klein v Russia*[129]. This time government of Russia invoked assurances from Columbian Ministry of Affairs to the effect that the Israeli "mercenary" – Mr. Gal Yair Klein would not be subject to prohibited treatment under article 3 of the Convention. In this case court has reiterated the fact that lack of specificity makes DA's rather vague and lacking precision that assuring something in fact.[130] Regarding the element of 'transparency', which is closely related with 'specificity' element, the cases such as *Ryabikin v. Russia*[131], *Muminov v. Russia*[132] are significant. In these cases court has questioned transparency element of DA's and thus at the same time the value and quality of assurances itself. Main argument that was raised regarding this element was that the terms of the assurances have not been disclosed to the court and thus it makes DA's being not able to be examined. In *Ryabikin v. Russia* court noted that no copy of letter has been submitted to it[133]; in *Muminov case*, according to the ECtHR, the government did not submit a copy of any diplomatic assurances indicating the specific promise regarding applicant and article three. Further, court has noted that the only document that was submitted was relating to extradition proceedings, which makes the assurances being in a lack of transparency and at the same time not specific and not precise enough. Moreover, the particular reiteration is need to be put here by recalling that court in this case stated: *"even if such an assurance were obtained, that would not have absolved it from the obligation to examine, whether such assurances provided, in their practical application, is sufficient guarantee…"*[134] which shows that court has an obligation to examine assurances, and

[127] *Khaydarov v. Russia,* no. 21055/09, ECHR 2010.
[128] *Ibid.*, para. 111.
[129] *Klein v Russia*, no. 24268/08, ECHR 2010.
[130] *Klein v Russia, supra* note 120, para 55.
[131] *Ryabikin v. Russia*, no. 8320/04, ECHR 2008. Retrieved on 11th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87132
[132] *Muminov v. Russia*, no. 42502/06, ECHR 2008.
[133] *Ryabikinv. Russia*, supra note 131, para.119.
[134] *Muminov v. Russia*, supra note 132, para. 97.

without these two elements being fulfilled it is practically impossible. Thus, both these elements – 'transparency' and 'specificity' have established the fact that emerged from developing case – law, that the vague nature of DA's is supplementing court's concerns with regard to treatment that is prohibited. Moreover, it seems that court examines these elements often and it could be currently considered as well – established practice to determine, whether these elements were satisfied at a material time.

Going further to the practice of ECtHR, the tendency to attach some importance to the position of officer who has provided DA's is seen as well as the need to have the element 'authoritatively given' being satisfied in order to consider DA's as sufficient safeguard from prohibited treatment. Starting from 2007 it is possible to notice growing need to fulfil this requirement – element that could be put into the checklist of the Court when considering the value and quality of assurances. Such cases like *Ben Khemais v. Italy*, *Soldatenko*[135], *Baysakov v. Ukraine*[136] show, that court is paying attention to the question, who has given the assurances and whether that person was able to bind the receiving state.[137] In the case of Baysakov it was decided that it was not possible to establish that the person who has provided assurances in Kazakhstan was empowered to provide such a document on behalf of the State. Court also emphasized in this case that bearing in mind the lack of an effective system of torture prevention in the country it would be difficult to believe that such DA's could be respected. In a case *Ben Khemais* it was also noted specifically on this issue, and stressed that Advocate General of the General Directorate of Judicial Services was not competent to give such an assurance on behalf of the state. [138] Furthermore, the same has happened in Soldatenko and *Garayev v. Azerbaijan*[139] cases, where court found itself being not persuaded that the assurances from both, the Uzbek and the Turkmen authorities offered reliable guarantees against the risk of ill –treatment and particularly noted that neither the person who has provided the assurances, nor the institution which the person represented was empowered to provide such. Further court added that knowing the systematic torture situation on the ground in countries in question, assurances provided do not seem to be sufficient to ensure adequate protection against the risk of ill – treatment. As in these cases as in the later ones, ECtHR applied the same method while considering the quality of DA's. Court has examined all the foregoing consideration together and the element 'authoritatively given' was one

[135] *Soldatenko v. Ukraine*, no. 2440/07, ECHR 2009, para. 73.
[136] *Baysakov and Others v. Ukraine*, no. 54131/08, ECHR 2010, para. 51.
[137] Johannes, S. Extradition and Human Rights Diplomatic assurances and Human Rights in the Extradition Context. PC – OC meeting in Strasbourg/F. [Interactive]. 2014, p. 9. Retrieved on 15 May 2015 at: http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/Documents%202014/Special%20session%20Extradition%20-%20Extradition%20and%20human%20rights%20-%20Silvis.pdf .
[138] *Ben Khemais v. Italy*, *supra* note 119, para 59.
[139] *Garayev v. Azerbaijan*, no. 53688/08, ECHR 2010, para. 74.

of cumulative assessment. Thus, it seems that this element in the situations where Court doubts that the provider of assurances has the capacity to actually guarantee protection against torture and IDTP, especially where the situation of torture is problematic in the country, court considers removal being in a violation of article 3. Therefore, this element could be seen as one from the checklist, because it is currently has been often considered by the court in its jurisprudence.

Like the significance of the position of the officer who had provided assurances, the importance of the position and profile of the individual subject to transfer, also seem to be significant factors in weighting assurances. Therefore, we have another element – 'position and profile of the individual' which means that particular characteristics as well as the previous ill – treatments have to be verified in receiving state in order to decide, whether DA's are reliable. In one of the cases against Ukraine, Court has found violation of article 3 where it was established that the applicant has previously been ill – treated in receiving state. Court in case of *Koktysh v. Ukraine* [140] has particularly highlighted that although the reference to a general situation concerning human right observance in particular country cannot alone serve the basis for refusal of a transfer, the factor 'position of the individual' could change the situation to the extent which heightens risk of torture to such level that violation of article 3 of the Convention would be found. This element has developed further when court started attaching some attention also to related issues to this element. The national security profile was one of them. In cases where individuals are involved in terrorist activities, either for being accused or convicted in sending state or in receiving state and where diplomatic assurances are being employed the researcher does not see the big difference in the risk assessment. However, the enhanced risk was established in some cases. According to Court it should be done in the situations where an individual is considered to be transferred to countries were person is allegedly involved with the terrorism activities and because of this fact DA's cannot be considered as an instrument mitigating the risk, because he is wanted for particular reason. Such case as *Soltana v. Italy*[141] substantiates to this observation. In this case ECtHR has particularly emphasized the fact that numerous relevant international reports and the visits of International Committee of Red Cross has revealed regular cases of torture and ill – treatment in Tunisia to persons suspected or convicted of terrorism. According to the court this situation calls for wariness and obliges the court by taking into account all the circumstances prevailing at a material time to conclude that the decision to expel the person to Tunisia would breach article 3 of the Convention. This opinion of the court was repeated also in the case

[140] *Koktysh v. Ukraine*, no. 43707/07, ECHR 2010, para 64.
[141] *Soltana v. Italy*, no. 37336/06, ECHR 2009, para 38, 39, 46. Retrieved on 10th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91823.

Hamraoui v. Italy[142], *Darraji v. Italy*[143] and others. Thus this element 'position and profile of individual' is already established in court's jurisprudence as one of the factors that are being verified while weighing the value and quality of DA's that were provided. As reveal the cases, this element is of some significance, though again, it has to be kept in mind that all the circumstances prevailing at a material time of the case in question are relevant and the consideration of this factor is seemed to be one from the elements that are required for cumulative risk assessment.

One more rather very relevant matter in assessing the risks concerning transfers of foreigners is seemed to be delicate examination of another element which is the 'post – transfer monitoring'. This particular matter has been emphasized by the court in many cases. It would be difficult to imagine that without any doubts and in the absence of verifiability option it could be possible to believe that DA's would be respected, therefore in the jurisprudence the need to examine the possibility of post transfer monitoring has emerged. ECtHR judge Mr. Johannes Silvis has pointed out 3 main questions that arise before the court while considering the sufficiency of this 'post – transfer monitoring' factor. Mr. Silvis has highlighted the following questions that are usually being examined before the court: *"whether compliance with the assurances can be objectively verified through the diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyer; whether there is an effective system of protection against torture in the receiving state and whether the receiving state is willing to investigate allegations and to punish those responsible"*[144]. This 'post - transfer monitoring' element in the assessment of risk is seemed to be significant because there always exist a lack of trust between the states, there always exist a probability that the agreement will be denied, if breached subsequently. Thus, the proper protection related to well – functioned mechanism of monitoring included in DA's could provide some help. As it was already mentioned above, where exists torture – there exists a probability of secrecy and hidden activities.[145] Therefore, the reason why to have as proper monitoring as it could be is of great importance. Due to this reason, the ECtHR by examining this factor does give some guidance for the states, such as showing the examples of what has been already considered as being improper post monitoring mechanisms or what were the obstacles in previous cases. Though, it is quite difficult to describe what proper mechanism is. Nonetheless, in the decision concluded in 2010 in *Chantiev an Ibragimov v. Slovakia*[146] court found the assurances to be sufficient. In assurances provided, court found the existence of

[142] *Hamraoui v. Italy*, no. 16201/07, ECHR 2009, para. 37, 38. Retrieved on 10th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91835.
[143] *Darraji v. Italy*, no. 11549/05, ECHR, para. 58, 59. Retrieved on 10th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91819.
[144] Johannes, S, *supra* note 137, p. 10.
[145] The Committee of International Human Rights, *supra* note 29, p. 89.
[146] *Chentiev and Ibragimov v. Slovakia*, nos. 210022/08 & 51946/08, ECHR 2010.

monitoring mechanism that could be empowered through diplomatic representation of extraditing State. In this case the empowerment, which was found to be an important factor, has happened through the additional letters, in which Russian authorities has confirmed that guarantees include the possibility of Slovak diplomatic representatives to be able to visit applicant and speak with him without third person presence. However, nothing precise was added. It was left for the discretionary power of Slovak authorities to ask for the opportunity to carry out such monitoring in Russia, which actually had never taken place – this was not even requested by the Slovak domestic courts. However, court is of the opinion that Russian authorities by offering such opportunity of monitoring undoubtedly gave additional weight to assurances. On the other hand it is hard to speculate, what would happen if the opportunity would have been tried. This issue of reluctance to cooperate was well established in another case - *Ben Khemais v Italy*[147] judgement in 2009. Court has found that Tunisian authorities were reluctant to cooperate with independent organizations that defend human rights, such as Human Rights Watch. Further, it noted on the inability of the applicant's representative to visit his client in prison. Therefore, the situation given has shown that once the applicant is expelled and is already out of the territory of sending state, it might be impossible anymore to verify the situation to which the foreigner was subjected if no precise monitoring is established and agreed. Probably that's why court was satisfied by the assurances given in the *Chantiev an Ibragimov v. Slovakia* case, where particular letters proved the existence of the monitoring, which was at least agreed by the parties. However, already in 2008 case example it was indicated that mutual trust cannot be accepted as an evident in the context of article 3 risk assessment. In any event, even if the court accepts the existence of assurances, it notes that all the circumstances prevailing at a material time are relevant. For instance, in the case of *Ryabinkin v. Russia*[148] court stressed the systematic refusal by Turkmenistan to give an access to international human rights observers to check the situation in country, especially the places of detention. This judgement is one of the examples that showed the tendency of the court to be bound to question the value of the assurances in such circumstances, because the additional factor, the non – existence of objective means of monitoring in the country, questions the DA's monitoring mechanism itself. The same approach was confirmed by the ECtHR in its more recent case of *Kalesnik v. Russia*[149], where court has found itself unwilling to accept DA's furnished by Turkmen Government, stating that cumulative assessment of the situation[150] in Turkmenistan has shown that

[147] *Ben Khemais v. Italy, supra* note 119, para 61, 62.
[148] *Ryabikin v. Russia, supra* note 131, para 119.
[149] *Kolesnik v. Russia*, no. 26876/08, ECHR 2010, para. 73. Retrieved on 11th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99450.
[150] *Ibid*., para. 68. The factors that were taken into account for assessment were these*: "credible and consistent reports from various reputable sources of widespread torture, beatings and use of force against criminal suspects by the Turkmen law-enforcement authorities; very poor conditions of detention; discrimination against persons of non - Turkmen ethnicity, which made them particularly vulnerable to abuses; the cumulative effect of the poor conditions*

there appears to be no objective means to check whether the assurances had been fulfilled. Fortunately, there already exists some examples from the case law that could give some clarity regarding this element sufficient fulfilment. Case of *Othman (Abu Qatada) v. The United Kingdom*[151] is of great importance in this regard. The question, whether the framework of DA's offers sufficient protection against torture came under review in 2007 before the United Kingdom's immigration appellate court. At that time, United Kingdom and Jordan has already been agreed regarding monitoring mechanisms envisaged by Diplomatic assurances. The key features relating to monitoring agreed between two Governments when employing DA's were decided to be carried out by independent human rights organization the Abdulah Centre. The Centre has many obligations and rights such as: to accompany those returned to where in Jordan they may be going; to maintain weekly contact; to visit those returned unannounced and in private, by the experts to detect signs of ill – treatment; to arrange medical examination if needed; to have an access to all court hearing; to prepare and send regularly to the sending state the reports regarding individuals removed.[152] However, the independence and capability of the Abdulah Centre to perform its tasks and follow its obligations was subjected to some debate.[153] The United Kingdom government with this regard offered and provided the training and number of meetings were held with members of the Centre to establish the independency and professional experience of the organization. Government of United Kingdom has even funded an organization themselves in order to enable the NGO to carry out its mission. Though again these facts raised some doubts[154] in regards of independence of the Centre. Another problem was seen regarding reporting obligation – it was not clear to whom it should be reported. Nevertheless, as it was noted above, in order to determine quality of the assurances and their reliability in the receiving state practice, ECtHR is seemed to be applying a series of criteria and elements to examine it. Therefore, taking into account all of the issues in regards of the element 'post – transfer monitoring', it seems that currently the need to assess its fulfilment is well – established in the jurisprudence of the court. As the detailed list of safeguards in the assurances between the United Kingdom and Jordan has shown, ECtHR considers diplomatic assurances to be sufficient to remove the risk of ill – treatment and torture even despite the fact of inexperience, doubts regarding independence and no guarantees for a

of detention in view of the potential length of prison sentences; systematic refusal of the Turkmen authorities to allow any monitoring of the places of detention by international or non-government observers".

[151] *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR. Retrieved on 13th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629.

[152] *Omar Othman (Abu Qatada) v. Secretary of State for the Home Department*, SC/15/2005, United Kingdom, Special Immigration Appeals Commission (SIAC). 2007, para. 185,186. Retrieved on 12 May 2015 at: http://www.refworld.org/docid/499043ea2.html.

[153] *Ibid*., para 86.

[154] Skoglund, L. Diplomatic Assurances Against Torture – An effective Strategy? Nordic Journal of International Law, Volume 77, Issue 4, pages 319 – 364. 2008, P. 238, 359. Retrieved on 15 May 2015 at: http://booksandjournals.brillonline.com/content/journals/10.1163/157181008x374870.

proper access at any time.[155] Thus, post transfer monitoring element is seemed to be significant factor in the risk assessment, however, all the general assessment and consideration of all the elements together is vital.

Additionally, there is one more element that appears to be the most significant factor in evaluating the weight of assurances. The court keeps reaffirming the significance of 'receiving state's human rights reputation'. This factor seems to be the most significant element in the risk assessment related to the employment of diplomatic assurances. Bearing in mind that the aims of the Court in this regard is not to assess the consequences of seeking DA's or to assess the propriety of DA's itself but rather to examine whether such assurances in particular case are sufficient to remove any real risk of ill – treatment, it seems that court has found and established what could be considered as unquestionable real risk. Therefore, it is of great importance to consider this element in the context of general human rights records of the country in question, it could be also considered through the question, whether DA's concerns treatment which is legal or illegal in the receiving country, or what are the diplomatic relationships between the sending and receiving countries. Since *Saadi case* ECtHR seems to be specifically paying attention to the reputation relating to human right of the receiving country. As court particularly noted in this case: "*the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental human rights in principle are not 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 Convention*"[156]. In the same light court has expressed its approach regarding DA's in 2012 case *Othman (Abu Qatada) v. The United Kingdom*. Court clearly noted that assessing the practical application of DA's and determining the weight of them - the preliminary question should be always consider: *"whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever"*[157]. Indeed, this probably happens in very rare cases, however it may happen and if so – no weigh at all can be given to assurances. This approach was confirmed in *Gafarov v. Russia*[158] case, where ECtHR did not find the assurances provided by Tajikistani General's Office being sufficient to ensure protection against ill – treatment. Court concluded that reliable sources have reported practices which were manifestly contrary to the principles of the Convention and what is most important – were tolerated by the same authorities that provided the assurances. Also in the *Ismoilov and Others v. Russia* case and *Sultanov v. Russia* case, court has reiterated the well

[155] *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 151, para 199; also see Giuffre, M. *supra* note 8, p. 284.
[156] Saadi v. Italy, *supra* note 35, para 147.
[157] *Othman (Abu Qatada) v. the United Kingdom*, supra note 151, para 188.
[158] *Gafarov v. Russia*, no. 25404/09, ECHR 2010, para 138.

