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Seeking Reparation for Torture Survivors

ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

NON-REFOULEMENT UNDER THREAT

Proceedings of a Seminar Held Jointly By
The Redress Trust (REDRESS) And
The Immigration Law Practitioners' Association (ILPA)

16 May 2006, Matrix Chambers, London

Published November 2006

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I. INTRODUCTION

The prohibition of sending, expelling, returning or otherwise transferring (*refoulement*) a refugee to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group" is recognised in Article 33(1) of the 1951 UN Convention on the Status of Refugees,[1] its 1967 protocol and is enshrined in numerous other treaty texts.[2]

This principle of non-*refoulement* is also considered to apply in a human rights context to prohibit the forcible sending, or returning or in any other way transferring a person to a country where he or she may face torture.[3] The iteration of the principle in a human rights context makes it applicable to all persons and not only to refugees or asylum seekers. This has been affirmed by numerous international instruments, including Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[4] and Article 13 (4) of the Inter-American Convention to Prevent and Punish Torture.[5] The jurisprudence of the European Court of Human Rights recognises that the principle applies equally to torture and cruel, inhuman or degrading treatment and punishment,[6] as has the United Nations Human Rights Committee.[7]

Non-*refoulement* is recognised as a non-derogable principle applicable in all circumstances, regardless of the nature of the activities the person concerned may have been engaged in,[8] or their immigration status, and relates not only to the country to which the person faces immediate return but extends to "any other country where he runs a risk of being expelled or returned."[9]

Non-*refoulement* under threat

Despite the absolute prohibition of *refoulement*, the principle has been progressively under attack in recent years in at least two distinct areas. The first area relates to counter-terrorism efforts post 11 September and the handling of 'national security' cases involving persons alleged to be international terrorists. In the landmark *Chahal* case before the European Court of Human Rights, the Court recognised that the principle of non-*refoulement* to torture or cruel, inhuman or degrading treatment or punishment was absolute and allowed for no balancing with competing State concerns, even when these related to national security.[10] Yet five EU governments, led by the United Kingdom, have intervened in the pending case of *Ramzy v. the Netherlands*, (pending at the time of writing) to argue that the right of an individual to be free from torture may be balanced

[1] United Nations Convention Relating to the Status of Refugees, adopted 28 July 1951 and entry into force 22 April 1954.
[2] Art. 22 (8) of the American Convention on Human Rights (general clause on non-*refoulement*), adopted on 22 November 1969.
[3] Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, The Scope and Content of the Principle of *Non-Refoulement* (Opinion), 20 July 2001, para. 132, available from the website of the UN High Commissioner for Refugees, Global Consultations, Second track, expert meetings, at http://www.unhcr.ch.
[4] United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987.
[5] Inter-American Convention to Prevent and Punish Torture, adopted on 9 December 1985.
[6] European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161; *Nsona v. The Netherlands*, Judgment of 28 November 1996, 1996-V, no. 23; *Chahal v. The United Kingdom*, Judgment of 15November 1996, 1996-V, no. 22; *Ahmed v. Austria,* Judgment of 7 December 1996, 1996-VI, no. 26; *Scott v. Spain* Judgment of 18 December 1996, 1996-VI, no. 27; *Boujlifa v. France*, Judgment of 21October 1997,1997-VI, no. 54*; D. V. The United Kingdom* 02 May 1997, 1997-III, no. 37; *Paez v. Sweden* Judgment of 30 October 1997, 1997-VII, no. 56.
[7] United Nations Human Rights Committee, General Comment N° 20, 10/03/92, para. 9.
[8] Despite the limited exception set out in Article 33(2) of the 1951 Convention on the Status of Refugees in relation to persons convicted by a final judgment of a particularly serious crime, constituting a danger to the community of the country seeking to refoule, the prohibition against sending or transferring a person to a territory in which he or she may be at risk of torture or cruel, inhuman or degrading treatment or punishment is absolute. See, UN Committee Against Torture, Case *Seid Mortesa Aemei v Switzerland*, 29 May 1997, Communication No 34/1995, CAT/C/18/D/34/199.
[9] UN Committee Against Torture, *Mutombo v. Switzerland*, 27 April 1997, CAT/C/12/D/13/1993, para 10.
[10] (1997) 23 EHRR 413.

against the national security interests of the State.[11] Further, the United Nations Special Rapporteur on Torture and others have repeatedly expressed concern regarding the use of diplomatic assurances against torture in cases involving national security considerations.[12] Despite this, the United Kingdom Government has concluded Memoranda of Understanding with Jordan, Libya and Lebanon in order to circumvent non-*refoulement* obligations.

The second area relates to more diffuse concerns unrelated to national security, brought about by the general 'hysteria' concerning the perceived high numbers of asylum seekers in the United Kingdom and the tactics employment by the Government to reduce these levels as quickly as possible. Here, the threat relates as much to process as to principle. The implementation of the principle of non-*refoulement* in general requires an examination of the facts of each individual case, and an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. A *denial* of protection without an appropriate scrutiny of the individual circumstances of the applicant would be inconsistent with the prohibition of *refoulement*.[13] Equally, the practice of expediting returns of failed asylum seekers with final appeals still pending, would violate the principle of non-*refoulement*.

REDRESS, an international nongovernmental organisation which seeks justice on behalf of survivors of torture and ILPA, the UK's professional association of lawyers, advisers and academics practising or engaged in immigration, asylum and nationality law, convened the seminar on 16th May held at Matrix Chambers to consider these threats of principle and of practice and to assess their impact on refugees and asylum seekers in the United Kingdom and those working on their behalf. The seminar brought together legal practitioners, academics and advocacy groups and provided a forum to share experiences, learn from best practice and consider options and strategies for the optimal protection of those seeking refuge in this country.

The seminar was run in three main sessions, with a fourth and final one for discussion.

In the first session Professor Guy Goodwin-Gill and Mr Raza Husain provided an overview of the origin of the principle of *non-refoulement,* and under the chairmanship of Mr Nicholas Blake QC dealt with questions. This situated the threats to the principle in national security cases in the broader context of attacks on the principle as a whole, and the exceptions in legislation and refugee case law.

The next session dealt with threats to the principle of *non-refoulement* in cases other than those involving national security. Ms Sonal Ghelani and Mr Mark Henderson dealt with two specific and very recent case studies, involving asylum seekers from Zimbabwe and Iraq. Chaired by Ms Alison Harvey of ILPA this gave participants a clear understanding of recent developments on the 'frontline' of asylum litigation, and an opportunity to engage with these two practitioners on the law, practice and tactics in such cases.

The third session consisted of a close look at national security cases. Mr Rick Scannell placed the issue in a political context, while Ms Gabriela Echeverria analysed the principle of *non-refoulement* in the jurisprudence of the European Court of Human Rights and other

[11] Observations of the Governments of Lithuania, Italy, Portugal, Slovakia and the United Kingdom Intervening in Application No 25424/05 *Ramzy v The Netherlands*.

[12] See, the 2005 Report of the UN Special Rapporteur on Torture to the General Assembly, A/60/316, at para 51, in which he states that "It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment." See also, CAT/C/CR/33/3, para. 4 of November 2004, in which the CAT expressed its concern at the United Kingdom's reported use of diplomatic assurances in the refoulement context .

[13] See, for Example, UNHCR, EXCOM conclusions, 34th Session (1983), No. 30 (XXXIV), which "recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees."

international bodies. Ms Nuala Mole chaired this session, which again gave participants an opportunity to raise issues and question the panelists. The panel considered the use and negotiation of diplomatic assurances in the context of the Special Immigration Appeals Commission's closed evidence provisions, while at the level of the European Court of Human Rights, the UK Government's intervention in the pending case of *Ramzy v. the Netherlands* was also explored.

The final session consisted of a directed discussion of methods to realistically defend the principle of *non-refoulement* by way of litigation, advocacy and campaigning.

REDRESS and ILPA were not only pleased to be able to jointly organise this seminar but acknowledge the generous support of Matrix Chambers and the Joseph Rowntree Charitable Trust and the Ajahma Charitable Trust which enabled them to do so. It would also not have been possible without the expert panelists and the chairs whose invaluable contributions were the essence of the event, and the spirited contributions from all attendees.

II. SYNOPSIS OF THE SEMINAR

First session: Overview of the principle of non-refoulement

Professor Guy Goodwin-Gill and Mr Raza Husain provided an overview of the history and current scope of the principle of *non-refoulement,* under the chairmanship of Mr Nicholas Blake QC. The panel sought to situate the threats to the principle in national security cases in the broader context of attacks on the principle as a whole, and the exceptions in legislation and refugee case law. A joint paper by Professor Goodwin-Gill and Mr Husain was circulated, which is Annex 1 to this Report.

The session contextualised the best-known expression of the principle and the national security exception set out in Articles 33 (I)[14] and Article 33(2)[15] of the 1951 UN Convention on the Status of Refugees. The speakers emphasised the non-*refoulement* principle as contained in leading human rights treaties such as the European Convention on Human Rights, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights, as well as in the jurisprudence of national courts including United Kingdom courts. They underscored the absolute and unqualified prohibition of *refoulement* which applies to all and any forms of removal or return, including extradition, expulsion, or "rendition." From this flows the tension between the current policy of governments, including the United Kingdom Government, to make use of diplomatic assurances to circumvent the *non-refoulement* principle.

The session surveyed the range of eminent voices which have been raised in strong opposition to such a policy, and equally importantly the actual problems which have arisen in practice both in the United Kingdom and elsewhere. At issue is the extent to which States with poor records on torture can be relied upon to abstain from torturing returnees. Also mentioned were the challenges of monitoring the treatment meted out to detainees on return, and the lack of mechanisms to ensure accountability if such diplomatic assurances were breached. Both in principle and practice, therefore, the practice of relying on assurances in order to expel persons at risk of torture or cruel, inhuman or degrading treatment or punishment is to be deplored.

The panelists also surveyed the background to the attacks on the principle of non-*refoulement* and considered the extent to which the principle is accepted as having attained the status of a rule of customary international law. They noted the challenges in invoking principles of customary international law in United Kingdom courts. UK courts in particular, when faced with an argument about any rule of customary law, tend to look for a degree of universality and an amount of evidence which is very often not there. From an international law perspective the courts are a little more flexible on issues of proof, not requiring so much evidence of *universal* agreement as evidence of *general* practice accepted as law, something which necessarily admits of some exceptions. International courts also tend to be a little more flexible on their interpretation of the rule that practice must be followed as a matter of obligation, and they tend to be willing to 'infer' the sense of obligation from the practice.

[14] "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."
[15] "33(2). The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Applying this to the principle of non-*refoulement*, there is a long line of evidence pre-World War II of States admitting asylum seekers because they felt obliged to do so. There is also evidence of the non-return of refugees who faced persecution on the same basis.

Running parallel to the question of the existence of a customary rule is the question of equivalence to the content of treaty rules, either in the sense of the 1951 Convention or beyond, to include not only those who face a risk of torture but also those who face a general threat to their livelihood by virtue of violations of human rights in the country of origin. The expansion of the principle has led to the concept of 'complementary protection' reaching beyond the scope of the 1951 Convention. There is a wide body of practice, therefore, supporting such a rule. In international forums there is also wide endorsement of such a rule, most notably in the recent General Assembly resolution of December 2005 in which the principle was adopted by consensus without contrary vote. However, such a rule does partake of exceptions and/or violations which in the context of customary international law might be characterised as attacks on the basic legal rule itself.

The *first attack* on the principle of non-*refoulement* was in the context of the 1981 US Haitian interdiction programme. There, the US coast guard set out to patrol the seas between Haiti and the US and intercepted boats believed to carry illegal migrants. Reagan's executive order at the time recognised the *non-refoulement* obligation in so far as it indicated that anyone intercepted who claimed refugee status and might have a well-founded fear of persecution was not to be returned. The programme as originally formulated expressly recognised the *non-refoulement* principle and US statements at the time recognised the obligation without qualification, subject only to 'operational problems.' However, in 1992, the issue of Haitian interdiction became more complicated when former president Bush removed the screening requirement, which for a brief period continued under the Clinton administration, so that anyone intercepted was returned without regard to their status as potential refugees. Screening was then re-introduced, then taken out and re-introduced as the US political stance changed. The US has also claimed that the principle of non-*refoulement* does not apply extra-territorially, a position accepted by the US Supreme Court but firmly rejected by the UNHCR and not accepted by any other State.

The *second attack* on the principle arose in the context of the potential exodus of Iraqi Kurds in 1991 to Turkey, where Turkey indicated it would close its border, in effect preventing refugees from accessing Turkey to assert any claim. The potential breach of the *non-refoulement* principle was arguably avoided only by the actions of the British, US and French in setting up and maintaining the safety zone in Northern Iraq.

In addition to these attacks on the *non-refoulement* principle, there are also the more recent attacks ***aimed specifically and more squarely at the prohibition on torture itself.*** The prohibition against torture is an even longer standing principle which Lord Bingham in the Case of A and Others (No. 2) said the common law has supported since the 15th century.[16] These recent attacks, therefore, are perhaps more surprising seeing as the prohibition on torture is unqualified.

[16] A (FC) and Others (FC) v Secretary of State for the Home Department (2004), [2005] UKHL 71 at page 5.

Second session: Current threats to the principle of non-refoulement

This session examined threats to the principle of *non-refoulement* in cases where national security is not an issue. Ms Sonal Ghelani and Mr Mark Henderson led the panel under the chairmanship of Ms Alison Harvey. The panelists dealt with recent cases involving asylum seekers from Zimbabwe and Iraq. Their edited paper is attached to this Report as Annex 2. The presentation and discussion gave participants an opportunity to understand the problems faced by these legal practitioners on the frontline of asylum litigation.

The matter of failed Zimbabwean asylum seekers has led to complex legal battles in both the Asylum and Immigration Tribunal (AIT) and the Court of Appeal. In essence the cases concern reports that forced returnees were being ill-treated and even tortured. The UK Government lifted in late 2004 the freeze on sending back failed asylum seekers which had come into place in 2002 owing to the grave human rights situation in the country. In 2005 reports of the dangers facing forced returnees led the Refugee Legal Centre to challenge the practice of forced removals.

