

# There's no place like home: states' obligations in relation to transfers of persons

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## **Abstract**

*The article sets out states' obligations in relation to transfers of persons under international law, and revisits the key elements of the principled non-refoulement, including its application where persons are transferred from one state to another within the territory of a single state; the range of risks that give rise to application of the principle; important procedural elements; and the impact on the principle of so called diplomatic assurances.*



In recent years the detention operations of multinational forces in Iraq and Afghanistan as well as states' counter-terrorism activities have led national courts, international human rights supervisory bodies and humanitarian practitioners to take a closer look at states' obligations in relation to transfers of persons they are holding and, in particular, the application of what is often referred to as the principle of *non-refoulement*.

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*Non-refoulement*, the principle that precludes states from transferring persons within their control to another state if a real risk exists that they may face violations of certain fundamental rights, is the cornerstone of refugee law. It also finds expression, with certain variations in content and scope, in human rights and international humanitarian law. Traditionally, its protection is invoked by asylum seekers or by persons facing extradition or deportation. However, there is no reason for its application to be limited to such situations, as the underlying protection concerns and obligations of states with effective control over persons can arise in a variety of other situations – indeed, on every occasion when a state assumes effective control over a person.

The entitlement of multinational forces in Iraq to detain persons is established by Security Council resolution 1546 of 2004,<sup>1</sup> while the legal framework regulating such deprivation of liberty is set out in a number of Coalition Provisional Authority memoranda which remain in force today.<sup>2</sup> One dimension that is not expressly addressed in these instruments is how the states making up the Multi-National Force Iraq should implement their obligations under the principle of *non-refoulement* towards the persons they are holding. This is a live concern in Iraq when persons held by the multinational forces are transferred to Iraqi authorities for further detention where there may be a risk of ill-treatment or criminal proceedings leading to the imposition of the death penalty. This issue received extensive media coverage at the time of the transfer and subsequent execution of the former Iraqi president, Saddam Hussein and of other high-ranking members of his regime, and remains a cause of anxiety for the thousands of Iraqi held by the multinational forces in Iraq today.

It is not just transfers to further detention that raise protection concerns. In view of the situation prevailing in Iraq, the release of detainees in an environment where they may face serious risks from armed groups unconnected to the state or from the general public must also be considered. This could prove particularly problematic for senior figures of the former Baathist regime; for members of Mujahedin el-Khalq residing in Camp Ashraf, over whom the multinational forces assumed control in 2003;<sup>3</sup> and for third-country nationals, who are particularly at risk both if released in Iraq and, in some cases if transferred to their state of nationality.

Some of these same problems in relation to transfers of detainees to local authorities also exist in Afghanistan. At the time of writing, the responsibility in this regard of Canada, one of the participants in the NATO-led International Security Assistance Force (ISAF) was being examined by the Canadian Federal

1 Security Council Resolution 1546, 8 June 2004.

2 Most notably, Coalition Provisional Authority Memorandum Number 3 (Revised), Criminal Procedures, 27 June 2004, and Coalition Provisional Authority Order Number 99, Joint Detainee Committee, 27 June 2004. The present article does not address the compliance of these instruments with the obligations under international humanitarian law and human rights law of the states making up the multinational forces in Iraq.

3 On the Mujahedin el-Khalq see, for example, [www.fas.org/irp/world/para/mek.htm](http://www.fas.org/irp/world/para/mek.htm) (last visited 22 January 2008).

Court.<sup>4</sup> ISAF's detention operations also raise the question of the application of the principle of *non-refoulement* to transfers of detainees between different members of ISAF, including whether the risk exists that the persons concerned may ultimately be transferred to the Afghan authorities or out of Afghanistan altogether.

Until recently, scrutiny of the detention facility at Guantánamo Bay focused on treatment, conditions of detention and access to internment review mechanisms. However, one further preoccupation of many of the detainees is their possible repatriation, when they might be exposed to risk of ill-treatment.<sup>5</sup> Similar concerns arise in relation to the bilateral agreements for the deportation of persons concluded by the United Kingdom with a number of states including with Jordan, Libya and Lebanon in the wake of the London bombings of July 2005.<sup>6</sup>

Against this background the present article revisits the key elements of the principle of *non-refoulement*. Many aspects of the principle of *non-refoulement* are well established and straightforward. Closer consideration is given to elements that have received less attention or which are particularly pertinent to states' obligations in the situations just outlined. These include:

- the application of the principle in situations where persons are transferred from the authority of one state to that of another within the territory of a single state, be it from multinational forces to local authorities or between different contingents of such forces;
- the range of risks that give rise to the application of the principle; the source of such risk – an issue that is particularly relevant when persons are released instead of transferred to ongoing detention;
- the procedural dimension of the principle, which is essential for its application in practice; and
- the effect on states' obligations regarding assurances they may have obtained from the receiving state.

The present article sets out states' obligations in relation to transfers of persons under international law: refugee law, human rights law and humanitarian

4 Federal Court of Canada, *Amnesty International Canada v. Canada (National Defence)*, 2007 FC 1147, 5 November 2007.

5 See, e.g., the case of the seven Russian nationals repatriated from Guantánamo in 2004 outlined in Human Rights Watch, *The 'Stamp of Guantánamo' – The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, March 2007.

6 Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, signed August 10, 2005, <http://www.fco.gov.uk/resources/en/pdf/jordan-mou> (last accessed 3 January 2009); Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Cooperation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed October 18, 2005, <http://www.fco.gov.uk/resources/en/pdf/libya-mou> (last accessed 3 January 2009); and Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed December 23, 2005, <http://www.fco.gov.uk/resources/en/pdf/lebanon-mou> (last accessed 3 January 2009).

law. While the majority of persons held in the situations just outlined are unlikely to be protected by refugee law – the first, but by no means only, hurdle being the fact that they remain within their state of nationality – mention of it is nonetheless warranted for the sake of completeness and because it is pertinent to the small but significant number of third-country nationals held by the multinational forces in Iraq and Afghanistan, as well as all the detainees held in Guantánamo.