– known statement of his own, that was first established in *Chahal v. United Kingdom* case. At that time court has given the early warning against reliance on DA's against torture from the state where torture is endemic or persistent.[159] In these much more recent cases court again continued developing the meaning of this element and was not persuaded that assurances whatsoever could offer a reliable guarantee against torture. Conclusion was based on the fact, that manifestly contrary practice of torture in Uzbekistan was described by reputable international experts as being systematic.[160] Moreover, while evaluating the reputation of the receiving country, one more related issue arises sometimes, when Court faces the question, whether the treatment is legal or illegal in receiving country .In regards of treatment in question, there is the case of *Cipriani v. Italy*[161] in which Court found no appearance of a violation due to applicant's extradition, notwithstanding a fact that in U.S. the death penalty was not abolished. Therefore, for this fact to be decisive, there has to be established concrete facts substantiating the possible violation. As it was in Cipriani case, applicant and its representative tried to convince the court that there were no guarantees that he would not be condemned to death penalty and based their observation on the possibility of reclassification of facts that consequently may subject applicant to capital felony. Although DA's concerned treatment which was legal in U.S. law and seemed to show the reputation of receiving country immediately, it was not enough for the Court to consider DA's as unreliable. In the light of non- existence of any facts substantiating the alleged reclassification, with the observation that no attempts to reclassify the charges were established and keeping in mind that DA's were authoritatively given by Ministry of Justice of the U.S., Court has concluded that there was no violation in this case. Thus, the lack of evidence and the fact that U.S. had never breached diplomatic assurances were the main for the court to give its reasoning. In addition, assessing a foreigner's safety on return, one more significant part of the element – receiving state's human rights reputation – comes for the consideration. This part is to consider the strength and length of bilateral relations between two countries. For instance, the ECtHR already for a long time demonstrates that it accepts DA's from the United States.[162] In those cases court noted that U.S. has positive human rights records and as it was stressed *in Al – Moayad v Germany*[163] case, particular importance to the fact that Germany up to that point did not experience disrespectful practice concerning assurances agreed with United States is very significant factor in assessing the risk of being subjected to ill – treatment. Moreover, in the recent case of *Abu Qatada* – this point

[159] *Chahal v. The United Kingdom*, *supra* note 51, para 105.
[160] *Ismoilov and Others v. Russia*, *supra* note 122, para.121.127; *Sultanov v. Russia*, no. 15303/09, ECHR 2010, para 73.
[161] *Cipriani v. Italy*, no. 22142/07, ECHR 2010. Retrieved on 14th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98313.
[162] *Boumediene and Others v. Bosnia & Herzegovina*, *supra* note 121, *Al – Moayad v. Germany*, no. 35865/03, ECHR 2007, para 104. Retrieved on 14th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79710.
[163] *Al – Moayad v. Germany*, *supra* note 161.

of strength and length of bilateral relationship was stressed out again. In that regard court has cited Special Immigration Appeals Commission's (SIAC) observation that the 'crucial difference' between that what happened in *Agiza case* and *Abu Qatada* is the strength, duration and depth of bilateral relationships between two countries. SIAC was of the opinion that political realities matter rather more than a precise terminology of the assurances and further suggested that DA's is bilateral agreement which is the result of longstanding and friendly relationship in which there are mutual incentives to comply with what was signed.[164] Not so precise but rather similar approach was confirmed by the court itself, suggesting to consider the length and strength of bilateral relationship between the sending and receiving states, including the receiving State's records in abiding by DA's.[165] As Mariagiulia Giuffre accurately pointed out: *"Strasbourg Court gave great weight to the promise of country with which the sending State has solid and amicable diplomatic relations"*[166]. Thus, it shows that as a requirement for excluding potential violations of article 3 in regards of receiving state's human rights reputation could be firm, solid and longstanding diplomatic relationships between two countries and especially when DA's are to be given in the environment which is considered to be safe. Particular note on this point was made by ECtHR when considerable attention to diplomatic assurances which were received from: *"requesting state which has a long history of respect for democracy, human rights and the rule of law…"*[167]was given in this regard. Therefore, in such a way in 2012 Court has reaffirmed in *Babar Ahmad and Others v. The Unite Kingdom* case the significance of the element 'receiving state's human rights reputation' in the risk assessment process. In sum, this element was developing for a long time and currently seems to be established as one of the most significant from all the elements that are being considered before the court. The compliance with the assurances has to be accessible for the verification, accordingly the present human rights reputation may objectively show the impossibility of any assurances to be abide yet before it occurs.

All the elements given above are considered to determine the reliability of assurances. However, it seems that for the court to consider assurances as reliable or not, it does not depend on the context in which they were provided: evaluation will not be strengthened or alleviated in regards of expulsion, extradition or deportation. It would likewise give no weight to the form of it. Instead, some significance court appears to give to the content of DA's and its transparency, to the position of the officer and the position and profile of an individual in question as well as to the

[164] Jones, K. Deportation with Assurances: Addressing Key Criticism. The International and Comparative Law Quarterly Vol. 57. 2008, p. 188, 189. Retrieved on 14th April 2015 http://www.jstor.org/stable/20488195?seq=1#page_scan_tab_contents.
[165] *Othman (Abu Qatada) v. the United Kingdom, supra* note 151, para. 189.
[166] Giuffre, M. *supra* note 8, p. 289.
[167] *Babar Ahmad and Others*, no. 24027/07, ECHR 2012, para 179.

post – transfer monitoring. On the other hand, cumulative assessment of these elements seem to matter less than the well-established significance attached to the receiving State's human rights reputation. Accordingly, in order to sum up what was said above, it has to be understood that usually in the examination, whether an applicant faces a real risk of ill – treatment and if DA's are sufficient to alter that risk, it seems that court will consider all: general situation in the receiving country, particular characteristics surrounding the applicant and the practical application of guarantees provided.

2.1.3. Procedural safeguards

The intricate nature of diplomatic assurances suggests that in order to be in a compliance with the prohibition against torture and accordingly not to violate the principle of *non – refoulement* – the use of DA's is limited. Therefore, in this subparagraph the researcher will turn to procedural aspects in regards of DA's. The recognition and adequacy of procedural safeguards will be examined in the use of diplomatic assurances in the light of ECtHR case – law. From the beginning of DA's usage, the ECtHR was not interested in considering the procedural fairness where the DA's were being relied upon. The individual case – by case scrutiny with regards to article 3 was the only which was appropriately exercised by the court. All the rest articles were only significant in as much as they could contribute to the establishment of a violation against absolute prohibition against torture. However, the non – existence of possibility of individuals in question to exercise their rights and at least to be eligible for minimum procedural safeguards such as the right to challenge the decision authorising his removal on assurances, the right to independent judiciary review of the decision prior his removal and the right to fair trial may also raise the question of the acceptance of assurances as being sufficiently reliable tool in preventing the torture, therefore, the prevalence of these guarantees in the jurisprudence of the ECtHR will be examined in this sub – section.

One of the main procedural safeguards is the right of an individual to challenge the decision of his transfer prior his removal. The guarantee here is ensured possibility to challenge the decision to be expelled. The key question from the beginning of development of the guarantee was, whether it is fair when the foreigner in question has no opportunity to challenge the decision authorising his removal and this decision is not a subject to any judicial or administrative review? Accordingly to this thought, the need to protect this right in the light of expulsion cases has emerged. Further, for the practical application of the later guarantee, another safeguard - the right to independent judicial review, has been accepted as being significant for the DA's evaluation as well. From the following examples it will be established that a very close – link is seen between

these two safeguards, which apparently has to be guaranteed in the DA's. The very pictorial example is *Hirsi Jamaa & Others v. Italy*[168] case, which concerned Somalian and Eritrean migrants travelling from Libya who had been intercepted at a sea by Italian authorities and their allegedly arbitrary removal. The aliens were expelled as a group, without any assessment of an individual case and the most importantly – without having an opportunity to challenge their removal decision or to put forward arguments against it. Court concluded that applicants were actually unable to lodge their complaints with competent authority and to obtain a thorough and rigorous assessment before their removal was enforced. The violation of article 13 taken together with article 3 was found. In general, all the applicants were transferred to Libya without following any formal procedure. Accordingly, for the protection of Convention rights of foreigners that are subjected to removal on security or anti – terrorism grounds there is the ECHR article 13[169]. It sets a high standard of domestic remedies. Additionally it was established, that court considers judicial review to be effective enough when it meets the requirements of article 13 of the Convention in the context of article 3. The case in this regard is of *Chahal v. the United Kingdom* where court has stressed that: *"it requires independent scrutiny that must be carried out without regard to what the person may have done to warrant expulsion…"*[170] However, in this case neither the advisory panel, nor the court could review the decision of the Home Secretary to deport Mr. Chahal to India with reference to the question of ill – treatment. Court made it clear that a sending state has to be able to provide an independent and impartial mechanism of scrutiny. The 'independent and rigorous scrutiny' of all the factors relevant to the case with regard to complaint which is related to removal to a third country where an individual could be subjected to prohibited treatment, requires the competent body that must be able to examine the substance of the complaint and afford proper reparation.[171] This approach was confirmed also in already mentioned *Hirsi case*, where court has emphasized: *"the importance of guaranteeing anyone subject to removal measure <…> the right to obtain sufficient information to enable them to gain effective access to relevant procedures and to substantiate their claims"*[172]. Thus, the court has gradually developed the other aspects of an issue of the possibility to challenge the decision and close link between all of them is seen. The right of an individual to be provided with the relevant information upon which the decision to be

---

[168] *Hirsi Jamaa and Others v. Italy*, no. 27765/09, ECHR 2012, para. 185. Retrieved on 17th April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231; Also see Moreno-Lax, V. Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control? Human Rights Law Review. 2012, p. 589. Retrieved on 17th April 2015 at: http://hrlr.oxfordjournals.org/content/early/2012/10/04/hrlr.ngs024.full?etoc.

[169] ECHR, *supra* note 37, article 13: *"Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".*

[170] *Chahal v. The United Kingdom*, *supra* note, 51 Para 145, 151.

[171] *M.S.S. v. Belgium and Greece*, no. 30696/09, ECHR, para 387. Retrieved on 17 April 2015 at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050.

[172] *Hirsi Jamaa and Others v. Italy*, *supra* note 167, para. 203, 204.

removed was one between these. Moreover, the significance of legal assistance and interpretation were highlighted by the court as being essential elements in making independent and rigorous scrutiny a real possibility for applicants to defend themselves.[173] However, none of these requirements were followed by Italian authorities in this *Hirsi case*.[174] Also, in *Shamayev case*[175] court has developed further explanation on these guarantees and found that an effective remedy offered by article 3 with conjunction with article 13 could not be considered as such when the foreigner is informed of his decision to be removed only moments before the enforcement of his removal. Taking into account all the developing jurisprudence, basically the question, whether or not the sufficient judicial review was provided to comply with article 13 in the context of article 3 of the Convention, depends on the State party and particularly on the content of such proceedings in each case. [176] Therefore, these procedural safeguards must be effective in practice as well as in law. Thus, it is well established in current jurisprudence that the State as a whole has a responsibility to guarantee Article 3 protection in full: substantively and procedurally.[177] On the other hand, it has to be noted that an effective remedy is guaranteed under article 13 of the Convention only when the individual has an arguable claim that it will happen in the context of protection from *refoulement,* meaning that first of all an expulsion will be in a breach of article 3.[178]

Another issue related with procedural guarantees in cases of removal on the basis of diplomatic assurances is article 6 of the Convention and the right to fair trial enshrined under it. The right to fair trial means that people can be sure that process during the trial will be fair and certain. This guarantee basically should prevent the governments from abusing their powers and is as a keystone for a just society. However, the approach of the court in regards of this guarantee in the context of expulsion and employment of DA's was not consistent and has been changing over times. Currently, it led to the opinion that the absence of procedural safeguards in the receiving state should equally lead to the suspension of the removal appeared. The practice of ECtHR had some early vestiges over this issue. The shift in this regard is seen already since *Soering case*[179]– court has stated that a serious and flagrant breach of fair trial rights under article 6 of the Convention could have relevant consequences in transfer cases. In that case court did not exclude that this issue might be exceptionally raised under article 6 of the Convention by an

[173] *Hirsi Jamaa and Others v. Italy*, *supra* note 167, para. 185.
[174] *Ibid.*, para.205
[175] *Shamayev and 12 others v.Georgia and Russia*, *supra* note 123, para. 460.
[176] *Benediktov v. Russia*, no. 2345/02, ECHR, para. 28.
[177] Wouters, C. *supra* note 38, p. 339.
[178] This 'arguability test' was introduced by these cases: *Soering v. the United Kingdom*, *supra* note 100, para.117; *Vilvarajah and Others v. the United Kingdom*, no. ECHR, para. 21.
[179] *Soering v. United Kingdom*, *supra* note 100, para 113.

extradition decision in circumstances were a foreigner has suffered or is in a risk of suffering the flagrant denial of a fair trial in the requesting state. Though the actual recognition of procedural safeguards in the context of expulsion cases is seen since recent *Othman (Abu Qatada) v. The United Kingdom case* in 2012. ECtHR concluded that expulsion would entail a violation of the right to fair trial as enshrined in article 6 of the Convention.[180] It was a big change, because before this case court has never found that an expulsion would be in violation of Article 6 in any case.[181] Therefore, in the light of the above, the researcher is focused to the 2012 case of Abu Qatada and its outcomes. As it was showed above, it is already developed that the assurances must meet certain minimum procedural standards dealing with all parts of transfer. In later case court for the first time has found a violation of the right to a fair trial entailing a flagrant denial of justice. As a result of that, the concept of flagrant denial was determined and accordingly some forms of it has been pointed out. Moreover, this significant case gave the 'stringent test of unfairness'[182] to verify if the substantial grounds of flagrant denial of justice are found. Furthermore, court in such a way has expressed its recognition over the need of broader scale of procedural safeguards, particularly has recognised the non – derogable right of fair trial and consequently the fact, that breaches of it may have an effect suspending a decision on expulsion.[183] To be more precise, court has pointed out these forms of possible unfairness that could reach a threshold of the test: conviction *in absentia* with no chance to obtain an assessment of the merits of the charge[184]; a summary trial with total disregard for the rights of defence[185]; detention without any access to an independent and impartial tribunal in charge of reviewing the legality of the detention[186]; deliberate and continuous refusal of access to a lawyer.[187] Therefore, it means, that following the test, if applicant is able to establish that there were substantial grounds to believe, that he could be subjected to situation with a flagrant denial of justice – the government of the sending state has an obligation to dispel the arising doubts about it, if wants to expel the foreigner.[188] For instance, in the present case, there was a question regarding the evidence that were allegedly obtained by torture[189], the Jordanian courts have failed to establish the convincing facts to dispel the doubts, which evoked a violation of article 6 of the Convention upon the removal of individual. Similar situation occurred in *El Haski v. Belgium*

[180] *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 151, para. 282, 285.
[181] *Ibid*., para 206.
[182] *Ibid.*, para 261.
[183] Giuffre, M. *supra* note 8, p. 273. Also see McCarthy, C. Diplomatic Assurances, Torture and Extradition: The case of Othman (Abu Qatada) v. the United Kingdom. 18 January 2012 [Interactive]. Retrieved on 17th April 2015 at: http://www.ejiltalk.org/diplomatic-assurances-torture-and-extradition-the-case-of-othman-abu-qatada-v-the-united-kingdom/.
[184] *Einhorn v. France* (Dec.), no. 71555/01, ECHR 2001, para. 33; also see Wouters, C. supra note 38, p. 349.
[185] *Bader and Kabor v. Sweden*, no. 13284/04, ECHR 2005, para. 47; also see Wouters, C. *supra* note 38, p. 350.
[186] *Al – Moayad v. Germany*, *supra* note 161, para. 101; also see Wouters, C. *supra* note 38, p. 351.
[187] *Othman (Abu Qatada) v. the United Kingdom*, supra note 151, para. 259.
[188] *Ibid.*, para 276.
[189] *Ibid*., para. 270, 277.

case[190], where ECtHR has recognised that deportation would evoke violation of article 6. The reasoning was based on the real risk that evidences subjecting an individual to terrorist activities have been obtained by torture. Additionally, this procedural aspect is also could be seen as related with already mentioned element 'receiving country's human rights reputation'. Thus, the admission of evidences obtained through torture would not only make the trial itself illegal but also substitutes the non - fulfillment of the element, which is significant in the assessment of the reliability of diplomatic assurances. On the other hand, it is still difficult to speculate on this particular fair trial procedural safeguard prevalence in current jurisprudence of the Court, because the issue is not yet well developed and it is not yet clear how the court will decide on similar future cases and whether this, from the first glance expanded approach towards procedural safeguards will be well – established.

To sum up, after the famous case of Othman (Abu Qatada) v. The United Kingdom, the expulsion with assurances could not only be in a violation of article 3 taken together in conjunction with article 13 or others, but also in a violation of article 6 alone where the 'flagrant denial of fair trial' occurs. Thus, with this shift, ECtHR has expanded the normative content of *non – refoulement* by including the possibility of violations of the right to fair trial. However, it is hard to appreciate how sufficient procedural safeguards are required for the individual in cases of "systematic deficiencies" or where receiving States are 'incapable of properly investigating allegations of torture and excluding torture evidences". In any case, Court seems to be gradually attaching more weight and clarity to the respect of human rights in every case of removal.

2.2. The analyses of jurisprudence of the United Nations Human Rights bodies

The approach providing critique or acceptance coming from UN treaty – monitoring bodies (whose decisions are not generally considered binding on States, but they do represent a reasoned interpretation of the relevant treaty to which the States parties have agreed to be legally bound), should be taken into account when considering DA's legality, its criteria or procedural safeguards. The corresponding quasi – judicial bodies which provide authoritative interpretations and views an individual petitions are the United Nations Human Rights Committee (UNHRC) and the United Nation Committee against Torture (CAT Committee). Since it is already known, that some legal basis for DA's could be found under international law – the UNHRC body works in regards to ICCPR and supervises its interpretation by giving authoritative General Comments.