Details were provided of the serious practical problems which the legal team faced. These problems including not having Zimbabwean clients 'on the books' yet being in touch with some of those detained pending removal, and having to work under extremely tight deadlines in order to challenge deportations about to be executed. It was possible to halt the process pending an appeal to the AIT effectively seeking a re-imposition of the freeze. Despite the successful appeal, the Government appealed further to the Court of Appeal which found that the AIT had erred in finding that the evidence of ill-treatment was strong enough to warrant the conclusion that no failed asylum seekers should be deported back to Zimbabwe, and that the matter need to go back to the AIT for rehearing.[17]

At the heart of the Refugee Legal Centre's difficulty was adducing enough clear evidence of ill-treatment for a sufficiently large number or percentage of those who had been removed during 2004-2005; this difficulty revolves around resources both here and in Zimbabwe to track down what actually happens to returnees, given how stretched the human rights organisations already are in Zimbabwe and the fear amongst returnees to approach such organisations. Other issues concerned the standard and burden of proof, and questions concerning voluntary vs. involuntary returns. Persons who voluntarily returned would be at a lesser risk of torture (because they would not be so easily identified as failed asylum seekers). Consequently, in order to bolster claims to remain in the United Kingdom, failed asylum seekers would refuse to go voluntarily.

With Iraqi returnees there were similar problems. There was a sudden change in policy last year on the part of the Government and the Refugee Legal Centre did not have specific clients when the crisis erupted. There had been no forced removals to Iraq for many years, although in 2000 the policy was to return those from Kurdish-controlled areas, but not Kurds from outside those areas, even if they could go back to the 'safe' Kurdish-controlled part of Iraq. The Court of Appeal ruled in 2005 that a Kurd from outside the controlled zone had a legitimate expectation to be granted indefinite leave to remain, and could not be sent back on the basis that he would need to re-locate. Despite this it transpired that Iraqi Kurds were being detained pending deportation without establishing whether they came from inside or outside the Kurdish zone.

[17] Since the May 16 seminar the AIT has reheard the matter and ruled on 2 August 2006 that there was not sufficient evidence to order a general freeze on forced removals, and that each failed asylum seeker's case had to be examined on its merits to see if he/she would face a real risk. Leave to appeal to the Court of Appeal has been refused by the AIT, but an application is being made to the Court of Appeal itself for leave to appeal to it.

Some of the serious practical problems experienced in respect of these cases include difficulties accessing detainees, language difficulties and extremely tight deadlines.

Removals were halted but the process re-commenced later in the year with people being detained pending removal, and again the Refugee Legal Centre swung into action. Despite strenuous efforts to halt removal of all those perceived to be at risk some were in fact removed owing to the impossibility of gaining access to them and the way they were hurriedly detained and bundled away. The impossibly short notice or detention without warning is a serious obstacle in such cases, especially when coupled with a denial of legal access. In the Refugee Legal Centre's view there has not been any proper assessment as to whether these people are from inside or outside the Kurdish zone. The current political climate is making it extremely difficult to deal with such urgent cases as the Government is under pressure to get rid of as many asylum seekers as it possibly can.

Third session: Non-refoulement in the Context of National Security

The seminar looked in more detail at some of the themes raised in session one, and examined the national security cases through presentations by Mr Rick Scannell and Ms Gabriela Echeverria, chaired by Ms Nuala Mole. Diplomatic assurances or memoranda of understanding in the context of hearings within the Special Immigration Appeals Commission's (SIAC) closed evidence provisions were placed in a clear political context, while the UK Government's intervention in the pending European Court of Human Rights case of *Ramzy v. the Netherlands* was analysed to illustrate its attack on the established jurisprudence governing the *non-refoulemement* principle. A paper outlining this jurisprudence is attached to this Report as Annex 3.

The risk to *non-refoulement* has to be considered greatest in cases of suspected foreign nationals removed in the interest of national security; firstly as this is the context in which diplomatic assurances are likely to be sought; and secondly as it is also in that context in which cases will be considered forensically in SIAC. Immigration has become a high stakes political issue and no longer one solely the concern of Home Secretaries. The Prime Minister has become increasingly caught up in it since 2003. All pronouncements have served to reinforce the view that the human rights of terror suspects in particular and of foreign nationals in general are not relevant.

This is underscored by the Prime Minister's public reaction to Mr Justice Sullivan's finding that the Government had failed abjectly to give effect to the earlier decision that the Afghan hijackers could not be returned without risking treatment contrary to article 3 of the European Convention.[18] He described the decision as 'an abuse of common sense.' Insofar as he must have known that the Government had not sought to challenge the earlier decision of the high court at the time, this would appear to be a deliberate attempt to mislead the public.

The case of *Youseff*[19] was very instructive: firstly in its revelation of the Prime Minister's attitude towards the deportation of Mr. Youseff to Egypt, and secondly in the sense of all the evidence of negotiations on diplomatic assurances being at the time classified as secret. These are central to the key problems with the memoranda of understanding themselves and the issues to be played out before SIAC. There is a shortfall between what is heard in public and what is heard in closed.

[18] "Blair dismay over hijack Afghans" BBC News (UK), 10 May 2006, available at: http://news.bbc.co.uk/1/hi/uk/4757523.stm.
[19] Youssef v Home Office [2004] EWHC 1884

The *Youseff case* records developments in the negotiations and the reduction in the assurances the Government would be willing to accept, showing the primary concern is political rather than the securing of effective assurances. The question then arises as to what happens if the Government does not succeed in the case of *Ramzy*,[20] where it seeks the adoption of the minority view in *Chahal*.[21] If a country does not sign up to the European Convention on Human Rights then that country is out of the EU: this suggests those assertions about withdrawing from the obligations under article 3 are absurd. Yet they are perhaps not so absurd given the political climate influenced from different sources, as referred to above.

Whenever immigration decisions are taken in the interest of national security, or the relationship between the UK and another country, it is heard by SIAC. Section 7 of the 2006 Immigration and Asylum Nationality Act inserts a new section 97 (a) into the 2002 Act, the effect of which is that an appeal against a decision/deportation order, certified as having been made on national security grounds, can only be made from outside of the UK. Where the appellant has made a human rights claim it can be brought from within the UK unless the Secretary of State certifies that removal would not breach the European Convention on Human Rights. An appeal to the issuing of a certificate will be heard in SIAC. So there is only a human rights caveat. The Joint Committee on Human Rights in its third report of 2005/6, was critical of the provision for this very reason. The Government contended that such persons would be excluded from recognition as refugees as the scope of the Refugee Convention is wider than that of the European Convention on Human Rights; however, this presupposes the correctness of the determination represented by the certification of the person as a national security threat.

The upshot of the statutory framework is therefore that in national security cases, where *refoulement* is at issue, the appeal will be heard by SIAC, subject to the appeals in new section 97 (a) as mentioned. Since the 1997 Special Immigration Appeals Commission Act, representation in national security cases of those subject to immigration controls has been both by lawyers of the appellant's own choosing and by a special advocate, whose role is defined in section 6 as to represent the interests of the appellant in any proceedings before SIAC to which the appellant or his legal representative is excluded. It might have been benign at the outset to use a specially cleared advocate in order to be able to have access to closed material – it has been acknowledged by Strasbourg that there *are* legitimate security concerns. However, what is in place now is not what was envisaged then. At least then, in article 3 cases concerning a national security issue against the individual, if argument was about risk on return then that would be able to be played out in open court with an advocate quite properly representing their client. Since then much has changed. The reality now is that the Government's changes are taking the real argument into a closed arena. There is no basis for or justification whatsoever for arguing about risk on return on the basis of diplomatic assurances made in closed session. The forum in which to challenge *non-refoulement* in national security cases therefore provides scant guarantee for the rights of persons facing removal.

In as far as the European Court of Human Rights and the jurisprudence of other international bodies is concerned, the *non-refoulement* principle is clear: it is implied in article 3 of the European Convention and has been found to be equally absolute in expulsion cases irrespective of the activities of the individual involved. This is now being challenged by a group of States led by the UK in *Ramzy,* based on a number of key submissions: the direct conduct of States within the EU has to be differentiated from what happens in receiving States; there ought to be a balancing of the rights of individuals not to be at risk against the rights of 'society' to be free of 'terrorism'; that domestic criminal

[20] *Ramzy v The Netherlands* Application No.25424/05.
[21] *Chahal v United Kingdom* (1996) 23 EHRR 413.

systems are not sufficient to protect democracies against alleged terrorists who should therefore be deported irrespective of the risk to them of torture or other forms of ill-treatment. Because there is an exception to the *non-refoulement* principle in refugee law based on national security it is sought to import this into the argument for the balancing of the rights alluded to.

However, the jurisprudence of the Human Rights Committee, the Committee Against Torture, the European Court of Human Rights and other international bodies and eminent writers is clear: *non-refoulement* is an essential aspect of the absolute prohibition against torture at customary international law and in treaties such as the Convention against Torture – it is an inherent obligation under article 3 of the European Convention. As a consequence of this absolute prohibition against *refoulement,* no characteristics or conduct, including criminal or terrorist offences, alleged or proven, can affect the right not to be subject to torture or ill-treatment. The minority view in *Chahal* which *Ramzy* seeks to resurrect is at odds with the authorities which have consistently and repeatedly re-affirmed the majority position. Where there is a real, foreseeable and personal risk the rule operates, and in making the assessment of the risk regard must be had to the extent of human rights repression in the State concerned, including where applicable the existence of a consistent pattern of gross, flagrant or mass violations. If an existing risk is established it cannot be displaced by diplomatic assurances or memoranda of understanding; once again there is a wealth of authority to this effect, including most recently the UN General assembly by consensus.[22]

Fourth session: Discussions

The seminar was not intended to reach any formal conclusions or recommendations but rather to give the participants an opportunity to thoroughly explore the *non-refoulement* principle as it applies, or should apply, to both national security cases and 'ordinary' asylum cases. The fourth and final session gave those present a chance to review the main themes which had emerged. The panelists from all the previous sessions joined with the participants to do this. What is clear is that there are issues involved which are not amenable to easy solution, as the UK Government is undoubtedly on a path where its overriding concern appears to be to expel persons suspected of any remote connection to terrorism, and to slash the number of asylum seekers. A number of areas emerged during the individual sessions and in the final general discussion around which any strategies to defend the principle on *non-refoulement* will need to be considered. These can be broadly summarised as follows:

- *Memoranda of understanding/diplomatic assurances*

The problems with and weaknesses of these have been thoroughly debated. There can be contrasting views as to their worth. They can be considered as bilateral agreements between States, and as such are said to be worth something more than mere aspirations promptly forgotten. It can therefore be argued that they are analogous to the developing practice in the extradition context where assurances are routinely sought in respect of the death penalty and the rule against speciality. A contrary view is that they arise in situations precisely where both States would be keen to cover up a breach of the assurance - the returning State would not be keen to have their responsibility invoked for the violation of the individuals rights and the torturing State will obviously be equally unlikely to bring the violation to light. Furthermore, because these are bilateral agreements it

[22] General Assembly Resolution on torture, and other cruel, inhuman or degrading treatment or punishment, 18 November 2005, UN. Doc. A/C.3/60/L.25/Rev.1.

means that individuals cannot invoke them. The key problem remains the difficulty in monitoring the assurances.

- *The standard and burden of proof in national security cases where return is sought is problematic*

In general terms the individual bears the burden of proof, being the existence of a 'real risk'. In refugee law where someone is found to be a refugee the burden then falls on the State to show a cessation of circumstances which caused the person to seek asylum. The issue is thus not a temporary change in the State concerned but a genuine and lasting one there. People should not be forcibly returned under some special individual arrangement. What should be required is that there has been a proper and overall change in the State concerned.

- *Serious practical problems have arisen in 'ordinary' cases*

Damages are often no longer able to serve as an effective deterrent for people being unlawfully expelled, as the situation is becoming one where Government is willing to risk payment of or to pay damages to be rid of people. Clients are frequently denied proper access to legal advice and hence to court, and officials are willing to risk contempt of court in preventing such access. The resources of those litigating are under strain. These are all aspects of the Government's overwhelming wish to get people out, rather than concerns with the principles of *non-refoulement*.

- *The necessity of adequate notice of removal directions is called for to be able to effect a remedy*

Notice is often given too late and not made officially, and amounts to 'notice by chance.' This is unacceptable, as are the obstacles put in the way of the Refugee Legal Centre and other practitioners. There is an urgent need for transparency.

- *Difficulty of monitoring the people returned is a considerable hurdle*

This has been highlighted in the cases of Zimbabwe and Iraq, where the fate of people returned is often impossible to verify, but this applies to all States where it is felt a failed asylum seeker was wrongly returned. Again it is partially a matter of resources. In some case there is no effective monitoring presence in the country at all e.g. in Iraq because of the security situation. In other cases, such as Zimbabwe, although there are human rights organisations on the ground, they are over-whelmed by other concerns.

- *SIAC sharply brings into focus the issues*

In addition to concerns which have been highlighted in the papers such as evidence in closed sessions, there is the difficulty of those advocates and judges involved with matters of national security becoming 'case-hardened'; in the absence of adequate procedures to test the evidence of diplomatic assurances there is a real danger in these regards.

- *The US position before CAT and its 'understanding' of extra-territorial refoulement was highlighted*

The whole role of the US in muddying the waters and seeking to roll back well-established principles is of serious concern in itself as well as in its impact on Europe governments and elsewhere. By arguing that it is not *refoulement* to send somebody to a place where they may be at risk if they are sent from *outside* the US (because they are not being 'returned')

is disturbing; it undermines the fundamental and absolute prohibition against torture and cruel, inhuman or degrading treatment and punishment.

- *Regional protection areas too raise problems for human rights lawyers seeking to defend the principle*

These schemes are being developed to keep groups of refugees in camps outside of Europe (e.g. in North Africa), and to process them from there. The problem with this is that these schemes have no basis in international law; there is no basis in international law for holding one State more responsible than another for refugees. They are also being promoted and induced through economic blandishments to the developing world.