Some of the situations referred to in the present article are contexts of armed conflict, where states' forces are operating extraterritorially. This raises questions as to the applicable legal framework, including whether human rights law applies in times of armed conflict; the interplay between human rights law and international humanitarian law in such circumstances;<sup>7</sup> and the extent of the extraterritorial application of human rights law.<sup>8</sup> These are complex questions that have often been raised in the periodic debates between states and human rights supervisory bodies referred to in the article, as well as in proceedings before national courts. A discussion of these issues is beyond the scope of the present article, which assumes, on the basis of recent and consistent jurisprudence: first, the concurrent and complementary application of human rights and international humanitarian law in times of armed conflict; and, second, that in situations where states are operating extraterritorially, whenever they are in a position to transfer persons and, consequently, the principle of *non-refoulement* applies, they are exercising the requisite level of effective control over such persons for their human rights obligations to apply extraterritorially.<sup>9</sup>

7 See, e.g., Cordula Droege, 'The interplay between international humanitarian law and human rights in situations of armed conflict', *Israel Law Review*, Vol. 40 (2) (2007), p. 310, and the references therein.

8 The Human Rights Committee confirmed the extraterritorial application of the International Covenant on Civil and Political Rights in its General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10, as well as in its Concluding Observations on the United States' second and third periodic reports in 2006. Human Rights Committee, Concluding Observations: United States of America, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 10. For the United States' arguments see, *inter alia*, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third periodic reports of States parties due in 2003, United States of America, 28 November 2005, UN Doc. CCPR/C/USA/3, paras. 129–30 and Annex I thereto. See also Committee against Torture General Comment No. 2, Implementation of article 2 by States Parties, 23 November 2007, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paras. 7 and 16, on the extra-territorial application of the Convention against Torture. For a comprehensive discussion of the extra-territorial application of human rights law, see Frans Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004. See also recent decisions of the International Court of Justice on this issue in the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, pp.178–81, paras. 107–113; and in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 3 February 2006, paras. 215–20; cf. [www.icj-cij.org/docket/index.php?p1=3&p2=1&code=co&case=116&k=51](http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=co&case=116&k=51) (last visited 16 October 2008).

9 This is, for example, the view recently expressed by the Committee against Torture in its review of the United Kingdom and United States' periodic reports. Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b); and Committee against Torture, Conclusions and Recommendations: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 15 and 20. For the United States' arguments, see United States' Response to the Committee against Torture's List of issues to be considered during the examination of the second periodic report of the United States of America, at pp. 33–7.

Most of the legal questions raised by states' transfers of persons have a clear answer. Regrettably, the same cannot be said of the practical solutions that must be found for persons whose transfer is precluded. While it is clear that such a solution must not violate other rights – for example, it cannot be indefinite detention – more thought must be devoted to finding acceptable alternative solutions. Their precise nature will have to vary according to the context. In relation to Guantánamo, in certain cases when persons were not transferred pursuant to diplomatic assurances, the preferred approach appears to have been transfer to a third state willing to accept the persons in question. As the case of the Uighurs transferred to Albania shows, this is by no means an easy task.<sup>10</sup> Moreover, this approach is obviously not suitable for situations such as Iraq and Afghanistan, where hundreds, if not thousands, of persons are held and are at possible risk if transferred to local authorities. While the risk of the imposition of the death penalty may be averted by requesting undertakings, and some of the shortcomings in criminal proceedings that could lead to its imposition could be remedied, a different approach needs to be adopted in order to remove the underlying reasons for the risk of ill-treatment. This is an issue to which states participating in multinational operations will have to pay closer attention and address in their standard operating procedures. Whatever solution is adopted in any particular context, it must not deprive persons of the right to an individualized review of the well-foundedness of their fears by an independent body.

## Legal bases of the principle

*Non-refoulement* is the cornerstone of refugee law. It is also a principle recognized by human rights law, in particular as a component of the prohibition on torture, cruel, inhuman or degrading treatment or punishment, and by international humanitarian law. The precise content and scope of the right varies slightly according to whether it is invoked as a principle of refugee law, human rights law or international humanitarian law.

### *Non-refoulement* as a principle of refugee law<sup>11</sup>

Possibly the best known expression of the principle of *non-refoulement* is found in Article 33(1) of the 1951 Convention Relating to the Status of Refugees, which provides that

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

10 Tim Golden, 'Chinese leave Guantánamo for Albanian limbo', *New York Times*, 10 June 2007. See also the endeavours of the United States in January 2009 in respect of other inmates Meraiah Foley and Mark McDonald, 'Australia and Britain signal reluctance to take Guantánamo prisoners', *International Herald Tribune*, 2 January 2009.

11 For a comprehensive discussion of *non-refoulement* as a principle of refugee law, see Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003.

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The principle of *non-refoulement* in the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa is slightly wider in scope, reflecting the wider definition of refugee adopted by this instrument to include persons fleeing, *inter alia*, armed conflict.<sup>12</sup>

### *Non-refoulement* as a principle of human rights law

*Non-refoulement* is also a principle of human rights law. The prohibition on *refoulement* can be an express, self-standing right, or an implicit component of other rights. *Non-refoulement* is expressly referred to, for example, in Article 22(8) of the 1969 American Convention on Human Rights, which precludes transfers that may put persons' life or personal freedom at risk, and in Article 16(1) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which precludes transfers which may expose them to a risk of enforced disappearance.

*Non-refoulement* is also a constituent part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment. Certain human rights treaties state this expressly, like Article 3(1) of the 1984 Convention against Torture, Cruel, Inhuman and Other Degrading Treatment or Punishment, which provides 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.