[190] *El Haski v. Belgium*, no. 649/08, ECHR 2012, para 90, 99.

Already in 1992 it made a link of article 7 of ICCPR to the principle of *non-refoulement*, which is a key principle in the case of DA's, when stated: *"State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"*.[191] In this regard, State parties were induced to indicate in their reports which measures they have adopted to stop the danger. With regards to CAT Committee - it is already over 25 years that CAT Committee, which is established under 1984 UN Convention against Torture, is promoting and deepening protection provided for individuals. Committee is adopting decisions and recommendations on individual claims which may give some guidance for legal bodies of international law.

Therefore, in this Paragraph the researcher will analyse the case – law that was before human rights bodies – United Nations Human Rights Committee and United Nations Committee against Torture - involving diplomatic assurances. More specifically, the researcher will analyse the key requirements that were considered as significant for DA's assessment and will reveal the key criteria and elements of Diplomatic assurances as well as procedural safeguards that were examined and currently could be seen as well – established conditions in the light of adopted decisions and recommendations of these bodies.

2.2.1. Criteria of diplomatic assurances

Since the International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment include the provisions of the principle of *non – refoulement*, which is related with DA's use, in this sub – paragraph focus will be on jurisprudence regarding criteria of DA's provided by UNHRC and the CAT Committee.

Before delving deeper, the researcher wants to remind, that general approach coming from Committees regarding DA's is quite similar. Both, the CAT Committee and UNHRC in 2007 expressed concerns in regards of employment of DA's*: "When determining the applicability of non – refoulement obligations under article 3 of the Convention, the State party should only rely on 'diplomatic assurances' in regards to states which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case"*[192], additionally, the Human Rights Committee highlighted the same great caution, that has

[191] Human Rights Committee (HRC), ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para 9. Retrieved 24th March 2015 at at: http://www.refworld.org/docid/453883fb0.html . (ICCPR General Comment No. 20)

[192] Jurisprudence of the CAT Committee. Part IV. P.227. Retrieved on 20th April 2015 at: http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf; also see Committee against Torture. Concluding Observations on the US, UN doc. CAT/C/USA/CO/2, [2006], para 21.

to be applied in the use of DA's against torture: *"The State party should exercise the utmost care in the use of diplomatic assurances<…>"*[193]. On the other hand, it seems that common stance was not to reject their use completely, but to assert certain criteria and elements that could help for diplomatic assurances to be seen as sufficient safeguard against torture and other prohibited treatment. Thus, as far the assurances are viewed as one fact out of many that affect the risk assessment of an individual concerned, the main question is whether the assurances constitute sufficient protection to alter that risk. Therefore, to understand how it works and which conditions are well – established as being the ones that needs to be presented in all cases, there is a great need to look to Committee's case – by – case examinations.

First of all, according to article 3 of the CAT Convention or article 7 of ICCPR while assessing, whether removal of the foreigner has been violated, there is clearly expressed need for substantial grounds for believing that a foreigner concerned would be in danger of being subjected to torture or other serious harm.[194] Accordingly, the first key requirement that is systematically used by CAT Committee and UNHRC and that makes forced removal unlawful is the establishment of 'personal, real and foreseeable risk' that the foreigner will be subjected to torture upon removal with assurances or in other words that are used by UNHRC the establishment of 'real risk' (the researcher will use the 'personal, real and foreseeable risk' term for further explanation). Second criteria that has to be assessed before going further is the presence of a 'consistent pattern of gross, flagrant or mass violations of human rights' in the receiving country.

The essence of the first criteria is to establish, if the person concerned was personally at real risk. Recent jurisprudence substantiates this observation and the following examples will reveal already developed issues related to it. One of the examples is the case *Kalinichenko v. Morocco* [195] where it was considered by the CAT Committees that individual was at 'personal, real and foreseeable risk', because his three close business partners were either found dead or disappeared. Moreover, the foreigner himself had already received death threats from organized groups, following which he decided to leave Russian Federation. Another great example of required risk is *Abichou v. Germany* [196]case, where CAT Committee noted the significance of fact, that two other defendants in the same case as applicant have been already tortured in order to extract confessions from them, also it pointed out the fact that the testimony of the two defendants

[193]Human Rights Committee. Concluding Observations: United States of America, CCPR/C/USA/CO/3/rev.1, [2006]. Retrieved on 20th April 2015 at: http://www.state.gov/documents/organization/133837.pdf.
[194] Committee against Torture, *supra* note 83, para 13.3.
[195] Committee against Torture. Decision on *Alexey Kalinichenko v. Morocco*. Forty – seven session, Communication No. 428/2010. U.N. Doc. CAT/C/47/D/428/2010. [2012], para 15.6. Retrieved on 15 May 2015 at: http://www.bayefsky.com/pdf/morocco_t5_cat_428_2010.pdf.
[196]Committee against Torture. Decision on *Inass Abichou v. Germany*, fiftieth session, Communication No. 430/2010. U.N. Doc. CAT/C/50/D/430/2010, [2013], para 11.7.

ants and the complaints of torture that they lodged before Tunisian courts were dismissed without verification or investigation further substantiates the highly probable risk to which person was subjected. Moreover, Tunisia was known as routinely resorting to widespread use of torture against those, who were detained for political reasons or charged with ordinary criminal crimes. Therefore, Committee concluded that in these circumstances, the 'personal, real and foreseeable risk' was well demonstrated. The UNHRC calls this risk assessment in a different way, but from the case law it basically means the same. In recent its case *Valetus v. Kazakstan*[197] Human Rights Committee has again reiterated the significance of existence of substantial grounds for believing that an individual concerned will face a 'real risk' of repairable harm. In this case, in regards of real risk assessment the Committee noted the fact, that applicant has sustained the severe bodily injuries, while in detention. Also it stressed the fact, that State has failed to explain why it rejected applicant's claims towards torture, moreover, the medical forensic examination was not carried out prior foreigner's removal. All this information was relevant for the Committee to assess and later constitute the 'real risk' of the applicant. Therefore, following first criteria, the determination of foreigner's personal, real and foreseeable risk of being subjected to torture has to be established in order to claim that foreigner could not be expelled, even with employment of diplomatic assurances.

However, it's almost inconceivable to establish that foreigner will be posed to prohibited treatment in a case of expulsion only by establishing the personal risk alone. Therefore, the presence of a 'consistent pattern of gross, flagrant or mass violations of human rights in the receiving country' could be seen as another criteria in the cumulative assessment of risk of person to be subjected to torture upon diplomatic assurances. As well vice versa, according to the jurisprudence of CAT Committee, it is not sufficient to establish the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the receiving country to consider the diplomatic assurances as unreliable. Thus, it follows that both criteria substantiates each other. In many cases Committee has reiterated the significance of 'consistent pattern of gross, flagrant or mass violations of human rights in the receiving country' criteria. However, as it was restated in recent 2012 case, *Abdussamatov and 28 other v. Kazakhstan*[198], assessing the violation of article 3 of the CAT Convention, this criteria is significant but not yet determinative alone.[199] It stated

[197] Human Rights Committee. Decision on *Nikolai Valetov v. Kazakstan*. 110th session. Communication No. 2104/2011. U.N. Doc. CCPR/C/110/D/2104/2011. [2014], para 14.2, 14.4. Retrieved on 15 May 2015 at: http://www1.umn.edu/humanrts/undocs/2104-2011.html.

[198] Committee against Torture, Decision on *Toirjon Abdussamatov and 28 others v. Kazakhstan*. Forty – eighth session. Communication No.444/2010, CAT/C/48/D/444/2010. [2012] para 13.3; also see UN Committee against Torture, Forty – seven session, *Alexey Kalinichenko v. Morocco*, *supra* note 195, para. 15.3.; *Inass Abichou v. Germany*, supra note 196, para. 11.4.

[199]Committee against Torture. Decision on *S.M. v. Switzerland*. Forty – ninth session. Communication No. 406/2009. U.N. Doc. CAT/C/49/D/406/2009. [2013], para. 7.6.

that absence of such a situation does not mean that a person might not be subjected to torture in his or her specific circumstances. On the other hand, the Committee always express its concerns over it: *"it expressed its concerns about numerous, ongoing and consistent allegations of routine use of torture and other cruel, inhuman or degrading treatment or punishment by law enforcement or investigating officials <…>"* [200]. However, there are some opinions that Committee's jurisprudence is moving towards the acceptance of this criteria as being a decisive one, in the situations where highly disordered internal situation are found and even when a 'personal risk' is not specifically proven.[201] To conclude, following the jurisprudence of the Committees the presence of this criteria being as supplementing the first one is well - established, however, the presence of it as being decisive factor is seems to be yet on the way.

2.2.2. Elements of diplomatic assurances

In order to substantiate the above mentioned two criteria in the risk assessment procedure and in such a way to determine the substantial grounds, the researched now will turn to elements that were found to be significant in the jurisprudence of the international human rights bodies. Therefore, in this sub – section, the DA's issue is being examined in the light of the information that was known for the sending state or ought to have been known to it at the time of transfer. The researcher noticed that Committees in some cases has already expressed the tendencies to mention which information is considered to be as the most important for them in the real risk assessment of ill –treatment when employing DA's: *"The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements that are relevant to the overall determination…"*[202]Accordingly, as both Committees have pointed out, the substantial grounds for believing that person would be posed to danger, have to be decided in the light of the information that was known, or ought to have been known at the time of the removal. Therefore, it will be revealed, which particular elements are well – established in the jurisprudence of Committees.

First element which could be seen as significant one is 'the position of individual' concerned. It has been many times confirmed in the jurisprudence of human rights bodies. In regards of DA's, both Committees have expressed the need to determine, whether DA's in the specific cases were of the nature to eliminate all reasonable doubts that the foreigners in question

[200] *Ibid*., para. 13.6.
[201]Menendez, F., M., M. Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees. Refugee Survey Quarterly (2015). 2015, p. 9, 10. Retrieved on 15 May 2015 at: http://rsq.oxfordjournals.org/content/34/1/61.abstract
[202]*Nikolai Valetov v. Kazakstan*, *supra* note 197, para 14.5;

would be subjected to torture upon their returns. The reasonable doubts related to the position of an individual has occurred in the expulsion case – *Agiza v. Sweden*[203], where CAT Committee expressed an opinion that DA's obtained by the Sweden from Egypt were not sufficient to protect the foreigner from serious harm. This very well - known case from 2005 is still loudly discussed. From the first step of assessment of the calculus risk, the CAT Committee turned to the issue of the known fact that Egypt resorted to consistent and widespread use of torture against detainees, specifically targeting those who were held as detainees for political and security reasons.[204] The applicant concerned had been particularly wanted for the alleged terrorist activities. Another recent example is 2012 case *Boily v. Canada*[205]. CAT Committee was in particular concern because the sending state did not take into account the fact, that a foreigner would be sent back to prison from which he had escaped and in which he had been allegedly mistreated by the officers from the police station. Another case in which the significance of the profile of the individuals concerned was reiterated is *Abdussamatov and 28 others v. Kazakhstan*[206]. The CAT Committee noted that the use of torture and ill – treatment in Uzbekistan remains systematic, but most significantly it stressed the fact that Muslims practicing their faith outside the official state control as well as persons charged with religious extremism and those who attempt to overthrow the constitutional order – are specifically targeted. Additionally, this information was related to the fact that all 29 complainants were Muslims who were practicing their religious beliefs outside of official Uzbek institutions or who belonged to religious extremist organizations. These considerations raised reasonable doubts for the Committee that the foreigner would not be subjected to torture upon their return even with diplomatic assurances. Therefore, these cases and many others has shown the established significance of the element 'position of individual'. It is well – established by both Committees that the information related to the position of the foreigner is relevant for the determination of the substantial grounds for believing that person in question would be posed to prohibited treatment. Therefore, this element is considered as relevant for the answer to the questions: whether the risk was sufficiently established; whether diplomatic assurances were able to alter that risk, and thus, in the situation of reasonable doubts related to it – has to be evaluated.

Another element, that seems to be relevant for the Committees as well as for the ECtHR while determining the reliability of diplomatic assurances is the 'receiving state's human right reputation'. There is some significant jurisprudence maintaining this element. The CAT Committee has acknowledged its awareness of highly precarious human rights reputation in the

[203] *Agiza v. Sweden*, *supra* note 84.
[204] *Ibid*., para 13.4.
[205] Committee against Torture. Decision on *Regent Boily v. Canada*, Forty – seventh session. Communication No. 327/2007. U.N. Doc. CAT/C/47/D/327/2007. [2012], para 14.3, 14.5.
[206] *Toirjon Abdussamatov and 28 others v. Kazakhstan*, supra note 198, para. 13.5, 13.7.

cases where the receiving state has shown the tendency not to abide itself by international human rights obligations or by bilateral agreements in question. Committee has expressed concerns regarding the issue of DA's in the decision of 2013 in case *Abichou v. Germany*[207], because the practice already three times has shown that DA's provided by Tunisia were not honoured. Additionally, the Committee considered and related to this issue the actual human rights situation in the receiving country. According to CAT Committee, it should have been known for the sending State that at the removal time in Tunisia was seen and by numerous non- governmental sources reported widespread and frequent use of torture and ill – treatment. Therefore, it found a violation of article 3 of the CAT Convention, by declaring that this obvious risk of ill – treatment was not sufficiently removed by DA's, which were too vague and did not specifically referred to protection against it. Also, in the opinion of UNHRC, it is significant to determine the prevailing circumstances in the receiving state at a material time in order to assess the existence of a real risk. In the case *Valetov v. Kazakhstan*[208], Committee pointed to the receiving states reputation regarding human rights. It stated that to date representatives of Embassy of Kazakhstan in Kyrgyzstan were unable to visit the removed person at the place of his detention, because the permission to do so was refused by the Kyrgyz authorities. That clearly showed the reluctance to cooperate in regards of human rights and to abide itself by the DA's itself. Additionally, Committee recalled that it should have been known for the sending State that there were credible public reports about widespread use of torture against detainees in Kyrgyzstan, which had to be taken into account when evaluating the real risk of irreparable harm. On the other hand, too general allegations in regards of 'receiving state's human rights reputation' are not sufficient alone to conclude 'foreseeable, real and personal risk' of being subjected to prohibited treatment. It was confirmed by CAT Committee in *L.J.R. v. Australia*[209] case, where despite the facts substantiating the existence of brutality, excessive use of force by U.S. law enforcement personnel, ill treatment of vulnerable groups and racial minorities and no appropriate measures to combat it, the Committee did not find itself satisfied by mere this fact. It was explained stating that applicant did not established the risk that would be faced personally by him: "*No significant evidence is provided either that the conditions in the prison or prison in which he would be held in California generally amount to torture…*" [210] Thus, the too vague and general nature of the existing abuses in the receiving country is not itself sufficiently determinative factor to constitute that element will establish the real risk and additionally the non – existence of the possibility to rely upon DA's,

[207] *Inass Abichou v. Germany*, *supra* note 196, para. 8.6, 11.5, 11.6, 11.7.
[208] *Nikolai Valetov v. Kazakstan*, supra note 197, para. 14.5.
[209] Committee against Torture. Decision on *L.J.R. v. Australia*. Forty – first session. Communication No. 316/2007. U.N. Doc. CAT/C/41/D/316/2007. [2008], para 7.4, 7.7.
[210] *Ibid.*, para. 7.5.

because the personal risk must always substantiate it. To sum up, the 'receiving state's human rights reputation' is significant element to assess and judging from the jurisprudence, it is established, that when the reasonable doubts occurs in relation to it, the assessment has to be done. However, developing current practice has established that, too vague and general nature of human rights abuses in receiving state would not alone be considered as factor fulfilling the element and thus, the enhanced personal risk in such a situations has to be established.

The third element which seems to be the most significant in the assessment process while eliminating all reasonable doubts to be sure that individual concerned would not be subjected to prohibited treatment if removed upon DA's is the 'post – transfer mechanism' element. The value of DA's as a guarantee for lawfulness of removal has been already many time considered by the Committees in regards of the existence and adequacy of the post - transfer mechanisms. The following cases, will reveal the matters that has attracted considerable concerns of the Committee in regards of the element 'post – transfer mechanism'. The great concerns and at the same time the significance of the element was established already in 2006. UNHCR in *Alzery v. Sweden* case has heavily criticized Swedish Government and its actions that were related to article 7 of ICCPR.[211] In this case Sweden has acquired DA's and relied upon them regardless of the well – known and documented facts that torture was used in Egyptian prisons. The case concerned expulsions of Mr. Alzery, Egyptian national who was suspected of terrorism activities. The main argument of Sweden was that primary responsibility lays down with Egyptian authorities and thus, it rather represents a clear breach of their bilateral undertakings – DA's - but not a violation regarding Sweden's obligations under international law, more specifically – breach of article 7 of ICCPR. However, according to Committee, Sweden has relied upon DA's only by trusting Egypt and believing that the risk of serious harm was sufficiently reduced. One of the decisive reasons, why Committee has considered DA's rather as promise but not as an effective tool for reducing the risk, was that DA's contained no mechanism of their enforcement. In this particular case it meant: the visits of Swedish ambassador to check the treatment of returnee were held only after 5 weeks after expulsion was performed – it was considered as too long period to be regarded as the effective monitoring; no insistence for private access to the detainee was started; inclusion of appropriate and forensic expertise was not commenced.[212] In the *Agiza v. Sweden*[213] case, the CAT Committee came out with the very similar observations as UNHRC in Alzery case. In the more recent case of

[211] *Mohamed Alzery v. Sweden*, *supra* note 26.
[212] *Mohamed Alzery v. Sweden*, *supra* note 26; Also see United Nations. Selected Decisions of the Human Rights Committee under the Optional Protocol International Covenant on Civil and Political Rights. United Nations Publications CCPR/C/OP/9. New York & Geneva. 2008, P. 263, para. 11.5. Retrieved on 25 March 2015 at: http://www.ohchr.org/Documents/Publications/SelDec_9_en.pdf.
[213] *Agiza v. Sweden*, *supra* note 84, para 13.4.