ANNEX 1: OVERVIEW OF HISTORY AND CURRENT SCOPE OF NON-REFOULEMENT, AND CURRENT ATTACKS ON THE PRINCIPLE [23]

by **Professor Guy S. Goodwin-Gill**, All Souls College, Oxford & Blackstone Chambers, and **Mr Raza Husain**, Matrix Chambers
(Note: This paper was distributed at the seminar and used as the background to the presentation which followed, lead by Professor Goodwin-Gill. It has been lightly edited)

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 3 ECHR*
>
> *"Get them back." Tony Blair, in Youseff v Home Office [EWHC (QB) 1884 at [15]*

1. INTRODUCTION

It is important to sketch the history and current scope of *non-refoulement*, the principle which forbids States returning persons to prohibited ill-treatment, and to then examine attacks on the principle inherent in the increasing practice of seeking diplomatic assurances to guard against such risks that would otherwise obtain on the expulsion by a host State of an individual to a receiving State. That diplomatic assurances lack efficacy as a protection against prohibited ill treatment is revealed by the following:

- They are based on trust, in circumstances where routinely there will be no basis for such trust;
- Post-return monitoring mechanisms do not work because of the manner in which torture is typically practised;
- The risk may emanate not from official State acts, but rather from rogue State actors;
- There is no accountability, and little incentive for breaches of the assurance to become public.

In short, diplomatic assurances effectively add nothing to the receiving States' obligations, while in no way diminishing those of the sending State.

The issue has currency in the domestic context given the deportation appeals before the Special Immigration Appeals Commission of the so-called Belmarsh detainees, formerly detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001. The Home Secretary was unable to deport those men because of the real risks of treatment prohibited by article 3 ECHR that would eventuate on their return to their home countries. They were indefinitely detained. Following the House of Lords judgment in December 2004[24] declaring Part 4 to be incompatible with the detainees' human rights, the government indicated that it would continue to seek to obtain assurances so as to be able to secure their expulsion. Indeed this was its position before the House of Lords.[25] On 26 January 2005, while outlining the government's plans to replace indefinite detention under Part 4, the Home Secretary said to the House of Commons:

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[23] This paper draws extensively on two reports by Human Rights Watch: "Empty Promises: Diplomatic Assurances No Safeguard Against Torture" April 2004, and "Still at Risk: Diplomatic Assurances No Safeguard Against Torture" April 2005; and on REDRESS, "Terrorism, Counterterrorism and Torture: International Law in the Fight Against Terrorism", July 2004.

[24] *A v Secretary of State for the Home Department* [2005] 2 WLR 87.

[25] In its printed Case before the House of Lords in A, the government states that it had been exploring the possibility of removing foreign nationals to States where there are fears of article 3 treatment with a view to establishing memoranda of understanding which could provide sufficient safeguards to allow return*: A and Others v. Secretary of State for the Home Department*, Case for the Secretary of State [to House of Lords], September 13, 2004, p. 10, footnote 24.

> "(Regarding) deportation with assurances. As the House knows, we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focussing our attention on certain key middle-eastern and north African countries. I am determined to progress this with energy. My noble friend Baroness Symons of Verham visited the region last week. She had positive discussions with a number of countries, on which we are now seeking to build."[26]

The government's stance had earlier attracted the attention of the UN Committee against Torture. In its responses to the Committee, the UK delegation stated: "The UK is committed to abiding by its international obligations and it is UK policy not to remove any person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. But if we consider that securing assurances from a State authority will enable us to remove a person to a country in a manner consistent with our international obligations, then we believe it is worth trying to do so. We acknowledge that this is a difficult area, but believe that, properly handled, assurances can help us meet our international human rights obligations, while allowing legal processes to be properly carried out."[27]

The Committee nevertheless expressed its continuing concern at the United Kingdom's

> "... reported use of diplomatic assurances in the refoulement context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed, are not wholly clear…
>
> … the State party should provide the Committee with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees have occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases…"[28]

2. OVERVIEW OF HISTORY AND SCOPE OF THE PRINCIPLE OF *NON -REFOULEMENT*

The refugee context

The best known expression of the principle of *non-refoulement* is contained in Article 33 of the 1951 UN Convention on the Status of Refugees which provides that:

> "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.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

[26] Hansard HC debates, 26.1.05, Cot 307.
[27] Dame Audrey Glover, UK Responses to the UN Committee against Torture, 18 November 2004.
[28] Committee against Torture, Conclusions and Recommendations: Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland @ CAT/C/CR/3313, 10 December 2004, sections 4(d), 5(i).

There also later expressions of the principle in various instruments:

- the 1966 Principles Concerning Treatment of Refugees, Article ffl(3), adopted by the Asian-African Legal Consultative Committee;
- the 1967 Declaration on Territorial Asylum, Article 3;
- the 1969 Organisation of Africa Unity Convention Governing the Specific Aspects of Refugee Protection in Africa, Article 11(3);
- the 1984 Cartegena Declaration, Section III, para 5.

The extradition context

The principle is also contained in standard-setting instruments relating to extradition:

- the 1957 European Convention on Extradition, Article 3(2);
- the 1981 Inter-American Convention on Extradition, Article 4(5).

The human rights context

Article 3 ECHR 1950 provides that

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In a series of early decisions, the most notable of which was *Amerkane v. UK* (No.596/72) 16 YB 356 (1973), the European Commission on Human Rights interpreted Article 3 so as to contain a *non-refoulement* component. This jurisprudence inspired 1984 UN Convention Against Torture, Article 3(1), which provided (in unqualified terms) that:

> "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."

The European Court of Human Rights in turn invoked UNCAT, Article 3 in its seminal judgment in *Soering v. United Kingdom* (1989) 11 EHRR 439, an extradition case, deciding that a *non-refoulement* component was "inherent" in Article 3 ECHR. The approach in *Soering* was followed and extended to the immigration context in *Cruz Varas v Sweden* (1991) 14 EHRR 1 at [69-70] and in *Vilvarajah v UK*(1991) 14 EHRR 248, at [103].

In its turn, the HRC issued a General Comment 20 in 1992 on the scope of Article 7 ICCPR (the international analogue of Article 3 ECHR) in the following terms:

> "3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority
>
> 9... States 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*. States parties should indicate in their reports what measures they have adopted to that end."

The UK Government unsuccessfully questioned the *Soering* approach in the case of *Chahal v UK* (1997) 23 EHRR 413, where it submitted to the Commission that article 3 had no extra-territorial effect,[29] and alternatively, citing Grotius,[30] submitted that in deportation cases it was subject to limitations, qualifications or derogations.[31] The Commission rejected these submissions.[32] Before the Court, the UK Government abandoned its first submission,[33] but pressed the second. Again it was unsuccessful. The Court concluded that:

> "Article 3 enshrines one of the most fundamental values of democratic society…Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, article 3 makes no provision for exceptions and no derogation from it is permissible under article 15 even in the event of a public emergency threatening the life of the nation…
>
> The prohibition provided by article 3 against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion."[34]

This approach has subsequently been followed in a long line of cases. [35] Thus the subsequent jurisprudence clearly establishes firstly that Article 3 applies to all and any forms of removal or return, including extradition, expulsion, or "rendition": see generally; and secondly is absolute and unqualified: *Chahal v. United Kingdom* (1996) 23 EHRR 413 above. The central importance and value of this provision is no more clearly stated than in *D v. United Kingdom* (1997) 24 EHRR 423:

> "in exercising their right to expel... Contracting States must have regard to Article 3 of the Convention..., which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3... prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question..." (para 47)

The Canadian Supreme Court in *Suresh v. Canada (MCI),* 2002, SCC 1, held that "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified" (para 78). This finding, the so-called "Suresh exception" has been the subject of robust criticism both by the UN Committee Against Torture[36] and the HRC which said in its concluding observations:

> "15. The Committee is concerned by the State party's policy that, in exceptional circumstances, persons can be deported to a country where they would face the

[29] Paragraph 92, Commission decision
[30] De Jure Belli ac Pacis (1623)
[31] Paragraph 97-99, Commission decision
[32] 10 paragraphs 10 1-104 Commission decision
[33] Paragraphs 73-74, Court judgment
[34] 12 paragraphs 79-80, Court judgment
[35] *Ahmed v Austria* (1997) 24 EHRR 728, paragraphs 38-39; *HLR v France* (1997) 26 EHRR 29; *Hatami v Sweden* 27 EHRR CD 8; *Jabari v Turkey* (2000) BHRC 1; *Hilal v UK* (2001) 33 EHRR 2, paragraph 59; *Bensaid v U*(2001) 33 EHRR 10, paragraph 32.
[36] 34th Session, Conclusions and Recommendations of the Committee Against Torture: Canada, CAT/C/CO/34/CAN, May 2004, para 4(a)

> risk of torture or cruel, inhuman or degrading treatment, which amounts to a grave breach of article 7 of the Covenant.
>
> The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law."[37]

As regards the position in domestic law, article 3 is of course the controlling provision, by reason of the Human Rights Act 1998, sections 1 and 6. However, as noted above, the prohibition against return to prohibited ill-treatment is also reflected in other international and regional human rights instruments,[38] and also arguably (by reason of its inherent link to the absolute prohibition of torture) has the character of a peremptory norm of customary international law.[39]

3. THE TENSION BETWEEN DIPLOMATIC ASSURANCES AND THE PRINCIPLE OF *NON-REFOULEMENT*

Eminent human rights experts have expressed concern at the tension between reliance upon diplomatic assurances and the integrity of the principle of *non-refoulement*. Thus:

- The Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles stated in July 2004 that:

> "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition on torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nevertheless remains ... When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill- treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment."[40]

These comments were inspired by the Swedish government's expulsion (with the assistance of hooded US agents and a US aircraft; see *Agiza v. Sweden*, below) of two Egyptian asylum-seekers in December 2001 on the strength of assurances obtained from the Egyptian authorities. The men subsequently claimed to have been tortured.

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[37] CCPR/C/CAN/CO/5; 85th Session.

[38] ICCPR, Article 7 and UNHRC General Comments No. 20 (1992) and No.3 1 (2004); UNCAT, Article 3 and *Tapia Paez v. Sweden*, Communication No. 39/1996, 28.4.97; American Convention on Human Rights, articles 5, 22(8); Inter-American Convention on Torture, article 13.

[39] See eg. Lauterpacht and Bethlehem, "The Scope and Content of the Principle of *Non-refoulement*" in Feller, E., Volker Turk, Frances Nicholson, eds., Cambridge: Cambridge University Press, 2003, 87, Allain, "The Jus Cogens Nature of *Non-refoulement*", IJRL, Vol 13 (2001), p. 538.

[40] Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004, Council of Europe, CommDH (2004)13, 8 July 2004.

- The former special rapporteur on torture, Theo van Boven, in his September 2004 report to the UN General Assembly, concluded that where a person faced return to a state where torture was systemic:

  > "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to."[41]

- The current special rapporteur, Manfred Nowak, echoed these sentiments on the Today programme in March 2005:

  > "In the situation that there's a country where there's a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with. And there's then no way or very, very little possibility of the sending country to actually "as soon as the person is in the other country" to make sure that this type of diplomatic assurances are complied with."[42]

- The UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, in his February 2005 report observed that "the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated,"[43] and concluded that,

  > "Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation or other transfer, diplomatic assurances should not be used to circumvent the *non -refoulement* obligation."[44]

4. EFFICACY IN PRACTICE

Human Rights Watch in its April 2005 report[45] observes that,

> "Diplomacy entails the tactful management of foreign relations to promote the overall interests of the state. Human rights may be one of those interests, but it is seldom the only one, and as a consequence diplomacy cannot be an exclusive and reliable lever for human rights protection."

The report cites the experience of the Swedish government in its expulsion in December 2001 of two Egyptian asylum seekers on the strength of assurances obtained from the Egyptian authorities. The men claimed to have been tortured. The Swedish ambassador was asked why five weeks were allowed to pass before he visited the men. He replied that he could not have visited them immediately because that would have signalled a lack of trust in the Egyptian authorities.

[41] Report of the Special Rapporteur on Torture, Theo van Boven, to the General Assemble, 23.8.04, paragraph 37.
[42] BBC Radio 4, Today Programme, 4 March 2005.
[43] UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, 7.2.05, p.19, paragraph 56.
[44] Ibid. p.20, paragraph 61.
[45] Still at Risk: Diplomatic Assurances no Safeguard against Torture.

The Committee against Torture has now given its views on this case, *Agiza v. Sweden.*[46] Sweden argued that "by obtaining the guarantees in question from the competent Egyptian official, it lived up to its commitments under the Convention while at the same time as fulfilling its obligations under Security Council Resolution 1373. Prior to expelling the complainant, appropriate guarantees were obtained from the official best placed to ensure their effectiveness... (and) a monitoring mechanism was put into place and has been functioning for almost two years.." In the alternative, it claimed that "the crucial question is what the State party's Government had reason to believe at the time of the expulsion. As the complainant has not substantiated his claim under article 3, his removal to his country of origin was not in breach of that provision."(para 4.29)

In a submission reminiscent of Mr Blair's reported remarks in the *Youssef* proceedings (see below), Sweden also suggested that it was doubtful, "whether the value of assurances should be considered to be increased simply because they include a reference to a state's human rights obligations. *The important factor must be that the State in issue has actually undertaken to abide by the provisions of human rights convention by becoming party to it…"* (para 12.23, emphasis supplied).

The Committee was not persuaded. It agreed that the question of breach of Article 3 CAT,

> "must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities at the time of the removal. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal" (para 13.2).

However, it was of the view that, "at the outset... it was known, or should have been known ... to the Swedish authorities that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons".(para 13.4) The Committee concluded that the expulsion of the complainant was in breach of Article 3 CAT, and that "The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."