In addition to such express prohibitions, human rights monitoring bodies have consistently adopted the position that a state would be in violation of its obligations if it took action of which consequence would be the exposure of a person to the risk of ill-treatment proscribed by the relevant human rights instrument.<sup>13</sup> This approach is a manifestation of the principle that a state can violate its obligations under human rights law not only by its own acts but also if it knowingly puts a person in a situation where it is likely that his or her rights will be violated by another state. The Human Rights Committee has couched this concept on the basis of states' obligation to respect and *ensure the rights* in the Covenant to all persons under their control.<sup>14</sup>

12 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Article II(3). The principle also appears in Article III(1) of the non-binding 1966 Principles Concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee in 1966 and Section III (5) of the 1984 Cartagena Declaration on Refugees embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.

13 See, e.g., ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, para. 126.

14 See Human Rights Committee General Comment No. 31, above note 7, para. 12. The General Comment reflects the position consistently adopted in the Committee's jurisprudence. See, e.g., its views in

In accordance with this approach, the prohibition on torture and cruel, inhuman or degrading treatment or punishment has been consistently construed as implicitly including a prohibition on transferring a person to a situation where s/he may face such treatment.<sup>15</sup> This was asserted, for example, in the Human Rights Committee's General Comment No. 20 of 1992, which provides that

States parties [to the International Covenant on Civil and Political Rights] 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*.<sup>16</sup>

In 2004 the Human Rights Committee reaffirmed this position in General Comment No. 31, where, *inter alia*, it stated that

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>17</sup>

The United States challenged this long-established position in 2006 during the Human Rights Committee's review of its second and third periodic reports. The United States argued that, unlike Article 3 of the Convention against Torture, Article 7 of the Covenant did not impose a *non-refoulement* obligation. Instead, in its view, this was a *new* obligation, not contained in the plain language of the provision, but purportedly imposed by the Committee in its General Comment No. 20, by which the United States did not consider itself bound.<sup>18</sup> Following extensive debates on this topic during the review of the report, in its Concluding

*Joseph Kindler v. Canada*, Communication No. 470/1991, Views of the Human Rights Committee of 18 November 1993, para. 6.2.

- 15 In the words of Theo van Boven, the former Special Rapporteur of the Commission on Human Rights on Torture, '[t]he principle of *non-refoulement* is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment'. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 28.
- 16 Human Rights Committee, General Comment No. 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, UN Doc. HRI/GEN/1/Rev.1, 28 July 1994, p. 31, para. 9. The Human Rights Committee has consistently adopted the same position in its jurisprudence. See, e.g., *Chitat Ng v. Canada*, Communication No. 469/1991, Views of the Human Rights Committee of 7 January 1994.
- 17 Human Rights Committee General Comment No. 31, above note 8, para. 12.
- 18 United States Response to the list of issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America, undated, pp. 16–18, available at [www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf](http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf) (last visited 15 October 2008).

Observations the Human Rights Committee recommended that the United States review its position in accordance with General Comments No. 20 and No. 31.<sup>19</sup>

The prohibition on torture and other forms of ill-treatment in Article 3 of the European Convention on Human Rights has been similarly and consistently interpreted by the European Court of Human Rights as imposing a prohibition of *refoulement* to a risk of such treatment.<sup>20</sup>

### *Non-refoulement* as a principle of international humanitarian law

*Non-refoulement* also expressly appears in international humanitarian law. Article 45(4) of the Fourth Geneva Convention provides that

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

Also of relevance is Article 12 of the Third Geneva Convention which states that

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.

Although Article 12 does not expressly refer to *non-refoulement*, its underlying objective is the same: ensuring that prisoners of war are not transferred to a state that will fail to treat them in accordance with the Third Geneva Convention. In fact, this provision affords prisoners of war a greater protection than that normally granted by the principle of *non-refoulement*. Ordinarily, the principle precludes transfers if the risk faced is torture, other forms of ill-treatment or persecution; however, Article 12 precludes a transfer if *any* of the rights and protections in the Third Geneva Convention cannot be assured.<sup>21</sup> This provision is mirrored in Article 45(3) of the Fourth Geneva Convention for the benefit of aliens in the territory of a party to an international armed conflict.

19 Human Rights Committee, Concluding Observations: United States of America, above note 8, para. 16.

20 The Court first addressed the issue in *Soering v. The United Kingdom*, 7 July 1989, Series A, No. 69, para. 91. This approach has been upheld in a subsequent long line of jurisprudence. See, *inter alia*, ECtHR, *Cruz Varas and Others v. Sweden*, 20 March 1991, Series A, No. 201, p. 28, paras. 69–70 and ECtHR, *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, Series A, No. 215, p. 34, paras. 102–103.

21 On the relationship between Article 12 and Article 118 of the Third Geneva Convention, which requires detaining powers to release and repatriate prisoners of war without delay after the cessation of hostilities, see the *Commentary* to the Convention. This explains that prisoners of war have an inalienable right to be repatriated, and that 'no exception may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually'. Jean Pictet (ed.), *Commentary III Geneva Convention relative to the Treatment of Prisoners of War* (1960), p. 546.



Additionally, when interpreting the prohibitions in international humanitarian law on torture, cruel or inhuman treatment and outrages upon personal dignity, guidance should be drawn from the jurisprudence of the human rights supervisory bodies, so as to include a prohibition on transferring persons to a real risk of such treatment. Such an approach is particularly valuable in situations of non-international armed conflict as neither common Article 3 of the Geneva Conventions nor Additional Protocol II have to specifically address transfers. However both prohibit torture.

### *Non-refoulement* and extradition

Extradition is but one of the many possible mechanisms for effecting the transfer of a person from the control of one state to that of another, and it is well established that the principle of *non-refoulement* also applies in relation to such forms of transfers.

The human rights rules just outlined apply to extraditions. Certain provisions such as, for example, the abovementioned Article 3(1) of the 1984 Convention against Torture, expressly mention extradition as a form of transfer to which the principle of *non-refoulement* applies.<sup>22</sup> Similarly, the jurisprudence according to which the prohibition of torture, and other forms of ill-treatment also precludes *refoulement* to a risk of such treatment also applies to extradition; in fact, the landmark case of *Soering* before the European Court of Human Rights related to an extradition request.