Kalinichenko v. Morocco[214] Committee has specifically stressed the need to establish and agree upon the follow – up mechanism in the DA's. The need was specifically pointed to situations, where human rights reputation of the receiving country and the situation of the individual concerned raise big doubts for the possibility to alter the risk at all. In 2007 another decision in *Pelit v. Azerbaijan*[215] case related to post – transfer monitoring was issued by CAT Committee. This time it noted that notwithstanding the fact that post - transfer monitoring took place at some point and there was no doubts about the existence of it, the adequacy of agreed post – transfer monitoring raised doubts for the Committee, simply because sending party did not supply DA's in order to ascertain it. The more detailed case occurred in 2012 case *Abdussamatov and 28 others v. Kazakhstan*[216]. The Committee highlighted the fact that Uzbekistan assured that international organizations will be able to monitor the detention places was not effective assurance. First of all, the rules of appointed organization did not allow any reports to be made to the sending state authorities and second of all, any other organizations did not get an access to the facilities of detention. Therefore, without any other evidences regarding post –transfer monitoring, it was concluded that sending state has failed to establish the details of its effective engagement in monitoring process and thus did not convince the Committee that DA's contained objective, impartial and sufficiently trustworthy post – return monitoring. Further, on the effective implementation of 'post – return monitoring' mechanism CAT Committee expressed its view in the very recent case of 2014 *Valetov v. Kazakhstan*[217]. In this case it specifically emphasized that*: "<…> at the very minimum, the assurances procured should contain a monitoring mechanism and be safeguarded by practical arrangement as would provide for their effective implementation by the sending and receiving states"*[218]. Therefore, it was explained that such actions as refusal to provide an access to visit a foreigner in the place of detention and the fact sending state did not react to that refusal shows the absence of practical arrangement as well as the lack of sufficient efforts by both countries to ensure implementation of it. Thus, taking into account all the concerns and still developing understanding on what could be considered as adequate 'post - transfer monitoring', this element could be seen as stable one in the assessment procedure, that needs to be presented in all cases. Furthermore, the well – established that without practical application of assurances, meaning the adequate post – transfer monitoring mechanism, the ineffectiveness of DA's as a whole to protect the foreigner from the risk of torture would be concluded.

[214] *Alexey Kalinichenko v. Morocco*, *supra* note 195, para. 15.6, 17.
[215] UN Committee against Torture, thirty – eighth session, *Elif Pelit v. Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005, 5 June 2007, para. 11.
[216] *Toirjon Abdussamatov and 28 others v. Kazakhstan*, supra note 198, para 13.5, 13.10.
[217] *Nikolai Valetov v. Kazakstan*, supra note 197, para.14.6, 14.7.
[218] *Ibid.* para. 14.5.

To sum up what was said above, the jurisprudence of the both Committees is still clarifying in which manner the DA's could be accepted as a sufficient safeguard in the assessment of the risk of torture. On the other hand, there are already some case – law examples which has developed the assessment procedure in regards of lawfulness of expulsion when DA's are employed. It could be concluded, that DA's before the international human rights bodies seems to be considered in the light of:

- The assessment of manifest risk, which consist of two main criteria: real risk (or as CAT Committee calls it - personal, real and foreseeable risk) and the existence of a consistent pattern of gross, flagrant or mass violations of human rights;
- The information that was known for the sending state or ought to have been known to it at the time of transfer. The key elements that are usually being considered to substantiate the risk assessment are these: position of individual, reputation of the receiving country, the existence of adequate post – transfer monitoring mechanism.

2.2.3. Procedural safeguards

The expulsion of foreigners must also comply with the necessary procedural requirements as it was revealed in Section 1 of the paper. The researcher now will examine the procedural safeguards that should be put or are in the lack at the moment for DA's to be considered as reliable tool in international law. It will be looked from the perspective of jurisprudence of UN human rights bodies to reveal which particular safeguards are well – established as being currently considered in all cases related with DA's. Starting with relevant jurisprudence of CAT Committee, to reveal the value of DA's as a guarantee for a lawfulness of a removal there are number of cases that can be identified. On the other hand, all these cases have touched the same procedural issues that have been touched by the ECtHR, which shows the unified acceptance on their necessity.

From the perspective of procedural safeguards it is of great significance to start from well – developed case law regarding two procedural safeguards that are closely related between each other. The right to challenge the decision and the right to independent review have been recalled by Committees in their jurisprudence not in one case. In two well - known cases against Sweden, the *Agiza v. Sweden*[219] before the CAT Committee and *Alzery v. Sweden*[220] before the UNHRC, the procedural assessment of the risk related to prohibited treatment was considered and evaluated. In the latter case, UNHRC pointed out to the issue of the absence to review the Cabinet's decision

[219] *Agiza v. Sweden, supra* note 84.
[220] *Mohamed Alzery v. Sweden, supra* note 26, para.11.8.

to expel Mr. Alzery. Under ICCPR, article 2 requires effective remedy for violations of article 7, this particularly means that person subjected to expulsion must be in a position to have an opportunity for an independent review of his decision to be expelled before it takes place. Otherwise, it would mean that an individual is left without any opportunity to challenge decision against him prior to his expulsion. In this case Committee has also welcomed the specialized migration courts to review decisions of expulsion in order to avoid such breaches of International law as occurred in present case. Therefore, the Committee concluded that bearing in mind the presence of a real risk of torture and the absence of independent review of a decision on expulsion, these actions of sending state amounted to violation of article 7 reading it in a conjunction with article 2 of ICCPR. Similar case is *Agiza v. Sweden*, where Committee has observed that individual was subjected to a real risk of torture in Egypt in the event of expulsion. Particularly relevant for this part of the paper is the observed procedural assessment by the Committee. First of all, CAT Committee came out with the similar observations as UNHRC in case of *Alzery v. Sweden*: there was absence of an independent and impartial review of a decision to expel. This right of an appeal is enshrined under article 3 of UN Convention against Torture. It requires in coherence with the nature of *non-refoulement* principle – an opportunity to have effective, independent and impartial review before decision to be expelled will be put in force. At this point very significant emphasis was expressed towards appropriate review mechanisms. Committee stated that even in the case of security concerns, the Conventional protection is absolute and thus, individuals has to be afforded by the appropriate procedural safeguards.[221] It has to be pointed out, that after these cases, Government of Sweden itself has been providing the Committee with the follow – up information and comments in respect of these two very well known cases: *Agiza v. Sweden* and *Alzery v. Sweden* in order to repair the situation. Therefore, it has responded in 2009 to the Committee's comments in the Government's follow up reply to the 2008 Concluding observations[222] and later in 2013 in the State party report.[223] Turning to even more recent jurisprudence of the Committees, another issue – the adequate time to prepare the defence – that is related to both above mentioned procedural rights occurs. It was being developed by the CAT Committee in 2012, in case of *Abdussamatov and 28 others v. Kazakhstan*[224], where it has found itself convinced by the

[221] *Agiza v. Sweden*, *supra* note 84, para 13.8.
[222] Committee Against Torture, Concluding observations of the Committee against Torture: Sweden, U.N. Doc. CAT/C/SWE/CO/5. [2008], para 14 – 23. Retrieved on 26th March 2015 at: http://www.refworld.org/docid/4885cf85c.html.
[223]Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, pursuant to the optional reporting procedure: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: combined 6th and 7th periodic reports of States parties due in 2012: Sweden, U.N. Doc.CAT/C/SWE/6-7, [2013], para 123. Retrieved on 26th March 2015 at: http://www.refworld.org/docid/53c775774.html .
[224] *Toirjon Abdussamatov and 28 others v. Kazakhstan*, *supra* note 198, para. 13.9.

arguments of complainants and found a breach of article 3 of the CAT Convention. It was claimed by the applicants that the sending state did not provide with a sufficient time to prepare the defence on their accusations, they faced limited access to lawyers and interpretation and most importantly, the sending state did not individually examine the arguments raised by complainant's claims that they would face 'real, foreseeable and personal risk' of torture upon their return to Uzbekistan. Committee after assessment of all relevant factor, found a violation of article 3 of the CAT Convention, but did not express its opinion with regards of any other articles of the Convention. However, the decision has been clearly substantiated by the lack of adequate procedural safeguards.

The another more recent issue that has repeatedly raised concerns and which has even more established the significance of the right to independent review as a significant procedural safeguard among International Human Rights bodies in regards of diplomatic assurances is the United States reliance upon them. Accordingly, the united States have relied upon them without appropriate procedural safeguards, meaning that the adequate judicial mechanism for review was not provided for an individual. Committee was seeing the tendency of U.S. to disregard an obligation not to expose individuals to treatment prohibited by article 7 of ICCPR by using doubtful "more likely than not" standard[225]. UNHRC was concerned about allegations of removals and expulsions of individuals without the appropriate safeguards to prevent treatment prohibited by Covenant. Yet in 2006, Human Rights Committee has already called on the U.S. *"to adopt clear, transparent procedures with adequate judicial mechanism for review"* if using diplomatic assurances. [226] In this regard U. S. government in 2011 Report stated to UNHRC that situation has changed and corroborated it by the statement that the implementation of a Task Force Recommendations is commenced. Accordingly to it, the State Department from now on has obtained the new role in evaluation process of DA's; monitoring mechanism is foreseen in assurances and some governmental agencies has an obligation to submit annual reports on practise of transfers with assurances.[227] However, according to Human Rights Institute of Columbia Law School some significant gaps are left for the new policy to be accepted as having ability to change situation in U.S. on use of DA's. Regarding procedural safeguards - transparency element is clearly in a lack. First of all, the opportunity to review the assurances is doubtful, mainly because the only opportunity for the new policy on the review is an informal process executed by State Department and there is nothing about judicial review, which should be given as an option for individual

[225] The term used under United States law was explained in Section 1, paragraph 1.5.
[226] UN Human Rights Committee, *supra* note 193, p.5, para. 16.
[227] Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, 30th December 2011, para 285, 286. Retrieved on 15 May 2015 at: http://www.state.gov/j/drl/rls/179781.htm;

subjected to expulsion. Otherwise it means the deprivation of an individual right to challenge the decision, or in other words – to challenge the reliability of DA's. Furthermore, according to scholars, the Government did not specify how mentioned monitoring mechanism is going to work. It is unclear how exactly it will be conducted, who will be responsible for monitoring, how long it will take and what will be the frequency of checks and etc. Lastly, there were expressed concerns, that Report did not mention which agencies will be responsible for the preparation of annual Reports.[228] Moreover, the non- existence of such reports till that time, left many doubts for researchers.

Therefore, from the case – law of Committees the tendency to attach some weight on procedural safeguards, such as the well – established right to challenge the decision and the right to independent review has been accepted as significant safeguards that has to be provided for foreigners even in expulsion cases. Notwithstanding the fact that these safeguards alone would probably not constitute the unlawfulness of expulsion under DA's, but according to jurisprudence would definitely substantiate the decision and in conjunction with violation of prohibited treatment would constitute the DA's as being unreliable tool in altering the risk of foreigner.

Delving more deep to procedural safeguards, the is an emerged need to examine the Committees approach towards the newly developed acceptance of the right to fair trial, as a safeguard, that could be significant in evaluating the weight of DA's in expulsion cases. However, the UNHRC in its General Comment No. 13[229] on the right to fair trial as protected by article 14 of the ICCPR does not speak about this issue.

On the other hand, already in *Alzery v. Sweden* case, the applicant pointed to this issue and was trying to convince the Committee that his expulsion violated article 14 of the ICCPR[230]. Nevertheless, at that time Committee did not find itself prepared to make finding on fair trail issue, despite the fact, that no trial has occurred. On the other hand, as in Alzery case as well as in Abdussamatov it seems that Committees take into consideration this issue of fair trial while assessing the risk of torture or other prohibited treatment. Unlike the ECtHR, which has once

[228] Columbia Law School, Human Rights Institute. U.S. Compliance with the International Covenant on Civil and Political Rights, Suggested List of Issues to Country Report Task Force on the United States: 107th Session of the Human Rights Committee. Geneva. 2013, P. 11, 12. Retrieved on 25th March 2015 at: http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14521_E.pdf.

[229] Human Rights Committee (HRC), ICCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984. Retrieved on 23rd April 2015 at: http://www.refworld.org/docid/453883f90.html.

[230] *Mohamed Alzery v. Sweden*, *supra* note 26, para.11.9, also see Michaelsen, C. The renaissance of non – refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights. International and Comparative Law Quarterly. Volume 61, Issue 03, P. 750-765, 2012. P. 760. Retrieved on 23rd April 2015 at: http://journals.cambridge.org/abstract_S0020589312000243.

already accepted the possibility of article 6 of the ECHR alone to give rise to *non – refoulement*, the Committees have never done it so far and stand with their tentative position in this regard. On the other hand, the practice regarding such an acceptance of the right to fair trial is not yet well – established and it is not clear what will happen further. Furthermore, it must be kept in mind, that even if there have been many developments in international law to change the approach towards the procedural requirements necessity in expulsion cases, the wide margin of discretion with respect to them remains in states hands. This approach was based on opinions that*: "Procedure in matters of expulsion has developed in various countries under the impact of the principle that expulsion does not constitute a punishment, but a police measure taken by the government in the interest of the State"*.[231] The UNHRC already in 2002 expressed concerns in this regard related to DA's practise: "*When State party expels a person to another State on basis of assurances as to that person's treatments by the receiving State, it must institute credible mechanism for ensuring compliance by the receiving State with these assurances from the moment of expulsion"*.[232] Delving more deeply into the term 'credible mechanism', already in 2006 Thomas Hammarberg, the Council of Europe's commissioner for human rights, critically stated that DA's as such, in general, *"are not credible and also turned out to be ineffective in well – documented cases"*[233]. According to Oxford dictionaries definition of credible is *"something to be able to be believed; convincing"* or *"something capable of persuading people who something will happen or will be successful".[234]* From these definitions, the purpose of having 'credible mechanisms' is clear – to protect an individual. One of the credible mechanisms parts is to have credible procedural safeguards of diplomatic assurances.

All in all, taking into a count everything what was said, it seems that the relevant procedural safeguards from beginning should include the possibility of the affected person to challenge the basis for his/her decision that constitutes expulsion, before it takes place. It seems logical that it should be done before independent judge, and not before an informal review. It was also recommended by the set of policies in 2010 prepared by the University of Leiden that: *"Resort to diplomatic assurances can never per se obviate the risk of serious violations. Where diplomatic assurances are used as one element in the assessment of risk, they should be accompanied by rigorous safeguards, such as judicial review and effective post – return monitoring by transferring state*".[235] Therefore, it seems that non – existence of the possibility to challenge the diplomatic

[231] International Law Commission, *supra* note 68, para 598.
[232] Human Rights Committee, *supra* note 81, para. 12.
[233] Hammarberg, T, *supra* note 1.
[234]Oxford Dictionaries definition. Retrieved on 31 March 2015at: http://www.oxforddictionaries.com/definition/english/credible
[235]Schrijver, N. & Herik, L. Leiden Policy Recommendations on Counter-terrorism and International Law. Netherlands International Law Review, vol. 54 (2007), no. 3, P. 571-587. 2011, P.23, para 80. Retrieved on 25

assurances in the sending state yet before the removal of individual, the non – existence of independent judicial scrutiny of the claims and arguments presented by the foreigners subjected to removal and the non – existence of the right to fair trial are considered to be significant when determining the risk of prohibited treatment. Therefore, it is established that without adequate procedural safeguards it would be considered as the violation of procedural rights of an individual facing removal to a risk of torture under international law. Both, the ECtHR and the international human rights bodies seems to agree on the fact, that effective judicial scrutiny is very difficult after removal and do emphasize the risk of irreparable harm.[236]

2.3. National law and Jurisprudence

The aforementioned case – law from ECtHR, decisions by CAT Committee and UNHRC show that diplomatic assurances are clearly considered as a part which has to be evaluated in the risk assessment procedure against torture by these bodies. Now the researcher will turn to case – law in domestic courts and will reveal the existing tendencies in their jurisprudence in regards of diplomatic assurances. In this sub – section the researcher will focus on the jurisprudence that did not rule out DA's as it has neither been done by ECtHR. Also, the focus will be put on the analyses of jurisdictions that have issued the different approach towards the assessment and its scope while evaluating the credibility of DA's. Moreover, the analyses further will allow to compare researched national approaches with the one that been issued by ECtHR and the Committees.

To begin the analyses of domestic court's decisions in order to understand their stand of point on DA's it is worth to start from Canadian case – law. The Supreme Court's judgement in *Suresh case*[237] is important example to show because it could be considered to be the most different from the ones that were issued by human right bodies. This Supreme Court's judgement was based on controversial idea, that terrorism as a threat to national security must be balanced against the rights of individuals.[238] This balancing method is completely different way of evaluation procedure comparing it to assessment which is used in ECtHR and international human rights bodies. Mr. Suresh was decided to be deported from Canada by a decision of minister's delegate because of his involvement in the Tamil terrorist organization. The Government of Canada has

March 2015 at:
http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf.