Closer to home, documents disclosed in the case of *Youseff v. Home Office* [2004] EWHC 1884 (QB) 30 July 2004 demonstrated the Prime Minister was concerned as to the diplomatic consequences of being demanding in the scope of the assurances sought from the Egyptian authorities by the Home Office in an effort to deport four Egyptian asylum seekers. An April 1999 letter to the Home Office revealed (see *Youseff* at [18]) his concerns:

> "(W)e are in danger of being excessive in our demands of the Egyptians … why (do) we need all the assurances proposed by the FCO and the Home Office Legal Advisers. Can we not narrow down the list of assurances we require?"

We return to *Youseff* below. In the result, individuals concerned were not removed to Egypt because the Egyptian authorities were not prepared to give the assurances sought, rather than because the United Kingdom was not prepared to rely upon them; whether a UK court would have been prepared to accept the 'validity' of any such assurances, of course, is another matter.

[46] *Agiza v. Sweden* (CAT/C/34/D/233/2003, 20 May 2005).

(1) Trust

A fundamental problem with the seeking of assurances from a state which has a record of torture or ill-treatment is that of trust. And it is from those states that assurances are sought: there is no need to seek assurances from states which do not inflict torture or ill treatment as a means of advancing state policy. Why should the state from which an assurance has been sought and obtained be trusted to comply with it?

Diplomatic assurances typically cite the receiving state's existing *binding* treaty obligations in the field of human rights obligations which have been routinely breached as the basis for illustrating the reliability of the non-binding assurance offered in the individual case. This point was not lost on the Home Office in the *Youseff* case. The Home Office recognised in a February 1999 memo at [8] that

> "there are a number of factors which suggest that assurances would do little or nothing to diminish the article 3 risk ... The main problem is that the Egyptian authorities' record in the treatment of political opponents is, by any standards, not good ... In particular as you will see, abuse and torture are widespread despite the prohibition by the constitution of infliction of physical harm upon those arrested or detained."

This approach fell to be contrasted with that of the Prime Minister, who took the view at [38] that

> "we should now revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking."

and that

> "we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and take our chances in the courts."

(2) Monitoring

Post-return monitoring mechanisms may be seen as a necessary minimum standard before an assurance may be relied upon. But in the context of protection against torture or ill treatment, they are very likely not to be sufficient: the practice of torture and ill-treatment is extra-legal and usually covert. As the Canadian Supreme Court observed in *Suresh v. MCI and Attorney-General of Canada* [2002] S.C.R. 3:

> "A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter."[47]

[47] Paragraph 124.

Robert K. Goldman, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, has also noted that compliance with assurances against torture cannot be verified in the same way as assurances in death penalty cases.[48] It is striking that in the *Youseff* case at [18] the Prime Minister was content to forego any assurance even as to post-return monitoring:

> "There is no obvious reason why British officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a United Kingdom-based lawyer. Can we not narrow down the list of assurances we require?"

The Egyptian authorities refused to permit access to United Kingdom lawyers. The FCO considered at [26] that

> "there was no alternative to access by British officials. The ICRC had a permanent presence there but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate or result in the deportations of individuals to Egypt."

(3) Rogue state actors

Relatedly, even where the receiving state can be trusted to comply with the assurance given, that will not be decisive where the risk of ill treatment emanates not from the sanctioned acts of state agents, but the action of rogue state agents. In *Chahal v. United Kingdom* the Indian government gave assurances to the United Kingdom that the applicant would not suffer mistreatment at the hands of the Indian authorities. The European Court of Human Rights observed:

> "(T)he United Nations Special Rapporteur on Torture has described the practice of torture upon those in police custody as 'endemic' and has complained that inadequate measures are taken to bring those responsible to justice .. The NHRC (Indian National Human Rights Commission) has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India ... Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem ... Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety."[49]

(Furthermore, even in a case where the risks emanate from rogue state actors, the test applied by the Court of Human Rights is the same test which applies where the ill treatment emanates officially from the home state, namely whether there are substantial grounds for believing that there a real risk of the ill treatment eventuating: see also *Hilal v. United Kingdom* (2001) 33 EHRR 2.)

However, in the United Kingdom, it appears that the domestic courts may have introduced a test, based upon the wholly different concerns in the Refugee Convention, which is different from and more onerous than that which the Strasbourg Court applies where the

[48] UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, 7.2.05, p.20 paragraph 57.
[49] Paragraphs 104-105.

risks emanate from unofficial acts of rogue state agents. In R *(Bagdanavicius) v. SSHD* [2005] UKHL 38, the House of Lords observed (per Lord Brown) that

> "…It may also be helpful, in any future case under article 3 where the threatened harm emanates not ... 'from the intentionally inflicted acts of the public authorities ... ' but rather from non-conforming behaviour by (perhaps quite junior) official agents, to apply by analogy the approach adopted by the majority of the Court of Appeal in the asylum case of *Svazas v. SSHD* [2002] 1WLR 1891…"[50]

Svazas requires the domestic courts to ask in a Refugee Convention case the question whether there exists a sufficiency of protection in respect of the acts of rogue state agents. But that sufficiency of protection is measured in a general or systemic manner, and may co-exist with a real risk of prohibited ill treatment. In this class of case, it appears at least to be an open question as to whether the domestic case law is compliant with the jurisprudence of the Court of Human Rights.

(4) Accountability

A further reason why monitoring arrangements are likely to be ineffective is that they do not provide for a mechanism whereby accountability may be allocated. Human Rights Watch report that typically the sending State will simply place blame on the recipient State for breach of the assurance.

5. CONCLUSIONS

The practice of relying upon assurances in order to expel persons who would otherwise be at risk of torture or ill-treatment in the receiving state is to be deplored both as a matter of principle and on practical grounds. Such a practice undermines the integrity of the principle of *non-refoulement,* and is very unlikely to achieve the desired result of human rights compatible treatment in practice. Indeed, the practice of states, particularly as revealed in the work of national courts, treaty and other monitoring bodies, shows up many of the contradictions inherent in very idea of seeking assurances that this or that candidate for removal will not be tortured. The process admits that torture takes place in the prospective receiving country, and is likely systemic; even as the sending State seeks protection for one, so it acquiesces in the torture of others.

Diplomatic assurances, while they may establish a certain level of bilateral obligation, do not effectively guarantee protection, no matter the level and respectability of the 'guarantor'. As Judge T. Workman remarked in extradition proceedings in the Bow Street Magistrates Court on 13 November 2003, in words which recall the approach of the European Court of Human Rights in *Chahal:*

> "The Deputy Minister responsible for Russian prisons gave evidence to me about the very considerable improvements that have taken place within Russian prisons in the past few years. They are commendable improvements made in difficult circumstances. He gave me an assurance that Mr Zakaev would come to no harm whilst he was detained in a Russian Ministry of Justice institution. Jam sure that he gave that assurance in good faith. I do, however, consider it highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison estate."[51]

[50] Paragraph 30.
[51] Bow Street Magistrates Court, *The Government of The Russian Federation v Akhmed Zakaev*, 13 November 2003: text at http://www.tjetjenien.org/Bowstreetmag.htm (site of the Swedish Committee for Chechnya).

Even when linked to post-return monitoring, there is still no sufficient guarantee of protection; as commentators have remarked, such procedures commonly lack basic safeguards, including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors. See also the report of the Committee against Torture in *Agiza v. Sweden*.

More to the point is the lack of any effective remedy for the person affected, whether in respect of the rights of him- or herself, or with a view generally to ensuring the accountability of both sending and receiving states for the violation of international law. The necessity for such a remedy, in advance of any prejudicial action, was recognized by the Supreme Court of Canada in *Suresh*. It held: "Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances" (Para. 123) The Court also warned against "relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past." (Para. 124) In evaluating any such assurances, regard should be had to the human rights record of the government giving the assurances, its record in complying with its assurances, and it capacity to fulfil its assurances, particularly in regard to the security forces. (Para. 125) Moreover, written reasons for the decision must be provided, which articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual will be subjected to torture, execution or other cruel or unusual treatment (Para. 126):

> "These procedural protections need not be invoked in every case, as not every case of deportation of a Convention refugee... will involve risk to an individual' fundamental right to be protected from torture or similar abuses. It is for the refugee to establish a threshold showing that a risk of torture or similar abuse exists before the Minister is obliged to consider fully the possibility. This showing need not be *proof* of the risk of torture to that person, but the individual must make out a prima facie case that there may be a risk of torture upon deportation. *If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons*. This is the minimum required to meet the duty of fairness and fulfil the requirements of fundamental justice under s. 7 of the Charter." (para. 127; emphasis in penultimate sentence supplied)

The local requirements which flow from Canada's Charter of Fundamental Rights and Freedoms are amply reflected in international law, and in the human rights obligations which bind the United Kingdom and other states. In *Agiza v. Sweden*, the Committee against Torture was of the view that in *refoulement* cases, the right to an effective remedy requires, "an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise." It recalled that "the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasise the importance of appropriate review mechanisms..." (Paras. 13.7, 13.8). In this Committee's view, moreover, its inherent jurisdiction to indicate interim measures means that an individual must have a reasonable period of time before execution of a final decision in which to consider whether to seize the Committee under its article 22 jurisdiction, and to do so in fact. (Para. 13.9)

The UN Human Rights Committee has expressed itself in similar language overall, in its General Comment on states of emergency and non-derogable rights:

> "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights."[52]

The *absolute* character of the prohibition of torture thus has major policy and legal implications for states and officials. Where there is evidence of a serious risk of torture, it is clear that diplomatic assurances do not offer any sufficient and effective guarantee; as a recent joint NGO statement put it:

> "In order for torture and other ill-treatment to be prevented and eradicated, international law requires that systemic safeguards at legislative, judicial, and administrative levels must be implemented on a state-wide basis. Such systemic efforts cannot be abandoned and replaced by consular visits aimed at ensuring compliance with diplomatic assurances."[53]

Criminal liability also extends to those guilty of complicity in torture (CAT, Article 4.1; see also Article 2); there is no reason in principle why this should not encompass those who seek to circumvent international obligations and the weight of the evidence.

The Security Council has repeatedly stressed that the struggle against terrorism must be carried out consistently with States' obligations under international law, in particular, international human rights law, international refugee law, and international humanitarian law. There is nothing exceptional in this statement, which simply reflects the international legal principle of good faith, and the duty of States, even in matters over which they exercise authority, not to abuse their rights, but to act consistently with the rule of law.

[52] Human Rights Committee, General Comment No. 29, "States of Emergency (Article 4)": UN doc. CCPR/C/2 I/Rev. I/Add. 11, 31 August 2001, para. 15.
[53] Amnesty International, Association for the Prevention of Torture, et al., "Call for action against the use of diplomatic assurances in transfers to risk of torture and ill-treatment", 12 May 2005, AI Index: ACT 40/002/2005.

ANNEX 2: REFUGEES IN THE UK OUTSIDE THE CONTEXT OF NATIONAL SECURITY: THE CASE OF ZIMBABWE AND IRAQ

by **Sonal Ghelani,** Refugee Legal Centre (RLC) and **Mark Henderson,** Doughty Street Chambers
(Note: this paper was presented by Ms Ghelani, and has been lightly edited.)

Zimbabwe

It is helpful to outline the events of July 2005 and the work the RLC did around Zimbabwe, which finally led in the middle of July to the Government undertaking not to forcibly remove Zimbabweans who had come to the end of the line in their asylum plea until the issue of whether they were at risk of persecution simply by virtue of having claimed asylum was resolved by the courts.

In July 2005 there were reports concerning the ill-treatment of people returned to Zimbabwe: at this time the RLC didn't have any clients, but we were in contact with failed immigration detainees, including about one hundred Zimbabweans detained on the basis that they were going to be removed.

We became aware, the day before, of cases that had already been coming before the courts and commission hearings and that some of the claimants were unrepresented, so we arranged for someone from the Zimbabwe Association to see if they would go to court to intervene in so far as the unrepresented claimants were concerned; if they wanted RLC to act for them then obviously we would do. Happily for us Mr Simon Cox of Doughty Street Chambers was around that day, and although not expecting to go to court, at less than half an hours notice, he was there, instructed by the RLC on a pro-bono basis. This was on 6th July. He set out the concerns of the RLC around Zimbabwe asylum seekers.[54]

At the end of the afternoon we had clients Mr M and Ms M protected in terms of their returns to Zimbabwe because they had claims to asylum outstanding, but there were still concerns over the unrepresented people in detention. Mr. Justice Collins that afternoon had made comments to the effect that anyone with a claim for judicial review wouldn't be removed, and if the Home Office did try to remove them they would be granted relief to stop their removal. However, that did not help the people who were in detention and who didn't have legal advice and therefore couldn't issue claims. We also flagged up the with the court that we would be looking to come back for class relief for all Zimbabweans who were detained if we didn't get anywhere in our inquires to the Treasury Solicitors, who simply said they had not received any instructions as to the issue. This caused us to go back to court using the case of M as a vehicle to seek class relief that no Zimbabwean failed asylum seekers ought to be removed to Zimbabwe whilst the issue of the risk on return was live before the court. This hearing came before Mr Justice Ouseley exactly a week later on 13 July, where he made his view very clear indeed to the Secretary of State that:

> *"…the reality of the position is that this court is not going to be told that someone who was removed to Zimbabwe tomorrow got tortured on return in a class that was going to be examined by this court. It is not going to happen, one way or the other."*

[54] These included the fact that the RLC had only heard about the hearings after they had begun; that it was concerned about its existing clients and those currently lacking resources to be represented; that the Home Office had apparently not examined all the newspaper reports which carried allegations of what happened to returnees, including prosecution.

That backed the Secretary of State pretty much into a corner and we submitted three versions of orders that we would be happy for the court to endorse for a class undertaking that no one would be removed to Zimbabwe. The matter was reserved/adjourned to the following day to enable the parties to agree and perhaps as a face saving measure for the Secretary of State, who, at about 2'oclock on the 14th July, about an hour before due back in court, made the relevant undertaking not to return the class. That undertaking still holds. We had a substantial hearing to follow on the case of M and M. on which time was spent collating evidence and a lot of work was done.