The obligation to comply with the principle of *non-refoulement* also finds specific expression in standard-setting multinational conventions on extradition, such as the 1981 Inter-American Convention for Extradition.<sup>23</sup> A number of United Nations and regional conventions for the prevention and suppression of terrorism also contain provisions that aim to prevent *refoulement*.<sup>24</sup>

22 See also Article 13 of the 1985 Inter-American Convention to Prevent and Punish Torture, and Committee against Torture, General Comment No. 1, Implementation of article 3 of the Convention in the context of article 22, 21 November 1997, UN Doc. A/53/44, Annex IX, para. 2.

23 Article 4(5) of the Convention precludes extradition when 'it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons'. See also Article 3(2) of the 1957 European Convention on Extradition.

24 These conventions operate by criminalizing certain activities and requiring states parties to prosecute or extradite persons suspected of these crimes. Recognizing the risk that persons whose extradition is sought may face ill-treatment or persecution, the conventions expressly foresee the non-application of the obligation to extradite in these cases. See, e.g., Article 9(1) of the 1979 UN Convention against the Taking of Hostages.

With regard to *non-refoulement* under refugee law and extradition, in 1980 UNHCR's Executive Committee adopted a Conclusion which, *inter alia*, called upon states to ensure that the principle of *non-refoulement* was duly taken into account in treaties relating to extradition and, as appropriate, in national legislation on the subject, and expressed the hope that due regard would be paid to the principle of *non-refoulement* in the application of existing treaties relating to extradition. UNHCR Executive Committee Conclusion, No. 17 (XXXI), 1980, Problems of extradition affecting refugees, paras. (d) and (e).

## What is prohibited?

The principle of *non-refoulement* prohibits a state from transferring a person *in any manner whatsoever* to another state, if a real risk exists that certain of his or her fundamental rights will be violated. The formal description of the manner in which the person concerned is transferred is irrelevant. The prohibition applies to any form of return, rejection, expulsion or refusal, wherever it may occur (e.g., at the border, on the high seas, in an internationalized zone) as well as deportation and extradition – so to *any* act of transfer whereby effective control over an individual changes from one state to another.<sup>25</sup>

Although *non-refoulement* is often described as prohibiting *return* – that is, transfer to a person's state of nationality – the principle in fact precludes the transfer of a person to *any* state where s/he may be at risk.

The principle has been interpreted as also precluding the removal of a person to a state from where she or he may be subsequently sent to a territory where she or he would be at risk – so-called 'secondary *refoulement*'.<sup>26</sup>

The recent operations of multinational forces in Iraq and Afghanistan, where such forces have detained persons with the ultimate intention of transferring them to local authorities, have raised hitherto unaddressed questions relating to the scope of the principle. Does *non-refoulement* also apply to transfers of persons from the authorities of one state to those of another *within the territory of a single state*? And does it apply to transfers of persons between different contingents of multinational forces operating in the territory of the same state?

None of the treaty provisions just outlined expressly addresses these issues. Some of them employ language that could be read as implicitly requiring that the transfer take place across a border; for example, Article 22(8) of the 1969 American Convention on Human Rights speaks of 'return[ing a person] *to a country*' (emphasis added). This being said, this expression is not sufficient per se to exclude

25 For European Council Member states, the principle that a state must not by its actions put a person at risk of torture or other forms of ill-treatment has been reaffirmed in a very expansive manner in a European Council Directive on assistance in cases of transit for the purposes of removal of persons by air. This Directive provides that transit by air should neither be requested nor granted if the person concerned faces the threat of torture or other forms of ill-treatment, persecution or the death penalty in the country of destination or in a country of transit. The Directive thus imputes *non-refoulement* obligations on the state through whose airports persons are transiting, even though the local authorities are only exercising limited and temporary control over the persons being removed and are not involved in the decisions to remove them. Council Directive 2003/110/EU of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L, 321, 6.12.2003, p. 26.

26 See, e.g., the decision of the European Court of Human Rights in *T.I. v. The United Kingdom*, Application No. 43844/98, Decision as to Admissibility of 7 March 2000, p. 15. See also Committee against Torture General Comment No. 1, which, *inter alia*, states that 'The Committee is of the view that the phrase "another State" in article 3 [of the Convention against Torture] refers to the state to which the individual concerned is being expelled, returned or extradited, as well as to any state to which the author may subsequently be expelled, returned or extradited'. UN Committee against Torture, General Comment No. 1, above note 22, para. 2. See also UNHCR EXCOM Conclusion No. 58 (XL), 1989, Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, para. f(i).

the possibility of the principle of *non-refoulement* applying to such transfers. The *travaux préparatoires* of the treaties in question reveal that the drafters had not considered the issue, so should not be taken as having excluded it by their choice of language. Moreover, other treaties – such as, for example, Article 3(1) of the Convention against Torture – speak of transfers to ‘another State’, implying that the focus is not territorial, but rather on the transfer from one authority to another.