[236] Jones, M. Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings. European Journal of Migration Law. 2006, P. 37, 38.

[237] *Suresh v. Canada*. Ministry of Citizenship and Immigration. 2002. Retrieved on 24th April at: http://www.canlii.org/en/ca/scc/doc/2002/2002scc1/2002scc1.html.

[238] Hasselberg, O., *supra* note 49, p. 76.

acquired diplomatic assurances from Sri Lanka in this way promising that the foreigner in question will not be tortured upon his return. In this particular judgement Canada Supreme court has clearly pointed out some key criteria that are being considered before it when evaluating the reliance on diplomatic assurances against torture. Thus, the Supreme Court has pointed out a number of substantial and procedural issues that are being considered before it in order to ensure that the foreigners are not going to be expelled to a risk of torture or death. It was stated that assessment of reliance on the DA's against torture is a fact driven inquiry for the court.[239] The human rights record of the receiving state, the personal risk for the claimant and the effective control in receiving country over its own security forces were the key elements that has been stressed out by the court.[240] Therefore, it was admitted that the receiving country has already reportedly engaged in illegal torture or allowed to do so on its territory and that due to this fact the enhanced risk is highly probable. Also, as a relevant factor to assess was held the element of effective control – in the cases where the receiving state is in fact unable to control the behaviour of its officials. Furthermore, the government's record in complying with its assurances was considered to be important element in the risk assessment procedure while evaluating the value of assurances of non – torture by foreign governments. On the other hand, although the Supreme Court has acknowledged the certain criteria and limitations for the DA's to be reliable, at the same time it acknowledged that the absolute international law bans could be limited on return where is a risk of torture in cases where national security interests are at stake and thus made an unprecedented qualification: *" We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified "*[241]. This court accepted a balancing test, which was widely criticised for permitting the derogation from absolute protection under international law. Following this decision international human rights bodies has advised Canada to fully comply with both, article 3 of the CAT Convention and article 7 of ICCPR, suggesting, that it is obliged to never expel, extradite, deport or otherwise remove person to a place where there is substantial risk to put persons in treatment or punishment which is contrary to these articles. Additionally it was repeated that protections are absolute, even in the context of national security concerns.[242] In general, the above example shows, how differently could be interpreted the international bans. On the other hand, till present Canada has not yet invoked the Suresh exception and is following quite similar evaluation process of diplomatic assurances as it is provided by human rights bodies. The Court while considering the reliability of DA's has been assessing such element as 'receiving State's human rights reputation'

[239] *Suresh v. Canada*, *supra* note 237, para 39.
[240] *Ibid*., para. 124,125.
[241] *Ibid*, para. 78.
[242] Jenkins, D. Rethinking Suresh: Refoulement to torture under Canada's Charter of Rights and Freedoms. Law Review 125. 2010, p. 148, 147. Retrieved on 24th April 2015 at: http://heinonline.org/HOL/Page?handle=hein.journals/alblr47&div=7&g_sent=1&collection=journals.

meaning the well documented torture practices and the absence of accountability regarding them.[243]

Another two jurisdictions that provided rather simple interpretation of the assessment procedure regarding diplomatic assurances had occurred in the Netherlands and later in Belgium. The judgements illustrated rather permissive approach towards evaluation procedure of DA's when considered in national security cases and thus are significant to understand the general approach by States towards DA's. The most significant fact to note is that cases showed initial reluctance by the states have proper assessment by the legal order. First of all, the Dutch district court in *Kesbir case*[244] found insufficient grounds to halt a removal order. Although the established fear of torture as well as the fear of fair trial was not completely unfounded, the district Court gave exclusive authority to Government to decide, whether to remove or not the foreigner. Later, the initial situation has changed and the Supreme Court of the Netherlands concluded that DA's could not be considered as sufficient guarantee, to prevent alleged abuses. The main criteria by the Dutch courts when assessing the reliance on DA's was to find out if the risk of torture or prohibited treatment could be altered by adequate assurances. The lack of adequacy was found in this case - they merely amounted to the general guarantee that Turkey would comply with its international treaty obligations. The Supreme Court of Netherlands concluded that assurances did not meet the adequacy criteria because they did not imply anything concrete and the mere fact that treatment will be according to applicable human rights conventions and Turkish laws was not sufficient to deem the assurances as adding any solace to the existing risk. Therefore, although the court clearly expressed the significance of adequacy criteria and consequently that without concrete guarantees for particular person it is not possible to fulfil this criteria[245], none of the courts in Netherlands have precise assessment procedure and were evaluating only one main 'adequacy' criteria. The similar issue occurred in Belgium jurisdiction. The same adequacy criteria was deemed to be significant in recent Belgium case before its Court of Appeal. In 2011, ethnic Chechen was wanted by Russian Federation and despite the fact that Court of Appeal was advising not to transfer Mr. Zarmaev, Belgian Minister of Justice allowed it.[246] This situation occurred, because in such

[243] *Mahjoub v. Canada*, Ministry of Citizenship and Immigration, 2006, para 68. Retrieved on 11 May 2015 at: http://reports.fja.gc.ca/eng/2006/2006fc1503/2006fc1503.html; also see Human Rights Watch. Cases Involving Diplomatic Assurances against Torture Developments since May 2005. January 2007, p. 7, 8. Retrieved on 11th May 2015 at: http://www.hrw.org/sites/default/files/reports/eu0107.pdf.
[244] Human Rights Watch, *supra* note 5, p. 75.
[245] Skoglund, L, *supra* note 153, p. 349, 350.
[246] Amnesty International. Belgium: Submission to the United Nations Committee against Torture. 51st session. 28 October 2015 – 22 November 2013. Amnesty International Publications. 2013, p. 24, 25, 26. Retrieved on 15 May 2015 at: https://www.amnesty.org/download/Documents/12000/eur450022013en.pdf.

national security case court was provided only with an 'advisory role'[247], because the last decision, whether to return foreigner or not, seems to be left for the Minister of Justice. The CAT Committee issued recommendations Another Therefore it shows the reluctance by the State itself to have a domestic legal assessment of the risk when relying on DA's in national security related cases and leaves some doubts in regards of a purpose of having DA's in a first place.

One more but this time more comprehensive example to look through is the United Kingdom (UK) and its domestic court's approach towards DA's and their interpretation in regards of risk assessment when relying upon DA's. It is so because UK is continuously seeking diplomatic assurances in national security related cases in order to deport those who pose a threat to UK and who would not otherwise be allowed to be deported because of the existence of the real risk of prohibited treatment they would face.[248] Moreover, the United Kingdom is considered to be one of the states that seeks for a new balance in regards of *"proper weight to the fundamental rights of citizens of contracting states who are threatened by terrorism"*[249]. Therefore, the UK has great experience in dealing with DA's. From the first glance it seems, that in *RB (Algeria) v. Secretary of State for the Home Department* case the four key requirements were developed by the House of Lords for an assessment of DA's reliability: *" the terms of the assurances had to be such that, if they were fulfilled, the person returned would not be subjected to treatment contrary to Article 3; the assurances had to be given in good faith; there had to be a sound objective basis for believing that the assurances would be fulfilled; fulfilment of the assurances had to be capable of being verified"*[250], which were supposed to show the proper scrutiny of the use of DA's by the domestic courts. Although these four requirements were related with those criteria and elements, developed by the ECtHR (the first three requirements are already with a vast part related to the receiving country's reputation, including the importance of the diplomatic relationships between receiving and sending countries, the general human rights records in receiving state, the ability to exercise

---

[247] *"A The State's representative explained that this is due to the possibility of including the National Preventative Mechanism*" Amnesty International. Press Release. Public Statement: Belgium falls short of its obligations on torture and other ill – treatment. Brussels [Interactive]. 27 November 2013. [Accessed 20-05-2015].http://www.amnesty.eu/en/news/press-releases/region/eu/belgium-falls-short-of-its-obligations-on-torture-and-other-ill-treatment-0679/#.VVyUFfntmko.

[248] Amnesty International. United Kingdom: Briefing to UN Committee against Torture. 50th session. Amnesty International Publications. 2013, p. 10. Retrieved on 15 May 2015 at: https://www.amnesty.org/download/Documents/12000/eur450022013en.pdf.

[249] *Ramzy v. The Netherlands*, supra note 53. Observations of the Government of Lithuania, Portugal, Slovakia and the United Kingdom, Application No. 25424/05, 21 November 2005, para. 3. Retrieved on 12th May 2015 at: http://www.redress.org/Government_intervenors_observations_in_Ramzy_case%20_21November.pdf; also see Vermeulen, M. Assessing Counter terrorism as a matter of human rights: Perspectives from European Court of Human Rights. European University Institute. 2015, p. 8. Retrieved on 12 May 2015 at: http://www.tandf.net/books/details/9781138854130/.

[250](*Algeria) (FC) and another v. Secretary of State for the Home Department*; OO (Jordan) (Original Respondent and Cross-appellant) v Secretary of State for the Home Department (Original Appellant and Cross- respondent. House of Lords of Appeal. 2009, para 23. Retrieved on 27th April 2015 at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/RBAlgeriajudgment.pdf.

the adequate degree of control over its agencies and officials (better known as criteria of 'effective control') also the receiving state's records in abiding itself by DA's), the blind eye was turned on the fact that wholesale breaches were well – documented at a lower level in Algeria. Furthermore, though the last requirement is also significantly related to the 'post – transfer monitoring' element of the ECtHR case –law, the Special Immigration Appeals Commission held that despite the fact that Algeria's refused to allow the post –transfer monitoring, it is sufficient for the verification that NGO's such as Amnesty International has been already able in certain cases to access to detainees.[251] In general, the conclusion of SIAC to allow the expulsion on DA's was based on the fact that Jordan itself is concerned for its own international reputation that leads it to ensure respect of DA's. The very similar credulous and complacent approach by domestic courts of UK was given in case of Othman (Abu Qatada) v. Secretary of State for the Home Department, where despite the fact of the well – documented general risk of torture in Jordan, contention that the DA's would be honoured was accepted and it was stated that Jordanian Government have a specific interest in not being seen by the Government of UK and the public in Jordan as having breached its word, that would be given to a country with which it has long enjoyed bilateral relations.[252] Therefore the researcher notes to a tendency in the United Kingdom to admit the general risk, but at the same time to deny the specific risk. Moreover, differently from international human rights bodies, SIAC has commented[253] that the political realities in receiving countries, the bilateral diplomatic relations matters more than the terminology of the assurances, while ECtHR and Committees has expressed the need to assess both these issues while considering reliability of DA's. Therefore, given examples has provided the approach of the national courts that is notably different comparing it with rather settled approach that was provided by the ECtHR and Committees. It is revealed that while assessing the credibility of assurances, states are rather minded to secure its nationals and public overall than to focus on due procedure or comprehensive examination related to foreigner's expulsion when employing DA's. In this section differences in assessment were revealed and thus the concerns towards effective fundamental human rights protection were recalled.

All in all, to summarize what was said in this Chapter, the researcher wants to emphasize that in the light of examples of few jurisdictions and the comprehensive analyses of the case –law of ECtHR and Committees, the appreciable differences regarding the scope of assessment are still visible. Indeed, the approach towards the scrutiny of diplomatic assurances against torture and

[251] Metcalfe, E. The false promise of assurances against torture. 1 Justice Journal. 2009, p. 78, 79.
[252] *Omar Othman (Abu Qatada) v. Secretary of State for the Home Department, supra* note 151, para 362.
[253] *(Algeria) (FC) and another v. Secretary of State for the Home Department*, supra note 249, para 126. Retrieved on 12 May 2015 at: http://www.refworld.org/docid/499be5b92.html.

other ill – treatment varies between jurisdictions. According to ECtHR and the Committees, in order to determine the existence of real risk of ill – treatment the examination must necessarily be a rigorous one. This necessarily rigorous examination was confirmed in the judgement of Chahal v. The United Kingdom. Court has stressed that this examination is in a view of the absolute character of article 3, which enshrines one of the fundamental values of the democratic societies making up in the Council of Europe.[254] *On the other hand, Court specifically underlined the issues relating to terrorist violence, which is so relevant for the States. Moreover, these concerns were emphasized in the case Othman v. United Kingdom*[255]*, where the ECtHR itself emphasize that throughout its working history, the court has been acutely conscious of the difficulties faced by States in protecting their population from such. Court has expressed his approval for states to be able to take a firm stand against those who contribute to such a violence. Nevertheless, Court has reiterated the well – established fact that in any way contracting state has to be careful with action of expulsion, because it may give rise for an issue under article 3 of the Convention, which accordingly may call the responsibility of the sending state. Accordingly, because of such a complicated issue of DA's that stands between two great statements, which are confirmed by different approached above, the researcher sees the need for a rigorous examination, that has to be carried out by each instance, while evaluating every case of expulsion. Therefore, the researcher is of the opinion, that irregular assessment of DA's is not sufficient to protect a foreigner from being removed to danger. By emphasizing this idea, Saadi case serves as good example, in which it was stated that: "it is not possible to weigh the risk of ill – treatment against the reasons put forward for the expulsion"*[256]*.*

[254] *Chahal v. The United Kingdom*, *supra* note 51, para 96. Also see *Vilvarajah and Others v. The United Kingdom*, *supra* note 177, para 108.
[255] *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 151, para 183, 184, 185, 187.
[256] *Saadi v. Italy*, *supra* note 35, para 125. Also see *Chahal v. The United Kingdom*, *supra* note 51, para 81.

3. THE FUTURE OF DIPLOMATIC ASSURANCES

As it was shown in two previous Chapters, DA's raise many questions in regards of its effect, normative quality and practice. In this Chapter, the researcher will reveal a possible future of this instrument, looking from the perspective of uneasy relationship between DA's and multilateral human rights system. Thus, having a reasonable need to clarify why this relationship is uneasy this Chapter will start with exploration of the DA's impact on *non – refoulement*. Further, after having explored the impact and consequently the future of this principle, in second section following the jurisprudence of the Court and Committees, the future for possible legal status that might be accepted as enhancing multilateral human rights system, will be revealed.

3.1. Possible future impact on the principle of *non – refoulement*

In recent years of State practice the tendency to employ diplomatic assurances in cases related with national security in order to expel dangerous foreigners has increased as it was shown in previous sections. Many examples, which were given above have revealed the great concerns of the State's that were created by the modern threat of terrorism. Additionally, it has pushed back the great concerns in regards of core human rights that are protected by the principle of *non - refoulement*. This situation highlighted worries in regards of clash between State's duties to protect foreigners from post – transfer ill – treatment and State's duty to protect its nationals as a public from dangerous foreigners within society. In this paragraph the researcher will elaborate on the impact by diplomatic assurances on the *non - refoulement* principle.

The ECtHR as well as UNHRC and the CAT Committee have already rejected the attempts of the States to have a national security exception to the principle of *non – refoulement*. ECtHR in *Chahal case* made it clear that despite the fact that it is aware of the modern threats, article 3 of Convention includes no provision of exceptions and no derogation from it even in the event of the public emergency, thus the prohibition under article 3 is equally absolute in expulsion cases. [257] The similar reasoning was given by Committees, stating that both, ICCPR and CAT Convention provides an absolute protection against transfer to face torture or IDTP and further did not develop any impact of it on the State's security interests in its General Comments[258]. Therefore, it seems that there is no exceptions to *non- refoulement*, because otherwise it would consequently lead to the exceptions of prohibited treatment. However, there are different views on the ground,

[257] *Chahal v. The United Kingdom*, *supra* note 51, para 78, 79.
[258] ICCPR General Comment No. 20, *supra* note 191, para. 9. Also see Padmanabhou, V., M. To transfer or not to transfer: Identifying and protecting relevant human rights interest in non – refoulement. Fordham Law Review, Vol. 80, 2011, 2010, p. 86. Retrieved on 30th April 2015 at: http://ssrn.com/abstract=1734923.

as the one provided by the Canadian Supreme Court. It has argued that Canadian immigration law in fact permits expulsion to a country where a person's life or freedom would be threatened if it is relevant to the risk coming from person that constitutes a threat to the security of Canada.[259] Therefore, Canadian Supreme Court, with the decision on the case of Suresh allowed balancing method in order to weigh the State's interest in combatting terrorism against basic human right not to be tortured. This balancing led to the observation that judgement has undermined anti – torture norm equally as it undermined the principle of *non – refoulement*. Therefore, in the light of these two divergent opinions, the impact on the principle by DA's has to be examined using ex –ante evaluation mechanism[260] in order to check if proclaimed rights are actually guaranteed by the diplomatic assurances or rather the employment of DA's provide lower level of protection and undermines the principle of *non – refoulement* in such a way. The main argument of the States in regards of this issue is that the employment of DA's is consistent with their *non – refoulement* duties[261], because DA's itself are designed to reduce the risk and not to lower the protection. Accordingly to the ex – ante evaluation, many indicators, such as the baseline or the starting point for the change, the vision of expected development of *non –refoulement* and comparison of systematic collection of data over time have to be assessed in order to reveal the path or directions of changes and thus to reveal the future impact of *non – refoulement*. As a starting point for the change, the researcher suggests to hold the concerns itself, that have been magnified by the threat of terrorism. The fact of concerns towards terrorism is significant for the change of principle of *non - refoulement*, because presumably the terrorism impelled the States to employ diplomatic assurances promising not to ill – treat transferred persons, when States feel a great need to expel the foreigner in any way. Further, remembering the cases in which both, court and Committees have not yet accepted assurances as sufficient protection, but rather provided future guidance on what needs to be included in DA's for the States - the vision of expected development of *non – refoulement* could be seen as becalmed. Merely because DA's that have been used so far were not fully in accordance with international law, risking to undermine absolute human rights and consequently the principle of *non – refoulement* and thus, the further development has not gone forward. Such cases as *Chahal, Arar, Agiza, Alzery* and more recent ones such as the *Saadi* are examples of the observed weakness in the practice of diplomatic assurances. Some academics have even argued that: *"State's obligation to protect the public from aliens suspected of terrorism*

[259] *Suresh v. Canada*, *supra* note 237, p. 4, 5.