Before the Asylum and Immigration Tribunal (AIT)

After a lot of evidence on either side (set out in the Court of Appeals judgment), the AIT had allowed the appeal in October 2005 and had ruled that all Zimbabweans who sought asylum who would not return voluntarily were at real risk of persecution and article 3 ill-treatment, and therefore the Home Office was obliged to recognise them as refugees.[55]

The Court notes[56] the most positive coverage that any group of asylum seekers having had as being the only reason these cases ever came to light and the reason for the AIT eventually ruling that everyone was entitled to protection. It was accepted, following evidence, that anyone forcibly removed from the UK to Zimbabwe was handed over to the CIO, the Zimbabwe intelligence agency, for interrogation, and that the person heading the CIO is on record as having said he would like to cleanse half the population leaving only those loyal to Mugabe, and that he'd repeatedly accused the UK of conspiratorial involvement, quoted as saying:

> *'we will be better off with only six million people, with our own people who support the liberation struggle. We don't want all these extra people.'*[57]

The Court notes the amount of evidence concerning individual returnees including witnesses who had given direct accounts of torture on removal, and the expert evidence of Professor Ranger, an extremely eminent expert who had known Mugabe for many years as well as other senior figures in the regime. Prof. Ranger's conclusion was the regime's belief about infiltration of spies/British agents and its attempt to affect regime change make it '*highly unlikely that a deportee would escape interrogation*' and with interrogation at the hands of the CIO would undergo ill-treatment.[58] The evidence that the Secretary of State gathered, having sent a team with the Foreign Office out to Zimbabwe where they joined forces with the British Embassy specifically to knock down the RLC's case, shows that much of the evidence they gathered was along the same lines; that someone having sought asylum in the UK was likely to be regarded as one of Blair's spies and at risk as a result. The AIT's conclusions as to why they allowed the appeal, accepting that the evidence how people removed from the UK are going to be treated, included the AIT setting out their understanding of the *burden of proof*, saying:

> '*As we have attempted to explain above, the claim that every person returned involuntarily is at real risk of ill-treatment is not a claim that everyone will in fact suffer ill-treatment. Likewise, looking at the past, the Appellant does not need to show that all those who have been returned involuntarily did suffer ill-treatment. He is entitled to rely, as he does, on evidence pointing to a*

[55] AA and LK v Secretary of State for the Home Department [2006] EWCA Civ 401
[56] Paragraphs 12 and 13.
[57] Paragraph 30
[58] Paragraph 47

> *substantial number of cases in the context of general evidence showing the source or reason for the risk.'*[59]

The AIT discusses the difference of opinion as to how the test should be applied when determining whether a class of people were at risk of being returned to a particular country, and specifically whether one must show that the treatment complained of is gross and systematic with respect to that class. They discuss the differing views of the Court of Appeal judges in previous cases and come down clearly in the RLC's favour, accepting that 'real risk' means simply that; and does not require showing systematic, routine, frequent risk or indeed that the majority will suffer it. This point was discussed at the hearing in the Court of Appeal and Lord Justice Brook wondered whether he was going to have to decide in the course of the judgment whether Lord Justice Laws (who was sitting with him on AA) or Lord Justice Sedley were right in their analysis of the standard of proof. In the event they managed or decided to deal with it by ignoring it entirely.

Court of Appeal's ruling

The Court Appeal felt able to set aside the primary finding of the AIT that anyone forcibly removed from the UK would be at real risk.[60] They looked at individual accounts of returnees which the RLC had managed to produce, almost all of them from newspaper reports and from the Zimbabwe Association, and essentially accepted the Home Office challenge to the AIT's determination, namely, that only a small minority (about a quarter) of these reports reported specifically treatment that would violate article 3 - others concerned detention, interrogation and release after a day or so or subsequent disappearance. We had said that in the context of the RLC's resources, the reign of terror in Zimbabwe, and the difficulty in getting information out of there, that all these were cases of concern; that the evidence manifestly showed something that could only be reasonably called a 'real risk' to people removed; and that therefore any loose language by the AIT should be regarded as immaterial. The Court of Appeal, however, accepted the Secretary of State's submission that this was all very uncertain, and that there was not enough evidence about individual returnees for the AIT to rely on as they had done, and decided that it would have to go back for a rehearing.

That indicates that without having to attack the legal standard of proof the Appeal Court felt able to set aside an extremely controversial determination allowing thousands of people the legal right to stay, by requiring a perhaps unreasonably high evidential standard in practice and ignoring what you might call 'circumstantial evidence' regarding the well known behaviour of the Zimbabwe CIO and the inferences that therefore could be drawn from an understanding that that agency would be interrogating the detainees. The implication from the Home Office, on the other hand, was that while these people were being returned by the British Government they would be in the public eye and so it cannot be assumed that the CIO would act in the same way toward this class.

The other interesting point from the judgment, suggesting that the Appeal Court was generous to the Home Office, was that despite the Home Office not having argued before the AIT that it was relevant whether these people would or would not have been at risk if returned *voluntarily*, provided they were not willing to return voluntarily, they were allowed to raise just such an argument in the Court of Appeal; in the result they successfully persuaded the Court that for the purposes of the Refugee Convention if someone would not risk persecution if returned voluntarily then regardless of their refusal to do so they were not refugees and so could be returned, regardless of whether they would face persecution for Refugee Convention reason.

[59] Paragraph 67
[60] The reasons are at paragraphs 70-72

That – on the wording of the Refugee Convention – is *not* an absurd analysis, but the Court (particularly Lord Justice Laws) seemed keen to extend it to article 3 where it is a much more difficult analysis of the law as established by the Strasbourg Court.[61] That aspect didn't form any part of the Secretary of State's case on the appeal, which was to accept that if there was a real risk they were protected by article 3, but that article 3 does not require them to be given any formal status whatsoever, similar to the issue in the Afghan case, and that the UK is not required (as we would be if they were refugees) to give them any form of legal status with rights and benefits and so on. However, Lord Justice Laws wanted an argument to the effect that if someone would return voluntarily without facing risk of ill-treatment (because they would not be picked out by the intelligence agency on arrival) then even if they refused to go then article 3 didn't prevent their expulsion to face torture regardless of that possibility, and actually sent the Government lawyers away to make written submissions to that effect. The Home Office initially agreed to make such submissions but on the day due to make the argument said they were not going to make them after all. They reserved their position on the point for the future.

Conclusion

This voluntary/involuntary distinction is dangerous for two reasons, apart from the fact the judgment means that the leave to remain people get in the UK and the rights they are entitled to depend on that distinction. Firstly, in relation to countries like Zimbabwe and the DRC where the point arises, people will very often be unwilling to return because of the general humanitarian situation, and on the basis of this judgment the risk is that people will not be entitled to status because risks that they directly identify and refuse to face unless forcibly removed are not of such a nature as to engage article 3 in the restrictive sense the immigration tribunals have given it.

Secondly, those issues that would engage article 3 and would entitle them to refuse to return, namely ill-treatment on return, are (as we are about to find out in AA remitted to the tribunal to consider the issue) much more difficult to establish in the case of voluntary removals, because by definition those who do voluntarily go back are highly unlikely to be heard from again i.e. they are highly unlikely to report such ill-treatment. It is therefore going to be much easier for the Government to say that all cases put forward are by people who had contacted NGOs and were semi-monitored and were forcibly removed, and that there is no evidence that those who had accepted the £3,000 inducement (by the International Organisation for Migration) or whatever to get on the plane voluntarily, had ever been ill-treated: significant evidential problems arise and are also reflected in the huge disparity of resources in those cases. This will show in the week long hearing in July 2006 when the case is to be re-argued before the AIT.[62]

Iraq

In August 2005 there were rumours that the Secretary of State was going to start forcibly removing people to Iraq as announced in February 2004. The common theme in both Zimbabwe and Iraq is that the RLC never have any clients when crisis hits, as was the case in August.

[61] Paragraph 107.
[62] The AIT ruled on 2 August 2006 that there was not sufficient evidence to order a general freeze on forced removals, and that each failed asylum seeker's case had to be examined on its merits to see if he/she would face a real risk. Leave to appeal to the Court of Appeal has been refused by the AIT, but an application is being made to the Court of Appeal itself for leave to appeal to it.

In Zimbabwe the procedure for removal was clear: people were sent to Harare. In Iraq, however, it is more complicated, principally because there had been no forced removals at least since 1991. From 1991 - 2000 Iraqis claiming asylum either got refugee status and indefinite leave to remain or four years exceptional leave to remain (ELR). In October 2000 the Secretary of State announced a change of policy/practice for Iraqi Kurds for the Kurdish-controlled area, on the basis of conditions having improved considerably and that people could get across areas in Kurdish control. Policy remained with respect to people outside Kurdish areas who would still get refugee status or ELR. For Kurds outside the Kurdish-controlled areas the policy was that they would not be refused refugee status on the basis that they could relocate to Kurdish controlled areas – this remained the position until March 2003; this policy was never and nowhere written down and only came to light partially in a case called *Rashid*.[63]

Mr Rashid had issued a judicial review claim relying on this policy as he was from outside the Kurdish-controlled areas and should have been granted indefinite leave to remain as a refugee, but had been refused on the basis he could relocate to the Kurdish-controlled safe territory. In June 2005 the Court of Appeal dismissed the Secretary of State's appeal and held that Mr. Rashid *did* have a legitimate expectation that he should be granted indefinite leave to remain, and that the Secretary of State's conduct was so appalling as to amount to an abuse of power. That was the position in August 2005 when we became aware of people being detained, through an email from ILPA.

At this time we had no clients, and began a frantic search through files. We had no idea of the route that they were going to take to forcibly return people except that it would not be Baghdad but would probably be somewhere in the north. We didn't know the mode of transport they would use and didn't have sufficient evidence of maltreatment on return of failed asylum seekers arriving back in Iraq. The only thing we *did* have was the case of *Rashid* and the judgment of the Court of Appeal. What appeared to be clear to us was the Secretary of State was detaining people without establishing whether they were from the Kurdish-controlled areas, so we started investigating/asking questions: who these people were, had the case of *Rashid* been considered and how would it be assured that people detained were able to get legal advice. We were concerned that they should be given proper notice and an opportunity to challenge any removal direction. To these questions we got no response.

In the frantic search for clients we identified two: Mr A and Mr M. What we needed were clients who would have qualified for indefinite leave under the *Rashid* policy and who had not been granted that leave simply because the policy had not been discovered in their cases. We flagged up again that we would be looking for class relief. We didn't know a date for removal, which we would only find out a week later, in a case in which the Secretary of State appealed somebody's bail on the basis that they were going to be removed on the bank holiday Sunday at the end of August.

Having identified A, we were very concerned and notified the court that this was going on, and issued a claim form in A on the 24th August for which the court was very accommodating, saying we could go along on Friday and that, even though in full court, they would hear any action for class relief in the afternoon. At the door of the court all the Secretary of State was prepared to say was that there would not be any removals that Sunday or over the bank holiday period, not saying whether there would be any removals on the Tuesday, not giving us any comfort at all. In court what came to light was that the Secretary of State had completely arbitrarily detained a large group of Iraqis on the basis that it would be up to us/the lawyers to issue lots of judicial review applications

[63] The Secretary of State for the Home Department v The Queen on the application of Bakhttear Rashid [2005] EWCA Civ 744

challenging the safety of their removal, and that his job in effect would be done for him in this process, even if in the end there would only be about 20 people left he could actually put on the plane; all the people were being detained on the anticipation that however many claims for judicial review were issued he'd always have enough people to put on the plane, which turned out pretty prophetic in light of what happened later in the year.

The judge would not give class relief considering he did not have jurisdiction to do so, but made it very clear that there might be people detained who should benefit from the *Rashid* principle and who ought not to be detained, and that until the Secretary of State had sorted out exactly who he was removing he ought to consider his position very carefully; if the court was to later find out that people had been removed who ought not to be removed the court would not hesitate to exercise its 'seek and find' jurisdiction to bring back those people. The Secretary of State's response to the *Rashid* point was that the judgment only really applied to Mr. Rashid and so it didn't matter who he detained as all failed asylum seekers were liable to removal. The court's position was that this was for the court to decide. The claims were issued. In mid-October the Minister wrote to Lord Avebury indicating there had been lots of problems organizing removals and that they were not going to efforts to remove people to Iraq forcibly:

> *'…operational issues have developed which will prevent their removal within a reasonable time frame. As such, an operational decision has been taken to release on… bail those who do not pose a threat of absconding and who can meet the necessary conditions and sureties required...'* [64]

On 17th November we had another ILPA email received about 3.30pm, that people had been rounded up for removal that Sunday 20th November. Again, the fact that we didn't have any clients didn't stop us from investigating how and whether they had checked that it was in fact only people from Kurdish-controlled areas being detained for removal.

This was very frustrating as unlike the Zimbabweans the Iraqis didn't speak English or their English simply wasn't good enough to take instructions, they didn't have their papers, we didn't know where they were from which is what we had to determine in order to decide whether there was a challenge that could be put in as a class action. We couldn't identify any cases of people outside the Kurdish areas that were being detained at the time; given that this was Thursday afternoon and the removal was on Sunday it is unsurprising. We eventually had three clients, the first of whom we found about 5.30pm Friday who was a man in a relationship with an EU national exercising her treaty right working in the UK. In this case an application could be made to challenge his removal on the basis that he should be allowed to stay with his EU spouse invoking EU rights. The difficulty in going for class relief was a lack of evidence and a client who fitted the profile that would enable us to go for class relief. By Saturday we had three clients.

What we had been told by the Secretary of State, and had also been communicated to the court, was that by about 2pm Friday afternoon all directions had actually been served and all were due to be removed. So Saturday was spent frantically communicating with and trying to find clients; we had serious problems in gaining access because there was only one phone line for both incoming and outgoing calls jamming the lines and no mobiles, such conditions making it very difficult to take instructions, compounded by the fact that some people were detained outside London or were in transit to detention centres in London.

[64] Letter on file dated 18 October 2005 from Tony McNulty MP, Minister of State in the Home Office.