More fundamentally, the objective of the principle of *non-refoulement* is to prevent a state from transferring a person to another state if the risk exists that certain of his or her fundamental rights will be violated. The geography and ‘mechanics’ of how the transfer is effected are irrelevant. What matters is the change in effective control over a person from one state to another. This view is supported by the extremely broad language used in the instruments to refer to the form of transfer.<sup>27</sup> Moreover, the decisions of human rights supervisory bodies and the resolutions of the Commission on Human Rights focus on the transfer to a ‘State’ and not a ‘country’ or ‘territory’.<sup>28</sup>

This dimension of the principle was specifically addressed by the Committee against Torture in its review of the United Kingdom’s fourth periodic report. The Committee expressly raised the question of the application of the Convention against Torture to transfers of persons in the United Kingdom’s effective control in Afghanistan or Iraq to the local authorities or to other states, particularly those with military forces in the theatre in question.<sup>29</sup>

In its response, the United Kingdom denied the application of the Convention to such transfers on the ground that its involvement in detention operations was simply to assist the Afghan or Iraqi authorities to enforce local

27 For example, Article 33(1) of the 1951 Refugee Convention precludes returning ‘a refugee in any manner whatsoever’. In respect of the prohibition under this instrument, Lauterpacht and Bethlehem point out that

... it must be noted that the word used is ‘territories’ as opposed to ‘countries’ or ‘States’. The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. *This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another state or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on non-refoulement to territory where the person concerned would be at risk.* (Lauterpacht and Bethlehem, above note 11, at para. 114 (emphasis added).

28 See, e.g., the European Court of Human Rights in *Chahal*, which spoke of the prohibition of transfers to ‘another state’. ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, para. 80. Similarly, in its resolution on torture and other cruel, inhuman or degrading treatment or punishment of 2005, the Commission of Human Rights urged ‘States not to expel, return (*refouler*), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture’. UN Commission on Human Rights resolution 2005/39, 19 April 2005, para. 5 (emphasis added). Similar language, based on Article 3(1) of the Convention against Torture, was used in the resolutions in previous years.

29 Committee against Torture, Thirty-third session, List of Issues, UN Doc. CAT/C/33/L/GBR, 15–26 November 2004, para. 25.

jurisdiction and that it did not assert separate jurisdiction over the persons it was holding.<sup>30</sup>

In its conclusions and recommendations, the Committee expressed concern at the United Kingdom's limited acceptance of the applicability of the Convention to the actions of its forces abroad and recommended that it apply Articles 2 (duty to take measures to prevent torture) and 3 (*non-refoulement*) of the Convention, as appropriate, to transfers of detainees in its custody to that, be it *de facto* or *de jure*, of any other state.<sup>31</sup>

The same issue of the application of the principle of *non-refoulement* to transfers of persons to local authorities in Afghanistan and Iraq was also raised by the review in 2006 of the United States periodic reports by the Committee against Torture and the Human Rights Committee. Although the United States denied the existence of a *non-refoulement* obligation under the International Covenant on Civil and Political Rights<sup>32</sup> and the application of the Convention against Torture as a whole, and Article 3 in particular, to these contexts on a variety of grounds,<sup>33</sup> on neither occasion did it argue that the principle did not apply because the transfers were taking place within the territory of a single state.

The Sub-Commission on the Promotion and Protection of Human Rights has taken the same approach as the Committee against Torture and the Human Rights Committee on the scope of application of the principle of *non-refoulement* in a 2005 resolution on transfers of persons, which addressed various aspects of the principle. According to operative paragraph 1, the resolution, and thus the principles it reaffirmed, apply to:

any involuntary transfer from the territory of one State to that of another, or from the authorities of one State to those of another, whether effected through extradition, other forms of judicially sanctioned transfer or through non-judicial means.<sup>34</sup> (emphasis added)

30 Response by the United Kingdom to Issues raised by the United Nations Committee against Torture for Discussion at the Committee's 33rd session in November 2004, para. 222, on file with author.

31 Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, above note 8, paras. 4(b) and 5(e). In June 2006 the United Kingdom submitted comments on the Committee's conclusions and recommendations, which, *inter alia*, addressed the application of the Convention to transfers of persons to the local authorities. While the United Kingdom had rejected the application of Articles 2 and 3 of the Convention in previous exchanges with the Committee, on grounds that it lacked jurisdiction in Iraq and Afghanistan, in this submission the United Kingdom made the additional argument that in these two contexts the persons transferred did not move from the territory of one state to another. Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture, UN Doc. CAT/C/GBR/CO/4/add.1, 8 June 2006, paras. 14–17.

32 United States Response to the list of issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America, undated, pp. 16–18, available at [www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf](http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf) (last visited 16 October 2008).

33 United States Response to the Committee against Torture's List of issues to be considered during the examination of the second periodic report of the United States of America, above note 9, pp. 33–7.

34 UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, Transfer of persons, 12 August 2005, adopted by a roll-call vote of 21 to 1, with 2 abstentions. Neither the contrary vote nor the abstentions related to this aspect of the resolution.

All the human rights monitoring bodies that have considered the issue have consistently been of the view that transfers of persons from one authority to another within the same territory, including between different members of a multi-national force operating therein, must comply with the principle of *non-refoulement*. Indeed, this conclusion appears to be supported by the actions of certain contingents of the multinational forces in Iraq and Afghanistan, which have adopted a variety of methods to try to meet – or, in the view of some, side-step – their *non-refoulement* obligations. For example, in Iraq to allay its concerns that persons transferred to the Iraqi authorities might be subjected to ill-treatment, the United Kingdom concluded an agreement with the Iraqi authorities in which the latter undertook to ensure certain standards as to conditions of detention and treatment and judicial guarantees.<sup>35</sup> Similarly, a number of the states that have contributed troops to ISAF in Afghanistan are reported to have entered into similar agreements with the Afghan authorities.<sup>36</sup> Although, as will be discussed later, it is questionable whether such agreements relieve sending states of their obligations under the principle of *non-refoulement*, they are indicative of their belief that they bear some responsibility towards the persons transferred.

## The nature of the risk to be faced

The prohibition against refoulement is not triggered by the risk of any violation of a person's rights. The nature of the risk that persons must face for their transfer to be precluded varies under the three different bodies of law.

Refugee law requires a threat to life or freedom on one of five specific grounds. International humanitarian law takes a much more expansive approach and precludes the transfer of prisoners of war or protected persons if any of their rights under the relevant convention cannot be ensured. Human rights law has the most rapidly evolving jurisprudence. While, traditionally, the principle applied to transfers to a risk of torture or other forms of ill-treatment, human rights supervisory bodies have also applied it to transfers where there was a risk of the imposition of the death penalty following a manifestly unfair trial and, most recently, for sending states that have abolished the death penalty, to transfers where the risk of the imposition of such punishment existed even absent shortcomings in the trial. It cannot be excluded that the list of violations of fundamental rights that may give rise to *refoulement* may be further expanded in future decisions.