[260] Commission of the European Communities. Report on Impact assessment and ex ante evaluation", Brussels, 6.4.2005, SEC (2005) 430, 2005. Retrieved on 4 May 2015 at: http://ec.europa.eu/research/future/pdf/comm_sec_2005_0430_1_en.pdf.

[261] Redress Trust (REDRESS) and the Immigration Law Practitioners' Association (ILPA). Non – refoulement under threat. Matrix Chambers, London. 2006, p. 14. Retrieved on 5 May 2015 at: http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf.

implied that the non – refoulement principle should no longer be considered an absolute rule"[262] probably because it is either circumvented or violated by the States. Moreover, the Human Rights groups are also critical about DA's because usually the States that are asked to give assurances have already violated their international commitments not to ill – treat the individuals. [263] Critical input into the vision of development of *non – refoulement* could be added also by a Columbian Law School Human Rights Institute report which concluded that the United States is more likely to use less formal assurances where it has no tenable alternatives to mitigate the threat to national security which is posed by dangerous foreigners.[264] On the other hand, the states that are employing DA's are claiming that the transfers complies with *non – refoulement* duties, however, citing DA's received from countries with notorious history of torturing transferees. To this regard, it is further undoubtedly worth to compare the systematic collection of data over time, meaning the analyses of improvements over the time according to the case – law with regard to DA's effectiveness. Many suggestions from ECtHR and Committees have come on how to improve the usage of DA's. The lack of post – transfer monitoring was indicated as a problem leading to violation of prohibited treatments, which consequently leads to the violation of *non – refoulement* principle. Also many DA's were indicated as not sufficient to provide an effective protection for transferee because such criteria as adequacy, effective control and credibility were not fulfilled as it was noted in the Section 2. All these obstacles that were left in DA's elevate doubts to the willingness of the States to comply fully with a duty of *non – refoulement* that does not protect its security interests. Therefore, it could be that uncertainty which is hovering around DA's is convenient for the countries.

To sum up, the absolute nature of *non –refoulement* is being clearly challenged by the employment of diplomatic assurances in expulsion cases. The negative impact by DA's on the absolute character of the principle leads to the question, how to solve the problems in order to stop the undermining process? On the other hand, the efforts to re – enhance the clarity over DA's, to identify the factors that are relevant to assess the sufficiency of DA's and the endeavour by the ECtHR and Committees to indicate the separate criteria and elements in case by case analyses shows the reluctance to accept the fact, that *non - refoulement* protection could be undermined. Therefore, the negative impact is seen, however, it is not enough yet to constitute that it will

[262]Schmid, E., *supra* note 109, p. 222.
[263] Padmanabhou, V., M., *supra* note 257, P. 100.
[264] Columbia law School Human Rights Institute. Promises to keep: Diplomatic Assurances against Torture in US Terrorism Transfers. New York. 2010, p. 31. Retrieved on 5th May at: http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf.

definitely change the nature of the *non – refoulement* from absolute to the protection with exceptions.

3.2. Possible legal status of DA's in International law

To date, neither the status nor the detailed guidelines on the use of DA's are indicted or well – defined. Presently there are seen only the efforts to indicate the existing obstacles in the use of diplomatic assurances, however, the real and tangible outcome, such as creation of human rights instruments that would govern the acceptable use of DA's is not yet achieved. Thereby, in order to establish the uniform and general acceptance on the legal status of DA's is not easy. Thus, in the light of increasing use of DA's, existing tendencies on the DA's use, and the examples above, in this sub – section the researcher will reveal the possible future legal status of assurances under international law.

Many States are indeed frequently negotiating about the employment of diplomatic assurances in expulsion cases. On the other hand, bearing in mind the extensive negotiating practice and challenges that have been met on the legal value and status of diplomatic assurances, the international law lecturer William Thomas Worster[265] is of the opinion that these vague constructions on the legal value are intentional by the States. This approach is most probably endorsed by the high level of secrecy coming from: torture related issues, war on terrorism and non – transparency that is associated with the practice of DA's. In this sub - section the legality of DA's is not questioned, but the researcher is rather trying to indicate the possible option for the legal status of DA's in future that is consequential following present case – law as to give the name for the intentionally concluded product of diplomatic exercise between two states.

The only real option that seems to be used by the ECtHR and Committees as far, is to hold assurances as part of the matrix that has to be considered when deciding upon the existence of substantial grounds to believe that there is a real risk of inhuman and prohibited treatment.[266] In Section 2 it was shown that the ECtHR appears to accept the fact that DA's may be and in most cases are relevant for the assessment of the seriousness of the risk that allegedly may be faced by the transferred foreigner. Following the reasoning in the cases assurances might be understood as serving additional evaluation of the risk of torture or other ill – treatment. The clear

[265] Worster, W., T. *supra* note 20, p. 27.
[266] Such approach was applied by ECtHR in its case of *Shamayev and 12 Others v. Georgia and Russia*, *supra* note 123 and by the Committee against Torture. Decision on *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*. U.N. Doc. CAT/C/31/D/199/2002, [2003]. Retrieved on 6th May 2015 at: http://www.refworld.org/docid/404887e73.html ; also see *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 151, para 57.

acknowledgement of DA's as being *"acceptable way to allay the risk of torture"*[267] was recalled in 2012 case of *Othman (Abu Qatada) v. The United Kingdom*. Although the DA's have been criticised for circumventing the absolute prohibition of torture and other ill – treatment, the Strasbourg court seems to be accepting assurances, but only when considered as sufficient guarantees of safety. Therefore, it has admitted that it is of particular importance to properly measure in each case, how the specific conditions (that have been indicated by the researcher as criteria, elements and procedural safeguards) were to be considered. As discussed above, the issue of DA's has been many times criticised and is still being a subject of continued concern by human rights bodies, such as Human Rights Watch and Amnesty International. Thus, an important consideration that raises some doubts regarding this possible future status is frequent lack of the effectiveness of DA's that means the errors in assessment that makes the DA's not being in line with the international standards, most importantly, with the principle of *non – refoulement* as it was provided in the previous section. Although, there are great concerns over the true political reasons when trying to establish the legal status of DA's, the researches was not elaborating on this issue precisely. Rather, the preceding analyses of ECtHR and Committees case – law shows that International and Regional systems of human rights, has a possible desire for a positive future of DA's, as to be accepted as a part of real risk assessment procedure. However, in order to have a real potential for that, the desire is not enough – human rights protection could not actually diminish by DA's employment in expulsion cases. Therefore, the elaboration for legislative set of uniform set of standards for DA's use is in a great need in the opinion of the researcher. Indeed, by relevant jurisprudence which was revealed in Chapter two, and multilateral human rights treaties, it is shown, that all foreigners, even if linked to terrorism, should be entitled to the same rights and freedoms as any other human being[268].

To sum up, by studying carefully all terms of an instrument from a legal point and particularly taking into account the efforts provided by the ECtHR and Committees to indicate more rigorously requirements and by emphasizing that some of them already seems to be established by the case – law as being determinative in each DA's case, the researcher is of the opinion that these institutions desire not to outlaw the DA's as such from international law, but rather improve the conditions on their practice. Therefore, the only possible future that is impelled by real option for an instrument of DA's to be accepted in international law is to be considered as

[267] Sangmeister, B. Deportation on the basis of Diplomatic assurances – permissible under the European Convention on Human Rights? : A Critical Analysis of the Judgment of the ECtHR in Abu Qatada v the United Kingdom (2012) and its Impact on the Jurisprudence of the ECtHR. Victoria University of Wellington. 2013, p. 26. Retrieved on 13th May 2015 at: http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/3363/thesis.pdf?sequence=1.

[268] Sitaropoulos, N. The Role and Limits of the European Court of Human Rights in Supervising State Security and Anti-Terrorism Measures Affecting Aliens' Rights. Martinus Nijhoff Publishers. 2011, p.37. Retrieved on 21 May 2015 at: http://ssrn.com/abstract=1948391.

a part of risk assessment. However, only when actually protecting the foreigner and providing sufficient guarantees, not anything that is lower than it is provided by existing human rights system.

All in all, bearing in mind that courts and human rights treaty bodies have not ruled out completely the DA's as such and considering the fact that they do have an impact on the alleged risk posed to concerned foreigner, it seems from this Chapter that possible legal status of DA's could be regarded as a part of the difficult test to assess the risk that could be faced by the foreigner upon removal. Therefore, to establish this status there is a need for future reforms. Future reforms, related to the establishment of minimum standards for the content and the common procedures of due process on expulsion, could benefit from the willing intention of the states to actually preserve the fundamental human rights and consequently the absolute nature of non –refoulement. Therefore only in such it could be accepted to see DA's as a part of matrix while assessing the risk.

CONCLUSIONS AND RECOMMENDATIONS

1. The analyses of challenges related to legal status of DA's, already from the first sub – section of the research, shows the inconsistency among states with regard to DA's acceptance. After analyses of efforts to provide DA's with a legal status, the lack of genuine belief in DA's effectiveness is seen. Various international and regional multilateral instruments gives a conclusion that diplomatic assurances are not constructed to exempt the sending states from their obligations under multilateral human rights laws. The research shows, that accordingly to commonly accepted human rights standards, the DA's are accepted only if their function is to enhance this multilateral human rights framework, no matter how dangerous the foreigner is. Therefore, the first statement of thesis is defended.

2. The research presents that the jurisprudence of European Court of Human Rights and United Nations Committee's: UNHRC and CAT Committee provide some clarity over the assessment of DA's as relevant part for the determination of a risk that may be faced by the foreigner. The researcher, following the above jurisprudence has indicated certain criteria (adequacy, effective and credibility) elements (transparency, specificity, authoritatively given, position and profile of individual, post transfer – monitoring and receiving state's human rights reputation) and procedural safeguards (right to challenge the decision, right to independent judiciary review and the right to fair trial) that could be provided as established requirements for the assurances to be considered as sufficiently reliable tool.

3. However, the research shows, that understanding related to sufficiency of DA's differs comparing it with and between national jurisdictions (practices range from introduction of balance test to poor evaluation procedure that assess only one criteria). Thus, without having unified standards established for DA's use - assurances could not be considered as promoter of human right and therefore second statement is defended.

4. The research concludes that currently, many examples have indicated weaknesses of DA's and the violations of *non – refoulement* were determined. Notwithstanding the fact that such absolute prohibition is stated by many multilateral human rights instruments (CAT Convention, Refugee Convention, etc.) the research shows, that in the national security cases and consequently expulsion of foreigners, current unclarified use of DA's threatens to erode the absolute nature of the principle of *non – refoulement.* Thus, although the case - law is moving towards more detailed requirements on DA's use, the absolute character

of *non – refoulement* is challenged and therefore strong declaration from the Court for its preservation yet is in a lack.

5. Accordingly, the researcher recommends, that in order for DA's to be capable of following the sending state's obligations under international human rights law, such as not to violate the prohibition against torture - to establish a clear set of uniform standards, such as these indicated by the researcher: 1) criteria 2) elements, 3) procedural safeguards. However, notwithstanding the fact, that following the case – law these requirements are seemed to be settled by repetitive practice of their examination and they are considered as being significant for risk assessment, it has been never explicitly indicated by judicial bodies that they have become obligatory. Therefore, according to the researcher, requirements have to become necessary to be checked before each national court prior the removal of the foreigner. This has to be done implementing the uniform set of standards. In such a way DA's could be in conformity with multilateral human rights laws. Otherwise, DA's should not be allowed to be employed, because dissenting practices with regard to propriety of assurances among states already too many times lead to human rights violations.

6. Furthermore, Governments position towards DA's itself and their true effect should be clarified by introducing the compulsory and publicly available Report system within the context of United Nations and thus to evaluate how the DA's were drafted, assessed by national authority and what post transfer monitoring measures were taken and treatment provided on each case. To implement this - independent organization or Special Rapporteur should be appointed by Human Rights Council to scrutinize annual Government Reports and respectively provide with estimation on the practice of DA's that should be also publicly available. Also, whereas ECtHR is heavily dealing with DA's, for a better collaboration – the Council of Europe should encourage the States to respect the Report system and abide by it respectively.

7. Lastly, national courts should establish clear rules on due process of evaluation of DA's before the foreigner could be expelled. Court should be able to demonstrate that no any other reasonable facts could be found that would substantiate the basis for torture or IDTP risk. Furthermore, it should be stated that standard 'more likely than not' is not sufficient to preserve the absolute principle of *non – refoulement*.

LIST OF REFERENCES

Legal acts:

1. American Convention on Human Rights (ACHR), San Jose (concluded on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123,< http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf>, accessed on 15 May 2015;
2. Commission for Human Rights, Note by the United Nations High Commissioner for Human Rights on the Protection of human rights and fundamental freedoms while countering terrorism, 61st Session, 7 February 2005, E/CN.4/2005/103, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=fasch_rpt> , accessed on 15 May 2015;
3. Commission of the European Communities. Report on Impact assessment and ex ante evaluation", Brussels, 6.4.2005, SEC (2005) 430, 2005. <http://ec.europa.eu/research/future/pdf/comm_sec_2005_0430_1_en.pdf>, accessed on 15 May 2015;
4. Commission on Human Rights, Note by the United Nations High Commissioner for Human Rights, Goldman, R., K. 61st session 7 February 2005, E/CN.4/2005/103, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=fasch_rpt> , accessed on 15 May 2015;
5. Commission on Human Rights, Report of the Special Rapporteur on the question of torture, Manfred Nowak, 62nd Session, 23 December 2005, E/CN.4/2006/6, < http://www.refworld.org/docid/441181ed6.html>, accessed on 15 May 2015;
6. Commissioner from Human Rights, Report by Mr. Alvaro Gil-Robles on his visit to Sweden, Strasbourg, 8 July 2004, CommDH (2004)13, <https://wcd.coe.int/ViewDoc.jsp?id=758789&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> accessed on 15 May 2015;
7. Committee of Ministers of the Council of Europe, Guidelines on human rights and the fight against terrorism, 804th Meeting, Strasbourg, 11 July 2002, No. H (2002) 4, < http://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf >, accessed on 15 May 2015;
8. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York (concluded on 10 December 1984, entered into force on 26 June 1987), 1465 UNTS 85 (CAT Convention), < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>, accessed 14 -05 -2015;

9. Convention Relating to the Status of Stateless Persons (Stateless Person Convention), New York (concluded on 28 September 1954, entered into force 6 June 1960), 360 UNTS 117, < http://www.ohchr.org/Documents/ProfessionalInterest/stateless.pdf >, accessed on 15 may 2015;
10. Council, Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (adopted on13 June 2002, entered into force 7 August 2002), Official Journal No. OJ L 190, 18-7-2002, < http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from=EN>, accessed on 15 May 2015;
11. European Commission, Working Document on The relationship between safeguarding internal security and complying with international protection obligations and instruments, Brussels, 2001, COM/2001/0743 final, < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0743>, accessed on 15 May 2015;
12. European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1951, entered into force on 3 September 1953), ETS 5; 213 UNTS 221 (ECHR) < http://www.refworld.org/docid/3ae6b3b04.html> , accessed on 15 – 05 – 2015;
13. European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, Strasbourg, 14 February 2007, (2006/2200(INI), < http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-32>, accessed on 15 May 2015;
14. Geneva Convention Relating to the Status of Refugees 1951, Geneva, (adopted on 14 December 1950, entered into force 22 April 1954), 189 UNTS 150, <http://www.unhcr.org/3b66c2aa10.html>, accessed on 15 May 2015;
15. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Rights Convention), New York (concluded on 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3, <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>, accessed on 15 May 2015;
16. International Covenant on Civil and Political Rights, New York (concluded on 16 December 1966, entered into force on 23 March 1976), 999 UNTS 171 (ICCPR) <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf >, accessed 15 – 05 -2015;
17. International Law Commission, Draft articles on Responsibility of States for internationally wrongful acts, (concluded on 9 August 2001, commended to governments by a resolution of the General Assembly on 12 December 2001), Supplement No. 10 (A/56/10), chp.IV.E.1, <http://www.refworld.org/docid/3ddb8f804.html>, accessed on 15 May 2015;

18. International Law Commission, Memorandum by the Secretariat on Expulsion of aliens, Geneva, 58th session, 10 July 2006, No. A/CN.4/565, <http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf>, accessed on 15 May 2015.
19. International Law Commission, Report on Draft articles on the expulsion of aliens, New York, 66th session, 2014, NO. A/69/10, <http://legal.un.org/ilc/sessions/66/2014Report%28A_69_10%29-advance.pdf>, accessed on 15 May 2015;
20. International Law Commission, Sixth Report on Expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur, Geneva, 19 March 2010, No. A/cn.4/625, < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/281/25/PDF/N1028125.pdf?OpenElement>, accessed on 15 May 2015;
21. International Vienna Convention on the Law of Treaties, Vienna (concluded on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331 (VCLT) <https://treaties.un.org/doc/Treaties/1980/01/19800127%2000 52%20AM/Ch_XXIII_01p.pdf>, accessed 14-05-2015;
22. Parliamentary Assembly of the Council of Europe, Recommendation 1624 (2003) on Common policy on migration and asylum, 29th Sitting, 30 September 2003, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1624.htm#_ftn1>, accessed on 15 May 2015;
23. Parliamentary Assembly, Resolution 1433 on Lawfulness of detentions by the United States in Guantánamo Bay, 10th Sitting, 26 April 2005. <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm#_ftn >, accessed on 15 May 2015;
24. Security Council Resolution 1566 (2004) at its 5053rd Meeting, 8 October 2004, No. S/RES/1566 (2004), < http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1566%20(2004)>;
25. Steering Committee for Human Rights (CDDH) and Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), 2nd Meeting Report, Strasbourg, 3 April 2006, No. DH-S-TER(2006)005, <http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf>, accessed on 15 May 2015;
26. Steering Committee for Human Rights (CDDH) and Group of Specialist on Human Rights and the fight against Terrorism (DH-S-TER), 1st Meeting Report, Strasbourg, 16 December, 2005, no. DH-S-TER (2005)018, <http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2005_018_en.pdf>, accessed on 15 Mat 2015;

27. UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of *Non-Refoulement*, November 1997, < http://www.refworld.org/docid/438c6d972.html>, accessed on 15 May 2015;
28. United Nations. Materials on the Responsibility of Sates for Internationally Wrongful Acts. New York. 2012, U.N. Doc. ST/LEG/SER B/25. United Nations Legislative Series. 2012 <http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf>.