After a dramatic day we finally got injunctions preventing the removal of the three men. The only reason we were able to help these three men was because they had partners who were incredibly supportive; willing to stop at motorway cafes to send faxes and get documents to us so that we had some idea of what their cases where about. After we got these injunctions there was an incredible demand for advice from Iraqis detained and we were able to agree with the Legal Services Committee to run extra surgeries in detention centres around Heathrow and at Tinsley house near Gatwick. Through these we managed to pick up three clients detained for removal on the 20th, all three from outside Kurdish controlled areas.

What happened to these men in terms of preventing them from seeking advice is really disturbing, but happens regularly in asylum cases. They were picked up in dawn raids by immigration and police on 16th November 2005 and they were taken to police stations in Manchester and Doncaster over night and denied the legal advice that they had initially been told they would be allowed. They were given no reason for their detention and not told what was going on or that they were going to be removed to Iraq. On the 17th they were in transit all day to Tinsley house detention centre where they didn't arrive until very late on Friday, and where they were told they were going to be removed to Iraq at 12.30 on the Sunday. Still, reasons were not explained to them; what transpired from the evidence of clients was that each detainee was allocated a number; not known to them when each number was called that person was taken to the front of the coach surrounded by 3 'thugs', pushed off the coach and pulled on to the plane. During Saturday we were unaware but were contacted by what turned out to be the partner of the case of A and made a conscious decision not to take action in that case as no direction had been served, relying on the statement to that effect. On Sunday, we found out that A had in fact been removed to Iraq, and for the following week there was further frantic activity issuing claims that eventually led to his return to the UK.

Conclusion

In terms of the possibility for an *effective remedy*, judicial review in which safety issues can be tested cannot be considered effective where people are detained without warning, denied legal advice and removal directions either not served at all or served on the Friday to take effect on the Saturday. In terms of the submissions made by the Home Office that only people from the Kurdish-controlled regions would be removed and with regard to the situation transpiring that in fact many detainees were not in fact from those regions, and the assertion by the Secretary of State that detention is rendered unlawful solely on the basis that an assessment wrongly determined that they were from those regions, the RLC position is that *there was no assessment at all*. What is needed is a ruling by the court to effect notice within a reasonable time.

ANNEX 3: NATIONAL SECURITY CASES: NON-REFOULEMENT AND THE JURISPRUDENCE OF THE EUROPEAN COURT

by **Gabriela Echeverria,** REDRESS International Legal Advisor
(Note: this paper was presented to the seminar by Ms Echeverria. It has been lightly edited.)

This conference is very timely and its broad focus is appropriate. The question of *non-refoulement* is, as has been discussed, wider than the context of torture and national security. However, as has been seen in recent years the prohibition and safeguards against torture (including of course the principle of *non-refoulement* as applied in human rights law) seem to be under 'attack' as several governments, including the UK's, treat national security and the absolute prohibition of torture as opposite goals.

It is in this context of "national security" that the application of the principle of *non-refoulement* by the European Court of Human Rights (ECtHR) will be addressed, and at the same time it will be compared with the practice and jurisprudence of other international human rights bodies.

The jurisprudence of the ECtHR in regards to non-*refoulement* is clear: the principle is implied in article 3 of the Convention prohibiting ill-treatment, it is "equally absolute in expulsion cases" and therefore "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration." This principle was first developed in *Soering* and then reaffirmed in *Chahal*, where the Court further established that diplomatic assurances from the receiving government where not sufficient to justify the expulsion. The ECtHR has consistently asserted this principle in subsequent rulings.

This interpretation of non-*refoulement* as inherent to the absolute prohibition against torture is consistent with the practice and jurisprudence of all other human rights bodies and with general principles of international law.

However, the UK Government together with Slovakia, Lithuania and Portugal, is currently intervening in an expulsion case before the ECtHR, in *Ramzy v the Netherlands*, advancing the argument that the principle of non-*refoulement* is not absolute; that in cases where there is a threat to 'national security', States should be allowed to "balance" the risk of torture to the individual if transferred to a third country against the risk of national security if he or she is not transferred.

The submissions advanced by the UK, Lithuania, Slovakia and Portugal in *Ramzy* do not attempt to justify ill-treatment but to differentiate between torture and ill-treatment committed directly by member States, and torture and ill-treatment committed by receiving States in cases of removals. In other words, they challenge the position of the Court that the applicable principle is that of *causation* not of *extraterritoriality (Bankovic v Belgium)*. They also argue that the consideration of national security risks when balancing the rights of the individual not to be ill-treated against the rights of the 'society' to be free from 'terrorism', should be greater in cases where the risk of ill-treatment is further away from qualifying as torture (as opposed to cruel, inhuman or degrading treatment or punishment). That is, when the spectrum of treatment risked in an expulsion case qualifies as some form of ill-treatment that does not amount torture, the balancing towards national security considerations is 'obvious.' Finally, these submissions state that criminal systems are not sufficient to protect democratic societies against the danger posed by alleged terrorists and that the only solution therefore is to remove them despite the risk of torture or other ill-treatment that they might face in the receiving country.

The legal arguments advanced in this submission are in summary: 1) in *Chahal* the minority

of seven judges agreed with the UK position that national security considerations should be balanced with the individual's risk of ill-treatment; 2) the assessment of the nature of the risk required to trigger this prohibition as has been applied by the Court does not reflect international standards; 3) there are exceptions to the *non-refoulement* principle in refugee law, including the threat to national security posed by an alien and whether he or she has allegedly committed acts of terrorism, and this is the appropriate legal provisions to deal with immigration, asylum and expulsion cases.

Having this argument in mind, let us analyse the position of the ECtHR and other international bodies in regards to the nature and status *non-refoulement* in human rights law. It is clear that at a time when torture and ill-treatment – and transfers to States renowned for such practices – are arising with increasing frequency, and the absolute nature of the torture prohibition itself is increasingly subject to question, the Court's determination in this case is of potentially profound importance beyond the case itself and indeed the region. Let us examine:

- the position that the prohibition of transfer to States where there is a substantial risk of torture or ill-treatment ("*non-refoulement*") is an essential aspect of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment under international law;

- the absolute nature of the *non-refoulement* prohibition under article 3, and the approach of other international courts and human rights bodies;

- some aspects of the operation of this rule, including the nature of the risk required to trigger this prohibition; factors relevant to its assessment; and the standard and burden of proof on the applicant to establish such a risk.

"*Non-refoulement*" is an essential aspect of the absolute prohibition of torture

The transfer (or '*refoulement'*) of an individual where there is a real risk of torture or cruel, inhuman or degrading treatment or punishment is prohibited under both international conventional and customary law. A number of States, human rights experts and legal commentators have specifically noted the customary nature of *non-refoulement*[65] and asserted that the prohibition against *non-refoulement* under customary international law shares its *jus cogens* and *erga omnes* character. [66]

As explained by the Human Rights Committee, since the prohibition of all forms of ill-treatment (torture, cruel, inhuman or degrading treatment or punishment) is absolute, peremptory and non-derogable, the principle of *non-refoulement* applies without distinction.[67] Indicative of the expansive approach to the protection, both the Committee Against Torture and the Human Rights Committee are of the opinion that *non-refoulement* prohibits return to countries where the individual would not be at risk in a first country of return, but from where he or she is in danger of being expelled to another country or

[65] See Lautherpacht, E. and Bethlehem, D. *Opinion: The scope and content of the principle of non-refoulement* UNHCR, (2001): §§ 196-216.
[66] See Lauterpacht and Bethlehem (2001): § 195; Bruin, R. and Wouters, K. 'Terrorism And The Non--Derogability Of Non—*Refoulement*' *International Journal of Refugee Law* 15 (2003): § 4.6; Allain, J. 'The *Jus Cogens* Nature of *Non-Refoulement*', International Journal of Refugee Law 13 (2001): 533 ; Report of Special Rapporteur on Torture to the GA (2004); IACHR Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (2000): §154. There has also been considerable support among Latin American States for the broader prohibition of non-refoulement in refugee law as "imperative in regard to refugees and in the present state of international law [thus it] should be acknowledged and observed as a rule of jus cogens": Cartagena Declaration of Refugees of 1984, Section III, § 5): *Annual Report*, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85), 22 November 1984.
[67] See e.g. HRC General Comment No. 20 (1992, § 9): *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7),* 10 March 1992.

territory where there would be such a risk.[68]

The prohibition of *refoulement* is explicit in conventions dedicated specifically to torture and ill-treatment. Article 3 of UNCAT prohibits States from transferring an individual to a State "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Article 13(4) of the Inter-American Convention to Prevent and Punish Torture provides, more broadly, that deportation is prohibited on the basis that the individual "will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State."

The principle of *non-refoulement* is also explicitly included in a number of other international instruments focusing on human rights, including the EU Charter of Fundamental Rights and Inter-American Convention on Human Rights ("I-ACHR").[69] In addition, it is reflected in other international instruments addressing international cooperation, including extradition treaties, and specific forms of terrorism.[70] Although somewhat different in its scope and characteristics, the principle is also reflected in refugee law.

Importantly, the principle of *non-refoulement* applicable to torture and other ill-treatment under human rights law is complementary to the broader rule of *non-refoulement* applicable where there is a well founded fear of 'persecution' under refugee law, which excludes those who pose a danger to the security of the host State. However, as explained by Lauterpacht and reflected in international and national jurisprudence, there are no exceptions to *non-refoulement*, whether of a refugee or any other person, when freedom from torture and other ill-treatment is at stake.[71] The ECtHR explained in *Chahal* that the protection afforded by Article 3 is wider than that afforded by Articles 32 and 33 of the Convention Relating to the Status of Refugees.

In the same way, the argument that member States' decisions on immigration and extradition fall outside the scope of the European Convention (as this is dealt by the 1951 Refugee Convention) was analysed and rejected in *Habdulaziz v the UK* (1985). More recently, Guideline 12.2 of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism reaffirmed that it is the duty of a State that has received a request for asylum to ensure that the possible return of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion. Those guidelines reaffirm the absolute prohibition against torture in all circumstances "irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted."

The principle of *non-refoulement* is also implicit in the prohibition of torture and other ill-treatment in general human rights conventions, as made clear by consistent authoritative

[68] CAT General Comment No. 1(1997, § 2): *Implementation of article 3 of the Convention in the context of article 22,* UN. Doc. A/53/44, annex IX, 21 November 1997;*Avedes Hamayak Korban v. Sweden* (1997): Communication No. 88/1997, CAT/C/21/D/88/1997, 16 November 1998; and HRC General Comment 31(2004): *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 June 2004.

[69] Article 19 EU Charter of Fundamental Rights,2000; Article 22(8) I-ACHR; Article 3(1) Declaration on Territorial Asylum, GA Resolution 2312 (XXII) of 1 December 1967, UN. Doc. A/6716 (1967); Article 8 Declaration on the Protection of All Persons from Enforced Disappearances, GA Resolution 47/133 of 18 December 1992, UN. Doc. A/RES/47/133 (1992); Principle 5 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council Resolution 1989/65 of 24 May 1989, U.N. Doc. E/1989/89 (1989); and Council of Europe Guidelines.

[70] Article 9 International Convention against the Taking of Hostages; Article 3 European Convention on Extradition,1957; Article 5 European Convention on the Suppression of Terrorism,1977; and Article 4(5) Inter-American Convention on Extradition, 1981 contain a general clause on *non-refoulement*. See also Article 3 Model Treaty on Extraditions.

[71] See,*Chahal v. the United Kingdom*, no. 22414/93, judgment of 15 November 1996, (1996, § 80); the New Zealand case of *Zaoui v. Attorney General* (2005), Supreme Court of New Zealand,, CIV SC 13/04, judgment of 14 October 2004;; and Lauterpacht and Bethlehem (2001, §§ 244 and 250) loc cit.

interpretations of these provisions. As said earlier, in *Soering* and in subsequent cases, the ECtHR identified *non-refoulement* as an ***'inherent obligation'*** under article 3 of the Convention in cases where there is a "real risk of exposure to inhuman or degrading treatment or punishment." Other bodies have followed suit, with the HRC, in its general comments and individual communications, interpreting article 7 of the ICCPR as implicitly prohibiting *refoulement*.[72] The African Commission on Human Rights and the Inter-American Commission on Human Rights have also recognised that deportation can, in certain circumstances, constitute such ill-treatment. [73]

The jurisprudence therefore makes clear that the prohibition on *refoulement*, whether explicit or implicit, is an inherent and indivisible part of the prohibition on torture or other ill-treatment. It constitutes an essential way of giving effect to the article 3 prohibition, which not only imposes on States the duty not to torture themselves, but also requires them to "prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture."[74] . The ECtHR has already observed that enabling States to circumvent their obligations on the basis that they themselves did not carry out the ill-treatment would "plainly be contrary to the spirit and intention of [article 3]."[75]

This interpretation is consistent with the approach to fundamental rights adopted by the European Court, and by other international bodies like the UN treaty bodies and the ICTY, regarding the positive duties incumbent on State.[76]

The absolute nature of the *non-refoulement* prohibition under article 3, and the approach of other international courts and human rights bodies

UN resolutions, declarations, international conventions, interpretative statements by treaty monitoring bodies, statements of the UN Special Rapporteur on Torture and judgments of international tribunals, including the ECtHR, have consistently supported that the prohibition on *refoulement* is inherent in the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

As explained by the ECtHR in paragraph 80 of the *Chahal* case, the obligations of the State under Article 3 are "equally absolute in expulsion cases" once the 'real risk' of torture or ill-treatment is shown. Therefore, no characteristics or conduct, criminal activity or terrorist offence, alleged or proven, can affect the right not to be subject to torture and cruel, inhuman or degrading treatment or punishment, including through *refoulement*. In the recent case of *N. v. Finland* (2005), the ECtHR reiterated earlier findings that "[a]s the prohibition provided by article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, *the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration* (emphasis added)." The absolute nature of the prohibition has been reiterated in other decisions of the ECtHR as well as other bodies, like CAT.[77]

[72] See HRC General Comments No. 20 (1990, at § 9), and No. 31 (2004, §12) loc cit. For individual communications, see e.g. *Chitat Ng v. Canada*, (1994, § 14.1); *Cox v. Canada* (1994); *G.T. v. Australia* (1997).
[73] See African Commission on Human Rights, *Modise v. Botswana*, Communication. No. 97/93, 6 November 2000; and I-A Comm. HR *Report on Terrorism and Human Rights* (2004).
[74] Report of the Special Rapporteur to the Third Committee of the GA (2001, § 28).
[75] *Soering v. UK (*1989, § 88), no. 14038/88, judgment of 7 July 1989;
[76] See Special Rapporteur on Torture Report (1986, § 6) and Report (2004, § 27); HRC General Comments No. 7 (1982) and No. 20 (1992); Articles 40-42 and 48 of the ILC Draft Articles; ICTY *Furundzija* judgment (1998, § 148), IT-95-17/I, Trial Chamber judgment of 10 December 1998
[77] *See inter alia Ahmed v. Austria* (1996), no. 25964/94, judgment of 17 December 1996; and CAT *Tapia Paez v. Sweden* (1997, § 14.5), Communication No. 39/1996, CAT/C/18/D/39/1996, 28 April 1992; *M. B. B. v. Sweden* (1998, § 6.4), Communication No. 104/1998, CAT/C/22/D/104/1998.