35 Response by the United Kingdom to Issues raised by the United Nations Committee against Torture for Discussion at the Committee's 33rd session in November 2004, above note 30, para. 223. See also Committee against Torture, Third-third session, summary record of the 624th session, 17 November 2004, UN Doc. CAT/C/SR/SR.624, 24 November 2004, para. 26.

36 Amnesty International, *Afghanistan – Detainees transferred to torture: ISAF Complicity?*, November 2007, ASA 11/011/2007.

## Under refugee law

Article 33 of the 1951 Refugee Convention precludes the transfer of persons to where their 'life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion'. The language of this provision differs slightly from that of Article 1A of the Convention, which lays down the grounds for entitlement to refugee status, and which speaks of 'persecution' rather than of threat 'to life or freedom' on the same five grounds. It is generally accepted that, as a matter of internal coherence of the Convention, these terms must be understood synonymously, and that the nature of the risk to be faced is the same: any kind of persecution which entitles a person to refugee status constitutes a threat to life or freedom within the meaning of Article 33, precluding his or her *refoulement*.<sup>37</sup>

## Under human rights law

### *Torture, cruel, inhuman or degrading treatment or punishment*

Traditionally, *non-refoulement* as a principle of human rights focused principally on the risk of torture or cruel, inhuman or degrading treatment or punishment.<sup>38</sup>

Although the express prohibition on *refoulement* in Article 3 of the Convention against Torture only refers to transfers to the risk of torture,<sup>39</sup> the implicit prohibitions under Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights have been interpreted as extending to cruel, inhuman or degrading treatment or punishment. What treatment amounts to torture or cruel, inhuman or degrading treatment or punishment is to be determined in accordance with the jurisprudence of the relevant human rights supervisory body.

37 See, e.g., Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, UNHCR Division of International Protection, Geneva, 1997, pp. 231–2. The 1969 OAU Convention adopts a wider approach to the types of risks that could give rise to *refoulement*, reflective of its wider definition of refugee. Under this instrument, the prohibition of *refoulement* extends to persons whose 'life, physical integrity or liberty' would be at risk because of persecution or because of external aggression, occupation, foreign domination or events seriously disturbing public order. OAU Convention, above note 12, Article 2(3).

38 In its General Comment No. 31, the Human Rights Committee spoke of 'a real risk of *irreparable harm* such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture or cruel, inhuman or degrading treatment or punishment]'. Human Rights Committee, General Comment No. 31, above note 8, para. 12 (emphasis added).

39 In its jurisprudence the Committee against Torture has consistently denied applications where the risk in the receiving state was of ill-treatment short of torture. See, e.g., *T.M. v. Sweden*, UN Doc. CAT/C/31/D/228/2003, 2 December 2003; and *M. V. v. The Netherlands*, UN Doc. CAT/C/30/D/201/2002, 13 May 2003. Attempts in 2005 to expand the reference to the scope of the protection from *refoulement* under the Convention against Torture to cover other forms of ill-treatment in the resolutions on torture of the Commission on Human Rights and the Third Committee of the United Nations General Assembly were resisted by the United States. Annotated successive draft resolutions for 2005 on file with author.

The jurisprudence of the human rights supervisory bodies has also addressed the identity of the perpetrator of the harm. This is relevant to determine whether the ill-treatment and, consequently, the prohibition to transfer persons to situations where they may face such treatment, must be perpetrated exclusively by state agents, or whether the principle of *non-refoulement* also precludes transfers if the harm is inflicted by non-state actors. The issue is particularly relevant if the persons in question are not transferred to a state that will detain them, but are instead released in situations where they face a serious threat either from armed groups unconnected to the state or from the general public – the position, for example, of senior members of the former regime in Iraq currently held by the multinational forces.

As a consequence of the narrow definition of torture in the Convention against Torture, the Committee against Torture has adopted a more restrictive approach on this point than the Human Rights Committee and the European Court of Human Rights.

The definition of torture in Article 1 of the Convention against Torture requires the ill-treatment to have been ‘inflicted by or at the instigation of or with the consent and acquiescence of a public official or other person acting in an official capacity’. In view of this requirement, the prohibition on *refoulement* in Article 3(1) is very unlikely to be applied to transfers where the torture is inflicted without this level of state involvement or acquiescence.<sup>40</sup> This was the position adopted by the Committee against Torture in the first case in point to come before it, where the applicant was trying to set aside a decision to deport her to Peru, on the ground that it would expose her to a substantial risk of torture by Sendero Luminoso. The Committee rejected the application on the ground that the obligation to refrain from returning a person to a state where there are substantial grounds for believing that s/he would be in danger of being subjected to torture was directly linked to the definition of torture in Article 1, including the requirement therein for a nexus with a state.<sup>41</sup>

This conclusion should be contrasted with that adopted by the Committee one year later in the case of a Somali national who claimed that his expulsion to Somalia would put him at risk of torture at the hands of the clan which, at the time of the application, controlled most of Mogadishu.<sup>42</sup> On this occasion, while recalling the position it had adopted in *G.R.B. v. Sweden*, in view of the exceptional circumstances prevailing in Somalia, the Committee adopted a different position.

40 The need for a nexus between the ill-treatment and a state was specifically addressed by the Committee against Torture in its General Comment No. 1 where, *inter alia*, it emphasized that ‘Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of “a consistent pattern of gross, flagrant or mass violations of human rights” refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. Committee against Torture, General Comment No. 1, above note 22, para. 3.