Special literature:

1. Akhavi, A.S. Methods of Resolving Conflicts between Treaties. Nijhoff. 2003;
2. Amnesty International. Belgium: Submission to the United Nations Committee against Torture. 51st session. 28 October 2015 – 22 November 2013. Amnesty International Publications. 2013;
3. Amnesty International. United Kingdom: Briefing to UN Committee against Torture. 50th session. Amnesty International Publications. 2013 <https://www.amnesty.org/download/Documents/12000/eur450022013en.pdf>, accessed on 15 May 2015;
4. Columbia law School Human Rights Institute. Promises to keep: Diplomatic Assurances against Torture in US Terrorism Transfers. New York. 2010 <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf>, accessed on 15 May 2015;
5. Columbia Law School, Human Rights Institute. U.S. Compliance with the International Covenant on Civil and Political Rights, Suggested List of Issues to Country Report Task Force on the United States: 107th Session of the Human Rights Committee. Geneva. 2013 <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14521_E.pdf.> , accessed on 15 May 2015;
6. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Report of the Events Relating to Maher Arar: Factual Background. Volume II, Ottawa. Ontario. 2006 <http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf>, accessed on 15 may 2015;
7. Committee of International Human Rights of the Association of the Bar of the City of New York & Center for Human Rights and Global Justice. Torture by proxy: International and Domestic law applicable to "Extraordinary Renditions". New York: ABCNY & NYU School of Law. 2004, < http://chrgj.org/wp-content/uploads/2012/07/TortureByProxy.pdf>, accessed on 15 May 2015;
8. Crawford, J. The International law Commission's articles on State Responsibility: Introduction, text and Commentaries. Cambridge University Press. 2002.

9. Giuffre, M. An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom. International Human Rights Law Review 2 (2013), 266–293, 2012 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406183> accessed on 15 May 2015;
10. Guild, E. Asymmetrical sovereignty and the refugee: Diplomatic assurances and the failure of due process: Agiza v Sweden and Alzery v Sweden' in J Simeon book. Critical Issues in International Refugee Law: Strategies towards Interpretative Harmony CUP. Cambridge. 2010.
11. Hailbronner, K. EU Immigration and Asylum Law: Commentary on EU Regulations and Directives, Hart Publishing. Germany. 2010 <http://www.beckshop.de/fachbuch/inhaltsverzeichnis/INH_HailbronnerEUImmigrationan_978-3-406-60017-3_1A_Inhaltsverzeichnis.pdf>, accessed on 15 May 2015;
12. Hammarberg, T (CoE Commissioner for Human Rights). Torture can never, ever be accepted, 2001 <http://www.coe.int/t/commissioner/Viewpoints/060626_en.asp>, accessed on 15 May 2015;
13. Harvey, C. Is humanity enough: Refugees, asylum seekers and the rights regime. Contemporary Issues in Refugee Law, 2013;
14. International Commission of Jurists, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. Assessing Damage, Urging Action. Geneva. 2009 <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>, accessed on 15 May 2015;
15. Izumo, A. Diplomatic Assurances against torture and ill-treatment: European Court of Human Right Jurisprudence. Columbia University School of Law. Columbia Human Rights Law Review. 2011 <http://www3.law.columbia.edu/hrlr/hrlr_journal/42.1/Izumo.pdf >, accessed on 15 May 2015;
16. Jenkins, D. Rethinking Suresh: Refoulement to torture under Canada's Charter of Rights and Freedoms. Law Review 125. 2010 <http://heinonline.org/HOL/Page?handle=hein.journals/alblr47&div=7&g_sent=1&collection=journals>, accessed on 15 May 2015;
17. Johnson, J., G. The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11. International Criminal Law Review 11. 2011 < http://booksandjournals.brillonline.com/content/journals/10.1163/157181211x543911 >accessed on 15 May 2015;
18. Joint Committee on Human Rights. House of Lords, House of Commons. Counter-Terrorism, Policy and Human Rights: Terrorism Bill and related matters. Session 2005 – 06. Third Report. 2005 < http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf >, accessed on 15 May 2015;

19. Jones, K. Deportation with Assurances: Addressing Key Criticism. The International and Comparative Law Quarterly Vol. 57. <http://www.jstor.org/stable/20488195?seq=1#page_scan_tab_contents>, accessed 15 May 2015;
20. Jones, M. Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings. European Journal of Migration Law. 2006;
21. Larsaeus, N. The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment. Queen Elizabeth House, Department of International Development, University of Oxford. 2006 < http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp32-diplomatic-assurances-prevention-prohibited-treatment-2006.pdf >, accessed on 15 may 2015;
22. Londras, F. Shannon, Saadi and Ireland's reliance on Diplomatic Assurances under article 3 of the ECHR. Irish Yearbook of International Law. Oxford. 2009, <http://ssrn.com/abstract=1228342>, accessed on 15 May 2015;
23. Menendez, F., M., M. Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees. Refugee Survey Quarterly (2015). 2015 <http://rsq.oxfordjournals.org/content/34/1/61.abstract>, accessed on 15 May 2015;
24. Metcalfe, E. The false promise of assurances against torture. 1 Justice Journal. 2009;
25. Michaelsen, C. The renaissance of non – refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights. International and Comparative Law Quarterly / Volume 61, Issue 03, P. 750-765, 2012 <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8670031&fileId=S0020589312000243>, accessed on 15 May 2015;
26. Mischaelsen, C. The Cross-border Transfer of Dangerous Persons, the Risk of Torture and Diplomatic Assurances. Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives. London and New York: Routledge. 2012;
27. Moreno-Lax, V. Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control? Human Rights Law Review. 2012 <http://hrlr.oxfordjournals.org/content/early/2012/10/04/hrlr.ngs024.full?etoc>, accessed on 15 May 2015;
28. Noll, G. Diplomatic Assurances and the silence on Human Rights Law. Melbourne Journal of International Law. 2006 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=883347>, accessed on 15 May 2015;
29. Oppenheim, L & Lauterpacht, H. International Law: A Treatise. Vol. I –Peace. Second Edition. London.1995 <http://www.gutenberg.org/ebooks/41047>, accessed on 15 May 2015;

30. Padmanabhou, V., M. To transfer or not to transfer: Identifying and protecting relevant human rights interest in non – refoulement. Fordham Law Review, Vol. 80, 2011, 2010 <http://ssrn.com/abstract=1734923>, accessed on 15 may 2015;
31. Redress Trust (REDRESS) and the Immigration Law Practitioners' Association (ILPA). Non – refoulement under threat. Matrix Chambers, London. 2006 <http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf>, accessed on 15 May 2015;
32. Rodley, N. & Pollard, M. The Treatment of Prisoners under International Law. Oxford Press. 2009;
33. Sangmeister, B. Deportation on the basis of Diplomatic assurances – permissible under the European Convention on Human Rights? : A Critical Analysis of the Judgment of the ECtHR in Abu Qatada v the United Kingdom (2012) and its Impact on the Jurisprudence of the ECtHR. Victoria University of Wellington. 2013 <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/3363/thesis.pdf?sequence=1>, accessed on 15 May 2015;
34. Schmid, E. The End of the Road on Diplomatic Assurances: The Removal of Suspected Terrorists under International Law. 8(1) Essex Human Rights Review. 2011 <https://ius.unibas.ch/uploads/publics/41678/20141221144101_5496cded3d975.pdf, accessed on 15 May 2015;
35. Schrijver, N. & Herik, L. Leiden Policy Recommendations on Counter-terrorism and International Law. Netherlands International Law Review, vol. 54 (2007), no. 3, P. 571-587. 2011<http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf, accessed on 15 May 2015;
36. Sean D. Murphy. Current Developments: The Expulsion of Aliens and other topics: The sixty – fourth session of the International Law Commission. American Journal of International Law. 2013<http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1910&context=faculty_publications >, accessed on 15 May 2015;
37. Sitaropoulos, N. The Role and Limits of the European Court of Human Rights in Supervising State Security and Anti-Terrorism Measures Affecting Aliens' Rights. Martinus Nijhoff Publishers. 2011 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948391>, accessed on 15 May 2015;
38. Skoglund, L. Diplomatic Assurances Against Torture – An effective Strategy? Nordic Journal of International Law, Volume 77, Issue 4, pages 319 – 364. 2008 <http://booksandjournals.brillonline.com/content/journals/10.1163/157181008x374870>, accessed on 15 May 2015;

39. United Nations. Selected Decisions of the Human Rights Committee under the Optional Protocol International Covenant on Civil and Political Rights. United Nations Publications CCPR/C/OP/9. New York & Geneva. 2008 <http://www.ohchr.org/Documents/Publications/SelDec_9_en.pdf>, Accessed on 15 May 2015;
40. United Nations. Yearbook of the United Nations. Sixteenth Anniversary Edition, Volume 59. New York. 2005;
41. Vermeulen, M. Assessing Counter terrorism as a matter of human rights: Perspectives from European Court of Human Rights. European University Institute. 2015 <http://www.tandf.net/books/details/9781138854130/.>, accessed on 15 May 2015;
42. Wilcox E., R. Digest of United States Practice in International Law. Office of the Legal Adviser, United States Department of State. Oxford University Press. 2008 <http://www.state.gov/documents/organization/138513.pdf>, accessed on 15 May 2015;
43. Wissbrodt, D. & Hortreiter, I. The principle of non - refoulement: Art.3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non - Refoulement provisions of Other International Human Rights Treaties. Human Rights Law Review 1. 1999 <http://heinonline.org/HOL/Page?handle=hein.journals/bufhr5&div=5&g_sent=1&collection=journals#7>, accessed on 15 May 2015;
44. Worster, W., T. Between a treaty and not: A case study of the legal value of Diplomatic Assurances. Minnesota Journal of International Law, Vol. 21, No. 2, 2012. 2011 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1940444>, accessed on 15 May 2015;
45. Wouters, C. International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement, Intersection, Mortsel, 2009 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13756/000-wouters-B-25-02-2009.pdf?sequence=2>, accessed on 15 May 2015;
46. Wouters, C. Reconciling National Security and Non-Refoulement: Exceptions, Exclusion, and Diplomatic Assurances. Oxford: Counter-Terrorism International Law and Practice, 2012.

Jurisprudence:

European Human Rights Court's case – law:

1. *Al – Moayad v. Germany*, no. 35865/03, ECHR 2007;
2. *Babar Ahmad and Others*, no. 24027/07, ECHR 2012;
3. *Bader and Kabor v. Sweden*, no. 13284/04, ECHR 2005;
4. *Baysakov and Others v. Ukraine*, no. 54131/08, ECHR 2010;
5. *Ben Khemais v. Italy* [GC]no. 246/07, ECHR 2009;

6. *Benediktov v. Russia*, no. 2345/02, ECHR 2007;
7. *Boumediene and Others v. Bosnia & Herzegovina*, nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, ECHR 2008;
8. *Chahal v. The United Kingdom*, no. 22414/93, ECHR 1996;
9. *Chentiev and Ibragimov v. Slovakia*, nos. 210022/08 & 51946/08, ECHR 2010;
10. *Cipriani v. Italy*, no. 22142/07, ECHR 2010;
11. *Darraji v. Italy*, no. 11549/05, ECHR 2009;
12. *Einhorn v. France* (dec.), no. 71555/01, ECHR 2001;
13. *El Haski v. Belgium*, no. 649/08, ECHR 2012;
14. *Gafarov v. Russia*, no. 25404/09, ECHR 2010;
15. *Garayev v. Azerbaijan*, no. 53688/08, ECHR 2010;
16. *Hamraoui v. Italy*, no. 16201/07, ECHR 2009;
17. *Hirsi Jamaa and Others v. Italy*, no. 27765/09, ECHR 2012;
18. *Ismoilov and Others v. Russia*, no. 2947/06, ECHR 2008;
19. *Kaboulov v. Russia*, no. 41015/04, ECHR 2009;
20. *Khaydarov v. Russia*, no. 21055/09, ECHR 2010;
21. *Klein v Russia*, no. 24268/08, ECHR 2010;
22. *Koktysh v. Ukraine*, no. 43707/07, ECHR 2010;
23. *Kolesnik v. Russia*, no. 26876/08, ECHR 2010;
24. *M.S.S. v. Belgium and Greece*, no. 30696/09, ECHR 2011;
25. *Muminov v. Russia*, no. 42502/06, ECHR 2008;
26. *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012;
27. *Ramzy v. the Netherlands*, no. 25424/05, ECHR 2010;
28. *Ryabikin v. Russia*, no. 8320/04, ECHR 2008;
29. *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008;
30. *Shamayev and 12 Others v. Georgia and Russia*, no. 36378/02, ECHR 2005;
31. *Soering v. the United Kingdom*, no. 14038/88, ECHR 1989;
32. *Soldatenko v. Ukraine*, no. 2440/07, ECHR 2009;
33. *Soltana v. Italy*, no. 37336/06, ECHR 2009;
34. *Sufi and Elmi v. The United Kingdom*, nos. 8319/07 and 11449/07, ECHR 2011;
35. *Sultanov v. Russia*, no. 15303/09, ECHR 2010;
36. *Toumi v. Italy* [GC], no. 25716/09, ECHR 2011;
37. *Vilvarajah and Others v. the United Kingdom*, no. ECHR 1991;
38. *Zarmayev v. Belgium*, no. 35/10, ECHR 2014;

International Human Rights body's case - law

39. Committee against Torture, Concluding observations of the Committee against Torture: Sweden, U.N. Doc. CAT/C/SWE/CO/5. [2008] < http://www.refworld.org/docid/4885cf85c.html>, accessed on 15 May 2015;
40. Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, pursuant to the optional reporting procedure : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : combined 6th and 7th periodic reports of States parties due in 2012 : Sweden, U.N. Doc.CAT/C/SWE/6-7, [2013] < http://www.refworld.org/docid/53c775774.html>, accessed on 15 May 2015;
41. Committee against Torture, Decision on *Toirjon Abdussamatov and 28 others v. Kazakhstan*. Forty – eighth session. Communication No.444/2010, CAT/C/48/D/444/2010. [2012];
42. Committee against Torture. Concluding Observations on the US, UN doc. CAT/C/USA/CO/2, [2006] < http://www.state.gov/documents/organization/133838.pdf>, accessed on 15 May 2015;
43. Committee against Torture. Decision on *Agiza v. Sweden*, Separate Opinion of Committee Member Mr. Alexander Yakovlev, U.N. Doc. CAT/C/34/D/233/2003, [2003];
44. Committee against Torture. Decision on *Agiza v. Sweden*, Thirty-fourth session, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, [2005].
45. Committee against Torture. Decision on *Alexey Kalinichenko v. Marocco*. Forty – seven session, Communication No. 428/2010. U.N. Doc. CAT/C/47/D/428/2010. [2012] < http://www.bayefsky.com/pdf/morocco_t5_cat_428_2010.pdf>; accessed on 15 May 2015;
46. Committee against Torture. Decision on *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*. U.N. Doc. CAT/C/31/D/199/2002, [2003] <http://www.refworld.org/docid/404887e73.html>, accessed on 15 May 2015;
47. Committee against Torture. Decision on *Inass Abichou v. Germany*, fiftieth session, Communication No. 430/2010. U.N. Doc. CAT/C/50/D/430/2010, [2013];
48. Committee against Torture. Decision on *L.J.R. v. Australia*. Forty – first session. Communication No. 316/2007. U.N. Doc. CAT/C/41/D/316/2007. [2008];
49. Committee against Torture. Decision on *Regent Boily v. Canada*, Forty – seventh session. Communication No. 327/2007. U.N. Doc. CAT/C/47/D/327/2007. [2012];
50. Committee against Torture. Decision on *S.M. v. Switzerland*. Forty – ninth session. Communication No. 406/2009. U.N. Doc. CAT/C/49/D/406/2009. [2013];
51. Human Rights Committee (HRC), ICCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984< http://www.refworld.org/docid/453883f90.html > ,accessed on 23 May 2015;