In *Chahal*, the ECtHR was emphatic that no derogation is permissible from the prohibition of torture and other forms of ill-treatment and the obligations arising from it (such as *non-refoulement*) even in the context of terrorism. The ECtHR reached this conclusion after careful consideration of submissions by the UK that article 3 had implied limitations in expulsions cases involving national security issues. The UK had contended that it was under "a right and duty to weight the risk of torture against the harm caused to national security by the continued presence of an alien on its territory". This approached was expressly rejected by twelve judges of the Grand Chamber (affirming the unanimous decisions of the Commission) but accepted by seven of them.

As explained earlier, it is the minority view which the UK Government now seeks to resurrect. However, the minority view in *Chahal* has never subsequently been followed and the majority's decision has been consistently and repeatedly re-affirmed and re- asserted by the European Court and other human rights courts and bodies including the recent case of *Agiza v. Sweden* in which CAT stated that "the Convention's protections are absolute, even in the context of national security concerns."[78]

The operation of the rule

Let us look briefly at some technical aspects to analyse whether the standards used by the ECtHR reflect international standards:

When considering the obligations of member States under article 3 in transfer cases, the European Court seeks to establish whether "substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country."[79] This test is very similar to those established by other bodies. Article 3 (1) of the UNCAT requires that the person not be transferred to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture." The HRC has similarly affirmed that the obligation arises "where there are substantial grounds for believing that there is a real risk of irreparable harm."[80] The Inter-American Commission for Human Rights has likewise referred to "substantial grounds of a real risk of inhuman treatment."[81]

The legal questions relevant to the application of *non-refoulement* in transfer cases, are therefore: (i) the nature and degree of the risk that triggers the *non-refoulement* prohibition; (ii), the relevant considerations that constitute 'substantial grounds' for believing that the person faces such a risk; (iii), the standard by which the existence of these 'substantial grounds' is to be evaluated and proved.

On the nature and degree of the risk

The European Court, like the CAT, has required that the risk be "real", "foreseeable", and "personal".[82] There is no precise definition in Convention case law of what constitutes a "real" risk, although the Court has established that "mere possibility of ill-treatment is not enough",[83] just as **certainty** that the ill-treatment will occur is not required.[84] Notably, the

[78] See CAT *Agiza v. Sweden* (2005, § 13.8), Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005; *Aemei v. Switzerland* (1997, § 9.8), Communication No. 34/1995, CAT/C/18/D/34/1995, 29 May 1997; *M.B.B. v. Sweden,* §6.4; *Arana v. France*, (2000, § 11.5), Communication No. 63/1997, CAT/C/23/D/63/97, 5 June 2000.
[79] *N v. Finland* (2005), no. 38885/02, 6 July 2005.
[80] HRC General Comment 31 (2004): Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 June 2004.
[81] *Report on Terrorism and Human Rights (*2002), *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, (2000, § 154).
[82] CAT General Comment 1 (1997) loc cit; *Soering v. the United Kingdom* (1989, § 86) loc cit; *Shamayev and 12 others v. Russia* (2005) loc cit.
[83] See *Vilvarajah v The United Kingdom,* (1991, § 111), Nos. 13163/87, 13164/87, 13165/87, judgment of 30 October 1991

CAT has held that the risk "must be assessed on grounds that go beyond mere theory or suspicion", but this does not mean that the risk has to be "highly probable".[85] The risk must also be "personal". However, personal risk may be deduced from various factors, notably the treatment of similarly situated persons.

What constitute 'substantial grounds' for believing that the person faces such a risk

The ECtHR and other international human rights courts and bodies have repeatedly emphasised that the level of scrutiny to be given to a claim relating to *non-refoulement* must be "rigorous" in view of the absolute nature of the right this principle protects.[86] In doing so, the State must take into account "all the relevant considerations" for the substantiation of the risk.[87] This includes both the human rights situation in the country of return and the personal background and the circumstances of the individual.

While the ECtHR, like CAT,[88] has held that the situation in the State is not sufficient *per se* to prove risk, regard must be given to the extent of human rights repression in the State when assessing the degree to which personal circumstances must also be demonstrated.[89] This principle is explicit in Article 3(2) of UNCAT: "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Still, "specific circumstances" proving that the applicant is personally vulnerable to torture or ill-treatment need to be considered. These specific circumstances may be indicated by previous ill-treatment or evidence of current persecution (e.g. that the person is being pursued by the authorities), but neither is necessary to substantiate that the individual is 'personally' at risk.[90] A person may be found at risk by virtue of a characteristic that makes him or her particularly vulnerable to torture or other ill-treatment. The requisite 'personal' risk does not necessarily require information specifically about that person therefore, as opposed to information about the fate of persons in similar situations.

For example, it is clearly established in the jurisprudence of the CAT that, in assessing the "specific circumstances" that render the individual personally at risk, particular attention will be paid to any evidence that the applicant belongs, or is *perceived* to belong,[91] to an identifiable group which has been targeted for torture or cruel, inhuman or degrading treatment or punishment. It has held that regard must be had to the applicant's political or social affiliations or activities, whether inside *or outside* the State of return, which may lead that State to identify the applicant with the targeted group.[92]

Organisational affiliation is a particularly important factor in cases where the individual belongs to a group which the State in question has designated as a "terrorist" or

[84] *Soering*, (1989, § 94) loc cit.
[85] See e.g. CAT *X.Y.Z. v. Sweden* (1998), Communication No. 61/1996, CAT/C/20/D/61/1996, 6 May 1998; *A.L.N. v. Switzerland* (1998) *A.L.N. v. Switzerland*, Communication No. 90/1997, CAT/C/20/D/90/1997, 19 May 1998; *K.N. v. Switzerland,* Communication No. 94/1997, CAT/C/20/D/94/1997, 20 May 1998; and *A.R. v. The Netherlands* (2003), Communication No. 203/2002, CAT/C/31/D/203/2002, 21 November 2003
[86] *Chahal v. the United Kingdom*, 91996, § 79) loc cit; *Jabari v. Turkey* (2000, § 39), no. 40035/98, 11 July 2000
[87] UNCAT Article 33 (2).
[88] CAT has explained that although a pattern of systematic abuses in the State concerned is highly relevant, it "does not as such constitute sufficient ground" for a situation to fall under Article 3 because the risk must be 'personal'.
[89] *Vilvarajah* (1991, § 108) loc cit.
[90] See eg. *Shamayev and 12 others v. Russia* (2005, § 352), no. 36378/02, judgment of 12 April 2005; *Said* v. *the Netherlands* (2005, § 48-49), no. 2345/02, judgment of 5 July 2005
[91] It is not necessary that the individual *actually* is a member of the targeted group, if believed so to be and targeted for that reason. See CAT *A. v. The Netherlands* (1998), Communication No. 91/1997, CAT/C/21/D/91/1997, 13 November 1998.
[92] See CAT General Comment 1 (1997, § 8 (e)) loc cit.

"separatist" group that threatens the security of the State, and which for this reason is targeted for particularly harsh forms of repression. In such cases, the CAT has found that the applicant's claim comes within the purview of article 3 even in the absence of other factors such as evidence that the applicant was ill-treated in the past,[93] and even when the general human rights situation in the country may have improved.[94]

In this connection, it is also unnecessary for the individual to show that he or she is, or ever was, personally sought by the authorities of the State of return. Instead, the CAT's determination has focused on the assessment of a) how the State in question treats members of these groups, and b) whether sufficient evidence was provided that the State would believe the particular individual to be associated with the targeted group. Thus in cases involving suspected members of ETA, Sendero Luminoso, PKK, KAWA, the People's Mujahadeen Organization and the Zapatista Movement, the CAT has found violations of article 3 on account of a pattern of human rights violations against members of these organisations, where it was sufficiently established that the States concerned were likely to identify the individuals with the relevant organisations.[95]

In respect of proving this link between the individual and the targeted group, the CAT has found that the nature and profile of the individual's activities in his or her country of origin *or abroad*[96] is relevant. In this respect, human rights bodies have indicated that a particularly important factor to be considered is the extent of publicity surrounding the individual's case, which may have had the effect of drawing the negative attention of the State concerned to the individual. The importance of this factor has been recognized both by this Court and the CAT.[97]

Standard and burden of proving the risk

While the Court has not explicitly addressed the issue of standard and burden of proof in transfer cases, it has held that in view of the fundamental character of the prohibition under article 3, the examination of risk "must necessarily be a thorough one".[98] It has also imposed on States a positive obligation to conduct a 'meaningful assessment' of any claim of a risk of torture and other ill-treatment.[99] This approach is supported by CAT,[100] and reflects a general recognition by this and other tribunals that, because of the specific nature of torture and other ill-treatment, the burden of proof cannot rest alone with the person alleging it, particularly in the view of the fact that the person and the State do not always have equal access to the evidence.[101]

[93] *Gorki Ernesto Tapia Paez v. Sweden* (1997), Communication No. 39/1996, CAT/C/18/D/39/1996, 28 April 1992.
[94] See *Josu Arkauz Arana v. France* (2000), Communication No. 63/1997, CAT/C/23/D/63/97, 5 June 2000, finding that gross, flagrant or mass violations were unnecessary in such circumstances.
[95] See inter alia CAT, Cecilia Chipana v. Venezuela (1998), Communication No. 110/1998, CAT/C/21/D/110/1998, 10 November 1998;; Ahmed Hussein Mustafa Kamil Agiza v. Sweden (2005), Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005; Kaveh Yaragh Tala v. Sweden (1998), Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005; Seid Mortesa Aemei v. Switzreland (1996), Communication No. 34/1995, CAT/C/18/D/34/1995, 29 May 1997.
[96] See e.g. *Seid Mortesa Aemei v. Switzerland* (1997) loc cit; *M.K.O. v. The Netherlands* (2001), Communication No. 134/1999, CAT/C/26/D/134/1999, 9 May 2001.
[97] *N v. Finland* (2005, § 165), no. 38885/02, 6 July 2005; *Venkadajalasarma v. the Netherlands* (2004) , no. 58510/00, 17 February 2004; *Said v. the Netherlands* (2005, § 54), no. 2345/02, judgment of 5 July 2005; *Thampibillai v. the Netherlands* (2004, § 63), no. 61350/00, judgment 17 February 2004.See also CAT *Sadiq Shek Elmi v. Australia* (1999, § 6.8),Communication No. 120/1998, CAT/C/22/D/120/1998, 14 May 1999.
[98] *Said v. the Netherlands* (2005, § 49) loc cit, *N. v Finland* (2005) loc cit; *Jabari v. Turkey* (2000, § 39) loc cit.
[99] See *Jabari v. Turkey* (2000), no. 40035/98, 11 July 2000.
[100] E.g. CAT General Comment 1 (1997, § 9(b)) loc cit.
[101] See e.g. HRC, *Albert Womah Mukong v. Cameroon* (1994), Communication No. 458/1991, CCPR/C/51/D/458/1991, 10 August 1994; I-ACHR, *Velasquez Rodriguez v. Hondouras* (1988, § 134 *et seq*), Series C, No. 4, judgment of 29 July 1988.

Conclusion: an existing risk cannot be displaced by "diplomatic assurances"

States may seek to rely on "diplomatic assurances" or "memoranda of understanding" as a mechanism to transfer individuals to countries where they are at risk of torture and other ill-treatment. In practice, the very fact that the sending State seeks such assurances amounts to an admission that the person would be at risk of torture or ill-treatment in the receiving State if returned. As acknowledged by the European Court in *Chahal*, and by CAT in *Agiza*, assurances do not suffice to offset an existing risk of torture.[102] This view is shared by a growing number of international human rights bodies and experts, including the UN Special Rapporteur on Torture,[103] the Committee for Prevention of Torture,[104] the UN Sub-Commission, the Council of Europe Commissioner on Human Rights,[105] and the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.[106]

Most recently, the UN General Assembly, by consensus of all States, has affirmed "that diplomatic assurances, where used, do not release States from their obligations, under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*."[107] Reliance on such assurances as sufficient to displace the risk of torture creates a dangerous loophole in the *non-refoulement* obligation, and ultimately erodes the prohibition of torture and other ill-treatment.

Moreover, assurances cannot legitimately be relied upon as a factor in the assessment of relevant risk. This is underscored by widespread and growing concerns about assurances as not only lacking legal effect but also as being, in practice, simply unreliable, with post-return monitoring mechanisms incapable of ensuring otherwise.[108] While effective system-wide monitoring is vital for the long-term prevention and eradication of torture and other ill-treatment, individual monitoring cannot ameliorate the risk to a particular detainee.