41 Committee against Torture, *G.R.B. v. Sweden*, Communication No. 83/1997, Views of the Committee against Torture of 15 May 1998, UN Doc. CAT/C/20/D/83/1997, 15 May 1998.

42 Committee against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, Views of the Committee against Torture of 14 May 1999, UN Doc. CAT/C/22/D/120/1998, 25 May 1999.

In particular, it noted that for a number of years Somalia had been without a central government and that some of the factions operating in Mogadishu had set up quasi-governmental institutions. De facto, those factions exercised prerogatives comparable to those normally exercised by governments. Accordingly, in its view, the members of those factions could, for the purposes of the application of the Convention, be considered as falling within the expression 'public officials or other persons acting in an official capacity' contained in Article 1. Consequently, the Committee concluded that, although the source of the threat had no connection to a state, Article 3(1) nonetheless applied and precluded the applicant's expulsion.<sup>43</sup>

Unlike the Convention against Torture, the prohibitions of torture or cruel, inhuman or degrading treatment or punishment in the International Covenant on Civil and Political Rights and in the European Convention on Human Rights do not contain definitions of the prescribed treatment. These have been developed in the jurisprudence of the Human Rights Committee and the European Court of Human Rights, including *in terms* of the perpetrator of the ill-treatment.

The Human Rights Committee has affirmed that states must afford everyone protection against the acts prohibited in Article 7, whether inflicted by persons acting in their official capacity, outside their official capacity or in a private capacity<sup>44</sup> and must take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.<sup>45</sup> However, to date it has not had to decide a *refoulement* case where the source of the threat of ill-treatment was a non-state actor.

The European Court of Human Rights, on the other hand, has addressed the issue on a number of occasions and has adopted a much more expansive approach than the Committee against Torture. In a series of consistent decisions, it has ruled that transferring a person to a state where a real risk of violations of Article 3 of the Convention at the hands of non-state actors existed could amount to a violation of the Convention. A key consideration in the Court's approach is whether the state that would ordinarily have this responsibility is in a position to afford the individual adequate protection against the threatened harm.

For example, in the case of *H.L.R. v. France*, the applicant claimed that if deported to his home state of Colombia he would be exposed to vengeance on the part of the drug traffickers who had recruited him as a smuggler and about whom

43 *Ibid.*, para. 6.5. The exceptional nature of this decision was confirmed by a virtually identical case that came before the Committee three years later. The Committee noted that in the intervening years the situation in Somalia had changed significantly. Somalia now possessed a state authority in the form of the Transitional National Government that had relations with the international community in its capacity as central government, although doubts existed as to the reach of its territorial authority and its permanence. In view of the existence of this authority, the Committee did not consider that the case fell within the exceptional situation in *Elmi v. Australia*, and took the view that the acts of the non-state entities operating in Somalia fell outside the scope of Article 3 of the Convention. Committee against Torture, *H.M.H.I. v. Australia*, Communication No. 177/2001, Views of the Committee against Torture of 1 May 2001, UN Doc. CAT/C/28/D/177/2001, 1 May 2001, para. 6.4.

44 Human Rights Committee, General Comment No. 20, above note 16, para. 2.

45 Human Rights Committee, General Comment No. 31, above note 8, para. 8.



he had provided information to the French authorities. Although the Court found that the applicant had failed to show the existence of such a risk, it stated that

Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.<sup>46</sup>

### *The death penalty*

Traditionally the transfer of a person to face proceedings that could lead to the imposition and implementation of the death penalty was not considered of itself a violation of the principle of *non-refoulement*. The decisions of human rights tribunals relating to extraditions in such circumstances focused on the *manner* in which the death penalty would be applied, or the ‘death row phenomenon’ leading up to it, which was frequently found to amount to cruel, inhuman or degrading treatment or punishment giving rise to *refoulement*, rather than on the death penalty itself.<sup>47</sup> However, in recent years human rights supervisory bodies have

46 ECtHR, *H.L.R. v. France*, Judgment of 22 April 1997, para. 40. This position was reiterated, for example, in *T.I. v. The United Kingdom*, although in this case too the applicant failed on the merits. ECtHR, *T.I. v. The United Kingdom*, Decision as to Admissibility of 7 March 2000, p. 14. The conclusion that a threat emanating from a non-state actor may give rise to a violation of Article 3 of the Convention appears to have been so uncontroversial that in the case of *Ahmed v. Austria* which, like the above-mentioned cases before the Human Rights Committee, related to an expulsion to Somalia during the late 1990s, the Court did not even address this dimension of the case. ECtHR, *Ahmed v. Austria*, Judgment of 27 November 1996. It was only considered at an earlier stage of the proceedings by the Commission, which upheld the applicant’s claim of violation of Article 3 on the ground that it was sufficient that those who held substantial power within a state, even though they were not the government, threaten the life and security of applicant. *Ahmed v. Austria*, Application No.25964/94, Report of the Commission of 5 July 1995, p. 11. See also ECtHR, *Salah Sheekh v. The Netherlands*, Judgment of 11 January 2007, para. 97. The Court adopted an even more extensive approach in the case of *D. v. The United Kingdom*, where the applicant, an AIDS sufferer whose illness had reached a critical stage and who was about to be deported to his home state of St Kitts and Nevis, claimed that, in view of the quality and availability of medical treatment in St Kitts, his deportation would amount to a violation of Article 3 of the Convention. The Court noted that the principle of *non-refoulement* was ordinarily applied when the risk emanated from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies in that country when the authorities there were unable to afford appropriate protection. However, given the fundamental importance of Article 3 in the Convention system, the Court considered that it should reserve to itself sufficient flexibility to address the application of the article where the source of the risk in the receiving country stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, did not in themselves infringe the standards of that article. To limit the application of Article 3 otherwise would, in the Court’s view, have undermined the absolute character of its protection. On this basis, the Court found that the implementation of the decision to deport the applicant to St Kitts would have amounted to inhuman treatment in violation of Article 3 of the Convention. ECtHR, *D. v. The United Kingdom*, Judgment of 2 May 1997, Application No. 30240/96, paras. 49–53.