52. Human Rights Committee (HRC), ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, <http://www.refworld.org/docid/453883fb0.html>, accessed on 15 May 2015;
53. Human Rights Committee. Comments by the Government of Sweden on the concluding observations of the Human Rights Committee, U.N. Doc. CCPR/CO/74/SWE, [2003] <http://www.refworld.org/docid/403f64e40.html> , accessed on 15 May 2015;
54. Human Rights Committee. Concluding Observations, Fifth periodic Report of Sweden, U.N. Doc. CCPR/CO/74/SWE, [2002];
55. Human Rights Committee. Concluding Observations: United States of America, CCPR/C/USA/CO/3/rev.1, [2006] <http://www.state.gov/documents/organization/133837.pdf>, accessed on 15 May 2015;
56. Human Rights Committee. Decision on Mohamed *Alzery v. Sweden*. Eighty-eighth session. Communication No.1416/2005. CCPR/C/88/D/1416/2005. [2006];
57. Human Rights Committee. Decision on *Nikolai Valetov v. Kazakstan*. 110th session. Communication No. 2104/2011. U.N. Doc. CCPR/C/110/D/2104/2011. [2014] <http://www1.umn.edu/humanrts/undocs/2104-2011.html, accessed on 15 May 2015;
58. Jurisprudence of the CAT Committee. Part IV. < http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf>, accessed on 15 May 2015;
59. UN Committee against Torture. Decision on *Elif Pelit v. Azerbaijan*. Thirty – eighth session. Communication No. 281/2005. U.N. Doc. CAT/C/38/D/281/2005. [2007];

Other Court's case – law:

60. *(Algeria) (FC) and another v. Secretary of State for the Home Department*; *OO (Jordan) (Original Respondent and Cross-appellant) v Secretary of State for the Home Department (Original Appellant and Cross- respondent.* House of Lords of Appeal. 2009 <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/RBAlgeriajudgment.pdf >, accessed on 15 May 2015;
61. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Merits, Judgment, I.C.J. Reports. 2010 < http://www.icj-cij.org/docket/files/103/16244.pdf>, accessed on 15 May 2015;
62. *Barcelona Traction (Belgium v. Spain),* Judgment, I.C.J. Reports. 1970 < http://www.icj-cij.org/docket/files/50/5387.pdf >, accessed on 15 May 2015;
63. *Mahjoub v. Canada*, Ministry of Citizenship and Immigration, 2006 < http://reports.fja.gc.ca/eng/2006/2006fc1503/2006fc1503.html>, accessed on 15 May 2015;

64. *Mahmoad Abdah v. George Bush*. The United States district Court for the District of Columbia. Declaration of Pierre – Richard prosper. Civil Action No. 04-1254 (HHK). 2005 < http://www.state.gov/documents/organization/55821.pdf>, accessed on 15 may 2015;
65. *Omar Othman (Abu Qatada) v. Secretary of State for the Home Department*, SC/15/2005, United Kingdom, Special Immigration Appeals Commission (SIAC). 2007. <http://www.refworld.org/docid/499043ea2.html>, accessed on 15 May 2015;
66. *Suresh v. Canada*. Ministry of Citizenship and Immigration. 2002 < http://www.canlii.org/en/ca/scc/doc/2002/2002scc1/2002scc1.html>, accessed on 15 may 2015;

The Internet Database:

1. Amnesty International. Press Release. Public Statement: Belgium falls short of its obligations on torture and other ill – treatment. Brussels [Interactive]. 27 November 2013. [accessed 20 - 05- 2015] <http://www.amnesty.eu/en/news/press-releases/region/eu/belgium-falls-short-of-its-obligations-on-torture-and-other-ill-treatment-0679/#.VVyUFfntmko>;
2. European Parliament. Press Release. Report. CIA activities in Europe: European Parliament adopts final report deploring passivity from some Member States. [Interactive]. 2007 [accessed 15- 05- 2015] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IMPRESS+20070209IPR02947+0+DOC+XML+V0//EN>;
3. Hasselberg, O. Diplomatic Assurances: A judicial and political analyses of the undermining of the principle of non – refoulement. [Interactive]. 2009 [accessed 15- 05- 2015] <https://gupea.ub.gu.se/bitstream/2077/22053/1/gupea_2077_22053_1.pdf> ;
4. Human Rights Council. Office of the High Commissioner for Human Rights. Special Procedures Bulletin. 18th Issue: July – September 2010. [accessed 15- 05- 2015] <http://www.ohchr.org/Documents/HRBodies/SP/Bulletin18.pdf>;
5. Human Rights Watch. Cases Involving Diplomatic Assurances against Torture Developments since May 2005. No.1. 2007 [accessed 15 – 05- 2015] <http://www.hrw.org/sites/default/files/reports/eu0107.pdf>;
6. Human Rights Watch. Empty Promises: Diplomatic Assurances No Safeguard Against Torture. Vol.16 No.4 (D). April 2004 [accessed 15 – 05 - 2015] <http://www.refworld.org/docid/415c039b4.html>
7. Human Rights Watch. News. Diplomatic assurances against torture. 10 November 2006 [accessed 15 – 05 -2015] <http://www.hrw.org/news/2006/11/10/diplomatic-assurances-against-torture#_What_do_international>;

8. Human Rights Watch. Not the Way Forward. The UK's Dangerous Reliance on Diplomatic Assurances. 2008 [accessed 15 – 05 - 2015] <http://www.hrw.org/sites/default/files/reports/uk1008web.pdf>;
9. Human Rights Watch. Still at Risk: Diplomatic Assurances No Safeguard Against Torture. Vol. 17, No. 3 (D), 2005 [accessed 15 – 05 – 2015] <http://www.hrw.org/sites/default/files/reports/eca0405.pdf>;
10. International Centre for Counter –Terrorism -The Hague. Use of Diplomatic Assurances in terrorism – related Cases: In search of a balance between Security concerns and Human Rights obligations. [Interactive]. 2011[accessed 15- 05- 2015] <http://www.icct.nl/download/file/ICCT-van-Ginkel-EM-Paper-Diplomatic-Assurances.pdf >;
11. Johannes, S. Extradition and Human Rights Diplomatic assurances and Human Rights in the Extradition Context. PC – OC meeting in Strasbourg/F. [Interactive]. 2014 [accessed 15-05-2015] <http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/Documents%202014/Special%20session%20Extradition%20-%20Extradition%20and%20human%20rights%20-%20Silvis.pdf>;
12. Prasow, A. Human Rights Watch News Report - Diplomatic Assurances: Empty Promises Enabling Torture. [Interactive]. October 6, 2011[accessed 15- 05- 2015] <http://www.hrw.org/news/2011/10/06/diplomatic-assurances-empty-promises-enabling-torture;
13. Registrar of the Court of ECHR, Press Release. Another removal of a terrorist from Italy to Tunisia notwithstanding the Court's indications and the risk of ill-treatment. No. 299 05.04. (2011) [Interactive]. 2011 [accessed 15- 05- 2015] <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-3496485-3940839#{"itemid":["003-3496485-3940839"]} >;
14. Registrar of the Court of ECHR, Press release. Case of Ben Khemais v. Italy. No. 142 24.2.2009 [Interactive]. 2009 [accessed 15- 05- 2015]< http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2644455-2889373 >;
15. Registrar of the Court of ECHR, Press Release. Judgments concerning Belgium, Croatia, Russia and Slovenia. No. ECHR 058 (2014) [Interactive]. 2014 [accessed 15- 05- 2015] <http://hudoc.echr.coe.int/webservices/content/pdf/003-4683706-5681336>;
16. Schimmel, C., A. Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment? [Interactive]. 2007 [accessed 15- 05- 2015] <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/returningterroristsuspects.pdf >;

17. Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 1946 January 3. [accessed 15 – 05 – 2015] <http://www.phdn.org/archives/www.ess.uwe.ac.uk/genocide/Wisliceny.htm>;
18. UN High Commissioner for Human Rights, Chatham House. The Speech by Louise Arbour. [Interactive].15 February 2006 [accessed 15- 05- 2015] <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilparbour.pdf >;
19. UN High Commissioner for Refugees (UNHCR). UNHCR Note on Diplomatic Assurances and International Refugee Protection. 2006. [accessed 15-05-2015] <http://www.refworld.org/docid/44dc81164.html>;

Lastovkaitė, E. – Diplomatic Assurances in International law and expulsion of foreigners/ Master thesis in International law (in English). Supervisor: Prof. dr. Lyra Jakulevičienė. Vilnius: Institute of International and European Union Law, Faculty of Law, Mykolas Romeris University, 2015. – 94 p.

ANNOTATION

This master thesis analyses Diplomatic Assurances in International law and expulsion of foreigners. The increased use of DA's induced to explore the legal status and functioning of it, with a particular focus on expulsion of foreigners. By analysing diplomatic assurance's normative quality and the jurisprudence on present conditions and their extent, the legal problems impeding for DA's to be accepted as being an effective safeguard are identified. Therefore, in the first Section of this Master thesis the legal challenges related to nature and effect of diplomatic assurances are analysed. Further, in the second Section the comprehensive examination of the case – law of European Court on Human Rights, International Human Rights Committees and National Courts reveals different approach and conditions applied on diplomatic assurances. Lastly, in the third Section, focusing on national security concerns, the possible future of absolute principle of *non – refoulement* and of status of DA's is explored.

Key words: Diplomatic assurances, expulsion of foreigners, *non – refoulement*, protection against torture, national security.

Lastovkaitė, E. Diplomatinės garantijos tarptautinėje teisėje ir užsieniečių išsiuntimas/ Tarptautinės teisės (anglų kalba) magistro baigiamasis darbas. Darbo vadovė: Prof. Dr. Lyra Jakulevičienė. Vilnius: Tarptautinės teisės ir Europos Sąjungos Institutas, Teisės fakultetas, Mykolo Romerio Universitetas, 2015. – 94 p.

ANOTACIJA

Šiame magistriniame darbe analizuojamos diplomatinės garantijos tarptautinėje teisėje ir užsieniečių išsiuntimas. Vis didėjantis valstybių naudojimasis diplomatinėmis garantijomis paskatino ištirti šio instrumento teisinį statusą bei veikimą, ypatingą dėmesį teikiant užsieniečių išsiuntimo atvejams. Analizuojant diplomatinių garantijų normatyvinį pagrindą ir teismų praktiką susijusią su reikalavimais garantijoms, identifikuotos teisinės problemos užkertančios kelią pripažinti diplomatines garantijas veiksminga apsaugos priemone. Dėl to, pirmojoje Magistrinio baigiamojo darbo dalyje analizuojami teisiniai sunkumai susiję su diplomatinių garantijų teisine prigimtimi bei jų tikslu. Antrojoje dalyje nagrinėjama Europos Žmogaus Teisių teismo, tarptautinių žmogaus teisių komitetų bei nacionalinių teismų teisinė praktika ir pateikiama išsami šių teismų požiūrio į diplomatines garantijas analizė vertinant nustatytus reikalavimus diplomatinėms garantijoms. Paskutinėje trečiojoje dalyje pateikiamos absoliutaus neišsiuntimo principo (*non-refoulement*) bei diplomatinių garantijų galimo statuso įtvirtinimo ateities perspektyvos, atsižvelgiant į valstybių nerimą dėl nacionalinio saugumo.

Raktiniai žodžiai: Diplomatinės garantijos, užsieniečių išsiuntimas, tarptautinis neišsiuntimo principas, kankinimų draudimas, nacionalinis saugumas.

SUMMARY

This master thesis analyses legal status and functioning of Diplomatic assurances in International law with a particular focus on foreigner's expulsion. Increased use of Diplomatic assurances in the expulsion cases and the existence of diverge opinions on DA's legal acceptance make this research relevant. Research seeks to examine existing legal challenges and case – law related to its practice, in order to reveal solutions for DA's to be accepted under international law as being an instrument that enhances multilateral frameworks of human rights protection. Through historic, systematic, comparative, analyses and others methods - different approaches on the basis for legality of assurances as well as on their practical value is provided. Comprehensive analyses of jurisprudence at international, regional and national levels allows for the researcher to provide conclusions and indicate certain features as: criteria, elements and procedural safeguards, being significant to evaluate these assurances credibility.

In first Chapter of the thesis, statement that in expulsion cases DA's could only be accepted if they do enhance multilateral framework of human rights and never when diminish it, is defended by exploring historical challenges as well as discovering the difficulties under the laws of International and Regional legal systems. The second Chapter of the research reveals and outlines the key condition that are being considered before courts and human rights bodies in order to defend the statement, that although some efforts towards the promotion of human rights and the eradication of torture and IDTP are established, it is not enough for DA's to be regarded as such, while there are no uniform set of clear standards for their use. Therefore, the research seeks to indicate certain criteria, elements and procedural safeguards that seems to be established in a case – law and proposes to have an obligatory set of standards, according to these indicated. Lastly, the research contends that the practice of DA's in expulsion cases threatens to erode the regional and international absolute protection against *refoulement* and therefore demonstrates the existing equivocalness and reasoning regarding clash between international obligation to protect foreigner from ill – treatment and State's obligation to protect its national security. The researcher provides conclusion and some recommendations for preservation of absolute principle of *non – refoulement.*

SANTRAUKA

Šis magistro baigiamasis darbas analizuoja diplomatinių garantijų teisinį statusą bei veikimą tarptautinėje teisėje, ypatingą dėmesį skiriant užsieniečių išsiuntimo atvejams. Šios temos aktualumas grindžiamas vis didėjančiu valstybių naudojimusi diplomatinėmis garantijomis išsiuntimo bylose bei skirtingų nuomonių gausa dėl šių garantijų teisinio statuso pripažinimo tarptautinėje teisėje. Baigiamajame darbe analizuojami teisiniai sunkumai susiję su diplomatinių garantijų teisine prigimtimi ir jų pripažinimu, taip pat teismų praktika, susijusia su garantijų veikimu - siekiant surasti sprendimus, galinčius padėti diplomatinėms garantijoms būti pripažintomis veiksminga apsaugos priemone daugiašalėje žmogaus teisių sistemoje. Siekiant nustatyto tikslo, skirtingi požiūriai dėl diplomatinių garantijų teisėtumo bei praktinė reikšmė buvo analizuojama remiantis istoriniu, sisteminiu, lyginamuoju, analitiniu bei kitais metodais. Atlikta išsami jurisprudencijos analizė tarptautiniu, regioniniu ir nacionaliniu lygmeniu, kuri leidžia nurodyti esamus reikalavimus diplomatinėms garantijoms – identifikuojant tam tikrus kriterijus, elementus bei procedūrines apsaugos priemones, kurios yra svarbios vertinant diplomatinių garantijų patikimumą ir priimant pagrįstas išvadas.

Pirmajame baigiamojo darbo skyriuje, teiginys, jog diplomatinės garantijos gali būti pripažintos turinčiomis teisinį statusą tik tuo atveju, jeigu veiksmingai prisideda prie daugiašalės žmogaus teisių apsaugos sistemos, o ne ją menkina, yra apgintas šioje dalyje analizuojant istorinius išbandymus bei teisinius sunkumus atsiradusius tarptautinėje bei regioninėje teisinėse sistemose. Antroji dalis atskleidžia ir pateikia pagrindinius kriterijus, kuriais remiantis teismai bei tarptautiniai žmogaus teisių komitetai vertina diplomatinių garantijų veiksmingumą taip pagrindžiant ginamąjį teiginį, jog nors ir matomos dedamos pastangos gerinti žmogaus teisių apsaugą, diplomatinės garantijos negali būti vertinamos kaip šios apsaugos dalis, tol kol nėra nustatytų aiškių ir privalomų standartų jų veiksmingam naudojimui. Dėl šios priežasties, remiantis jurisprudencija yra išskirti tam tikri kriterijai, elementai bei procedūrinės apsaugos priemonės ir siūloma atsižvelgiant į nusistovėjusius standartus priimti privalomą reikalavimų diplomatinėms garantijoms rinkinį. Paskutinėje trečiojoje dalyje norima pagrįsti teiginį, kad šios garantijos išsiuntimo atvejais kėsinasi paneigti įtvirtintą absoliutų neišsiuntimo principą. Dėl to, atskleidžiamas interesų susikirtimas tarp valstybių įsipareigojimo apsaugoti užsieniečius nuo neteisėto išsiuntimo ir tarp valstybės pareigos apsaugoti nacionalinį saugumą. Pateikiamos išvados ir pasiūlymai dėl neišsiuntimo principo absoliutumo išsaugojimo.

Priedas Nr. 4

Forma patvirtinta Mykolo Romerio universiteto
Senato 2012 m. lapkričio 20 d. nutarimu Nr.1SN-10

PATVIRTINIMAS APIE ATLIKTO DARBO SAVARANKIŠKUMĄ

2015 – 05 – 25 d.
Vilnius

Aš, Mykolo Romerio universiteto (toliau – Universitetas),
Teisės fakulteto, Tarptautinės ir Europos Sąjungos teisės instituto, Tarptautinės teisės (anglų kalba)

(fakulteto / instituto, programos pavadinimas)

Studentė Eimantė Lastovkaitė _____,
(vardas, pavardė)

patvirtinu, kad šis rašto darbas / bakalauro / magistro baigiamasis darbas

„Diplomatic Assurances in International Law and Expulsion of Foreigners“:

1. Yra atliktas savarankiškai ir sąžiningai;
2. Nebuvo pristatytas ir gintas kitoje mokslo įstaigoje Lietuvoje ar užsienyje;
3. Yra parašytas remiantis akademinio rašymo principais ir susipažinus su rašto darbų metodiniais nurodymais.

Man žinoma, kad už sąžiningos konkurencijos principo pažeidimą – plagijavimą studentas gali būti šalinamas iš Universiteto kaip už akademinės etikos pažeidimą.