[102] *Chahal v. the UK* (1996, § 105) loc cit; *Agiza v. Sweden* (2005, § 13.4) loc cit.
[103] See Report of Special Rapporteur on Torture to the General Assembly, (2004, § 40).
[104] See CPT 15th General Report, (2004-2005, §§ 39-40), 20 September 2005.
[105] Report by Council of Europe Commissioner for Human Rights (2005, §§ 12-3), *Report on Visit to the United Kingdom, 4 - 12 November 2004*, CommDH/2005/6, 8 June 8, 2005.
[106] Report of the UN Independent Expert (2005, §§ 19-20) *Protection of Human Rights and Fundamental Freedoms while countering Terrorism,* UN. Doc. A/60/370, 21 September 2005.
[107] See UN Declaration (2005, § 8).
[108] Courts in Canada (*Mahjoub*), the Netherlands (*Kaplan*), and the United Kingdom (*Zakaev*) have blocked transfers because of the risk of torture despite the presence of diplomatic assurances. There is credible evidence that persons sent from Sweden to Egypt (*Agiza & Al-Zari*) and from the United States to Syria (*Arar*) have been subject to torture and ill-treatment despite assurances: for more information on practice, see Human Rights Watch, (2005), 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture,' *HRW Report* vol. 17, no. 4(D), April 2005, at http://www.hrw.org/reports/2005/eca0405/eca0405.pdf; Human Rights Watch (2004) "'Empty Promises': Diplomatic Assurances No Safeguard Against Torture," *HRW Report* vol. 16, no. 4(D), April 2004, at http://hrw.org/reports/2004/un0404/

ANNEX 4: CONFERENCE PROGRAMME

NON-REFOULEMENT *UNDER THREAT: PROGRAMME*

Situating an examination of current threats to the principle of *non-refoulement* in national security cases within the wider context of cases where attempts are made to remove despite identified risks of breach of the principle of *non-refoulement.* Discussions will focus on the UK and cover *non-refoulement* under both the 1951 Refugee Convention and human rights law and cover practical and procedural questions of litigating these cases. We are very grateful for the support of Matrix Chambers who are hosting the event and to the Joseph Rowntree Charitable Trust for their support.

Sessions	About the Sessions	Speakers
1.30 Welcome		Carla Ferstman, Director, Redress
1.30 – 2.45pm Overview of *non-refoulement*	Presentations followed by discussion. Overview of history and current scope of principle of *non-refoulement*. Exceptions to the principle in legislation and case law. Situating threats to *non-refoulement* in national security cases in the broader context of attacks on the principle.	**Chair: Nicholas Blake QC, Matrix Chambers.** Speakers: Raza Husain, Matrix Chambers and Professor Guy Goodwin Gill, All Souls College Oxford and Blackstone Chambers.
2.45 – 3.45pm *Non-refoulement* under threat: cases other than national security	Presentations followed by discussion. Returns to Zimbabwe and the case of AA and LK; returns to Iraq. Law, practice and tactics.	**Chair: Alison Harvey, ILPA legal officer (October 2005 - October 2006).** Speakers: Mark Henderson, Doughty Street Chambers and Sonal Ghelani, Refugee Legal Centre.
3.45 – 4.15pm	Coffee break	
4.15 – 5.15pm *Non-refoulement* under threat: national security cases	Presentations followed by discussion. Non-refoulement in national security cases: diplomatic assurances and memoranda of understanding, at cases before SIAC, and at the UK government's intervention in the European Court of Human Rights.	**Chaired by Nuala Mole of the AIRE Centre.** Speakers: Gabriela Echeverria, The Redress Trust and Rick Scannell, Garden Court Chambers.
5.15 – 6.00pm Discussion: Defending *non-refoulement*	No formal presentations: an opportunity for further questions from the floor and exchanges between panellists and participants on current and prospective challenges to the principle of *non-refoulement*, and responses through litigation, advocacy and campaigning.	**Chaired by Nicola Rogers of Garden Court Chambers.** Speakers from previous panels, joined by Tony Bunyan of Statewatch.
6.00	Close	
6.00- 7.00	Reception	

ANNEX 5: BIOGRAPHIES OF CHAIRS AND SPEAKERS

Nicholas Blake QC, Matrix Chambers
Nicholas Blake QC is a barrister practising in public and human rights law. He is a QC, Recorder of the Crown Court, Special Advocate and sits as a Deputy Judge in the Administrative Court. His cases include *Chahal, Ullah, Razgar, Abbasi, Huang,* and *Prabakhar* in the Hong Kong FCA. He is a former chair of ILPA and a member of the Council of Justice. He has written extensively on immigration and asylum issues.

Tony Bunyan, Director, Statewatch
Tony Bunyan is an investigative journalist and writer specialising in justice and home affairs, civil liberties and freedom of information in the EU. He has been the director of Statewatch since 1990 and edits Statewatch Bulletin and Statewatch News online (**www.statewatch.org**) He is the author of The Political Police in Britain (1977) and Secrecy and openness in the EU (1999). In 2001 (for access to EU documents) and in 2005 (for work on the war on terrorism and civil liberties) the European Voice newspaper slected him as one of the "EV50" – one of the fifty most influential people in the European Union.

Gabriela Echeverria, International Legal Advisor, The Redress Trust
Gabriela Echeverria holds an LLM from Harvard Law School and a law degree from the National Autonomous University of Mexico (UNAM). She served as assistant to Professor Rodolfo Stavenhagen, the UN Special Rapporteur on Indigenous Peoples, and worked with UNICEF's Integral Family Development project promoting children's rights through community-based advocacy in Mexico City. As International Legal Adviser of REDRESS, she has litigated several cases before international courts and tribunals, including regional human rights courts and UN treaty bodies. She has also been involved in international advocacy, notably in the drafting process of the "UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Grave Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", leading a coalition of NGOs supporting their recent adoption by the UN General Assembly.

Sonal Ghelani, Solicitor, Refugee Legal Centre
Sonal Ghelani is a solicitor at Refugee Legal Centre. At Refugee Legal Centre she is one of two solicitors (the other solicitor being Ravi Low-Beer) dealing with higher court work. She has worked principally in the not-for-profit sector in the field of immigration and asylum law. The overwhelming majority of the clients she and her colleague represent qualify for publicly funded legal advice and representation. They have been involved in the ligitation surrounding returns to Zimbabwe, and returns to Iraq.

Professor Guy S. Goodwin Gill, All Souls College Oxford and Blackstone Chambers
Guy S. Goodwin Gill MA, D.Phil., is a Senior Research Fellow of All Souls College, Oxford and Professor of International Refugee Law at University of Oxford. He was formerly Professor of Asylum Law at the University of Amsterdam, and served as a Legal Adviser in the Office of United Nations High Commissioner for Refugees (UNHCR) in various countries from 1976-1988. Since 1997, he has been President of the Refugee Legal Centre (a UK non-governmental organization). He is the Founding Editor of the *International Journal of Refugee Law* (Oxford University Press) and was Editor-in-Chief from 1989-2001. He is the author of *The Refugee in International Law,* Oxford: Clarendon Press, 2nd edn., 1996, and, together with Dr Jane McAdam, will publish a third edition in 2006. Professor Goodwin-Gill has written extensively on refugees, migration, free and fair elections, and child soldiers. Recent publications include *Free and Fair Elections,* Geneva: Inter-Parliamentary Union, 2nd edn., 2006; *Basic Documents on Human Rights,* with Ian Brownlie, eds., Oxford: Oxford University Press, 5th edn., 2006; 'State Responsibility and the "Good Faith" Obligation in International Law', in Malgosia Fitzmaurice and Dan Sarooshi, eds., *Issues of StateResponsibility before International Judicial Institutions,* Hart Publishing, 2004, 75-104; 'Refugees and Responsibility in the Twenty-First Century: More Lessons from the South Pacific', 12 *Pacific Rim Law & Policy Journal* 23-46 (2003). Professor Goodwin-Gill is a Barrister and practices from Blackstone Chambers, London; he has represented the UNHCR on a number of occasions, including in the House of Lords case, *R v Immigration Officer, Prague Airport and Another, ex parte European Roma Rights Centre* [2004] UKHL 55.

Alison Harvey, ILPA legal officer (October 2005 - October 2006)
Alison Harvey was called to the Bar in 1995 and holds an MA in human rights and civil liberties law. She has worked extensively with refugees in the UK and abroad, as a representative and in advocacy in national and international fora for organisations including ILPA, Refugee Legal Centre, the Medical Foundation for the Care of Victims of Torture, Amnesty International, as a consultant to UNHCR in the Republic of Guinea. She has worked with the internally displaced in Darfur. She is an editor of *Butterworths Immigration Law* and writes and trains on asylum, immigration and human rights. She is Chair of the Trustees of ECPAT UK, a former trustee of both Asylum Aid and Bail for Immigration Detainees and a former Chair of the Refugee Children's Consortium.

Mark Henderson, Doughty Street Chambers
Mark Henderson was called to the Bar in 1994 practises primarily in public law, specialising in asylum, immigration and social welfare. His work also encompasses international law, civil actions against the Home Office, and professional negligence claims. He is the author of the *Best Practice Guide to Asylum and Human Rights Appeals* (ILPA/RLG/EIN, 2003), co-author of *Blackstone's Guide to the Asylum and Immigration Act 2004* (OUP, 2004) and Convener of the Editorial Committee of the I*LPA Directory of Experts on the Electronic Immigration Network*. He is a member of the Executive Committee of ILPA and convenor of its Refugee Sub-Committee, a consultant to the Office of the Immigration Services Commissioner, a member of the Advisory Panel of the Electronic Immigration Network, and an assessor for the Bar Council's Immigration Accreditation Panel.

He has conducted training on immigration and social welfare issues for organisations including ILPA, Justice, the Electronic Immigration Network, the LSC's ACT Project, and the Immigration Advisory Service. His cases include *A* in the House of Lords where he acted for the coalition of NGOs intervening on the use of torture evidence; *Bensaid v UK* 33 EHRR 10 [2001] INLR 325 ('extra-territorial' application of article 8 in an expulsion case involving risk to mental health in receiving country); *Khadir* [2005] UKHL 39 (whether asylum seekers who cannot be removed must be granted leave to remain); *Turgut*[2001] 1 All ER 719 (standard of review in article 3 cases and treatment of fresh evidence on judicial review); *Al-Skeini*[2005] 2 WLR 1401 (extent to which articles 2 and 3 govern the conduct of British armed forces in Iraq); *Kurtolli* [2004] INLR 198 (circumstances in which risk of suicide will render expulsion inconsistent with article 3); *Husain* [2002] ACD 10 (whether withdrawal of asylum support violates Article 3, and applicability of article 6 to asylum support appeals), the appeals of the Afghan victims of the Stansted hijacking, and the Ahmadi family's appeal by video link against third country removal to Germany. He is counsel in AA and LK, the test case on removal to Zimbawe and has acted in several cases relating to the recent attempt to remove Iraqis.

Raza Husain, Matrix Chambers
Raza Husain is a barrister practising in public and human rights law. His cases include *A* (torture), *A* (Belmarsh), *Ullah* (extra-territoriality), *Razgar* (mental health), *Huang* (proportionality), *Rashid* (abuse of power and policy), *D v. Home Office* (false imprisonment), *Nadarajah* (detention policy), *Farrakhan* (exclusion), and *Al Rawi* (Guantanamo Bay). He is a former member of the ILPA executive committee and a member of the Council of Justice.

Nuala Mole, Director, AIRE Centre
Nuala Mole has degrees in law from the University of Oxford and in European law from the College of Europe, Bruges. She has been working in immigration and asylum for more than twenty years. She is the Founder-Director of the AIRE Centre, which she set up in 1993 as a specialist law centre providing information and advice on international human rights law and European Union law. She has litigated, taught and written widely on the interface between international law and asylum and immigration, and has conducted judicial training on these issues in almost all the Member States of the Council of Europe.

Nicola Rogers, Garden Court Chambers
Nicola Rogers is a barrister working in Immigration and asylum law at all levels. She is a specialist in human rights law and has represented before the European Court of Human Rights in a wide range of cases including unlawful killings, environmental law, medical negligence, detention, family law, housing and immigration. She is very experienced in using the European Court's procedures and making emergency applications in deportation cases. Cases include **Hilal v the UK** (2001) 33 EHRR 2. She is an expert in EU free movement law and EC Association Agreements. Cases include *Tum v*

SSHD [2004] CA. She is an experienced legal trainer in both EU and ECHR law. She is co-Convenor of ILPA's European Sub Committee and a former member of ILPA's Executive Committee. She is the Chair of Trustees of Bail for Immigration Detainees (BID).

She has worked as Assistant Director of the AIRE Centre from 2000 to 2002, a Legal Consultant to HM Inspector of Prisons from 2002 to 2003 and a consultant to UNHCR in Strasbourg in 1998. Her publications include *Practitioners' Guide to the EC-Turkey Association Agreement* (2000, Martinus Nijhoof). Contributor to *Handbook on European Enlargement* (2002), co-author *Free Movement of Person in the Enlarged European Union* (Dec 2004, Sweet & Maxwell, with Rick Scannell) and she is a frequent contributor to legal journals.

Rick Scannell Garden Court Chambers
Rick Scannell is a barrister specialising in immigration, asylum and human rights law. From 998 to 2005 he served as a Special Advocate before the Special Immigration Appeals Commission. He is a former chair of the Immigration Law Practitioners Association and has written extensively on immigration and human rights including as a contributor to *Macdonalds Immigration law and practice*, an editor of *Butteworths Immigration Law,* co-author of *Free Movement of Person in the Enlarged European Union* (Dec 2004, Sweet & Maxwell, with Nicola Rogers), and as a contributor to *Halsbury's Laws of England*. A major part of his practice comprises judicial review and statutory appeals to the Court of Appeal. He has appeared before the European Commission of Human Rights (*MAR v United Kingdom*); the European Court of Human Rights (*TI v United Kingdom*) and the European Court of Justice (*Bidar v United Kingdom*). Other cases include *Djebari v SSHD* [2002] CA (Algerian at risk of treatment contrary to Article 3 ECHR); *Saadi and others v SSHD* [2001] HL (Article 5 ECHR legality of detention of asylum seekers at Oakington Reception Centre) He regularly undertakes training, in the UK and abroad, for ILPA, Liberty, the UNHCR and others.

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