47 For example, in the *Soering* case, the European Court of Human Rights did not base its decision on the risk of the imposition of the death penalty per se but rather on the fact that the ‘death row phenomenon’

shown an inclination to scrutinize the lawfulness of other dimensions of transfers to face the possible imposition or execution of the death penalty.

Particular attention has been paid to cases where the risk existed that the death penalty would be imposed or executed after a trial that did not respect minimum judicial guarantees. This could give rise to issues of *refoulement* in two ways. First, following the *Soering/Ng* line of reasoning, the imposition of the death penalty in such circumstances could of itself amount to torture or other forms of proscribed treatment and thus give rise to possible claims of *refoulement*. In the *Öcalan* case, for example, the European Court of Human Rights held that the imposition of the death penalty following an unfair trial amounted to inhuman treatment *per se*. Even if the sentence was ultimately not implemented, as in this case, where Turkey later abolished the death penalty, the claimant nonetheless had to suffer for several years the consequences of its imposition following an unfair trial, and this amounted to inhuman treatment.<sup>48</sup> The case did not specifically address the *non-refoulement* dimension. While this question has not come specifically before the Court yet, now that it has determined that the imposition of the death penalty in such circumstances amounts to inhuman treatment, there is no reason for it not to apply its consistent approach that a transfer to where the risk of such treatment exists would violate the convention.

Second, it is well established that the implementation of the death penalty following a trial in which minimum judicial guarantees were not respected amounts to an arbitrary deprivation of life.<sup>49</sup> Without entering into a discussion of what comprises an unfair trial, the essential safeguards that protect persons held by one state and subsequently transferred to another for trial, and that are most at risk of being denied in the context of this article include serious limitations on the rights to adequate time and facilities for the preparation of a defence and to communicate with counsel; and the use of improperly obtained evidence in criminal proceedings. This could be evidence and information obtained during interrogations during which their lawyer was absent, or in situations where the transferee's fundamental rights were seriously violated, for example information obtained as a result of torture.

Although to date human rights monitoring bodies have not specifically addressed the lawfulness of the transfer of a person in such circumstances, such a situation appears to fall squarely within the 'irreparable harm' contemplated by the

amounted to cruel, inhuman or degrading treatment. ECtHR, *Soering v. The United Kingdom*, above note 19, para. 111. Similarly, in the *Ng* decision, the Human Rights Committee found that the manner in which the applicant would be executed (by gas asphyxiation) constituted cruel and inhuman treatment, in violation of Article 7 of the Covenant. *Chitat Ng v. Canada*, above note 16, para. 16.4.

48 ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Judgment of 12 March 2003, para. 213, confirmed by the Judgment of the Grand Chamber of 5 May 2005. The Court reiterated this position in the case of *Bader and others v. Sweden*, Application No. 13284/04, Judgment of 8 November 2005, para. 47.

49 See, e.g., the views of the Human Rights Committee in *Glenford Campbell v. Jamaica*, Communication No. 248/1997, Views of the Human Rights Committee of 30 March 1992; and *Eustace Henry and Everald Douglas v. Jamaica*, Communication No. 571/1994, Views of the Human Rights Committee of 25 July 1996.

Human Rights Committee in its General Comment No. 31, which precludes states from transferring persons

where there are substantial grounds for believing that there is a real risk of *irreparable harm* such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture or cruel, inhuman or degrading treatment or punishment]<sup>50</sup>... (Emphasis added)

Finally, there is also a move towards considering that states that have abolished the death penalty must refrain from transferring persons to face its possible imposition or implementation, even absent allegations of unfair trial. This was the position adopted by the Human Rights Committee in 2003 in the case of *Judge v. Canada*. Here, having noted that its position, as well as that of states, on the question of the death penalty was constantly evolving, the Committee held that

For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.<sup>51</sup>

The question is particularly pertinent for states that have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, and for those states parties to the European Convention on Human Rights that have ratified Optional Protocols No. 6 or No. 13 thereto.<sup>52</sup>

To date, the Human Rights Committee has not had to address the question of the effect of the Second Optional Protocol on transfers to face the death penalty. In the light of its view in the aforementioned *Judge* case, it seems safe to assume that it will read into the Protocol an obligation not to transfer persons to a situation where they could face the imposition or implementation of the death penalty.

Only one case has come before the European Court of Human Rights where the applicant argued that his deportation to proceedings that could lead to the imposition of the death penalty would violate Optional Protocols No. 6 and No. 13. Although the case failed on the merits, as the existence of the risk was not found to have been established, the Court reiterated its position that expulsions may give rise to violations of Article 3 if the person in question faced a real risk of being ill-treated in the receiving country. The Court added that it did not exclude that analogous considerations might apply to Article 2 of the Convention, on the

50 Human Rights Committee, General Comment No. 31, above note 8, para. 12 (emphasis added).

51 Human Rights Committee, *Roger Judge v. Canada*, Communication No. 829/1998, Views of the Human Rights Committee of 20 October 2003, para. 10.4.

52 Optional Protocol No. 6 abolishes the death penalty but allows states parties to make provision for it in respect of acts committed in time of war. Optional Protocol No. 13 abolishes the death penalty at all times.

right to life, and Article 1 of Protocol No. 6 if the transfer put a person's life in danger, as a result of the imposition of the death penalty or otherwise.<sup>53</sup>

While the trend clearly appears to be towards precluding transfers in cases of risk of the imposition or execution of the death penalty following a manifestly unfair trial and, in the case of sending states that have abolished the death penalty, even absent allegations of serious shortcomings in the proceedings, it should be borne in mind that it is generally accepted that undertakings from the receiving state not to seek, impose or execute the death penalty *are* sufficient to avert the existence of the risk. Indeed, they are sometimes expressly foreseen, if not required, by the relevant instruments or in the decisions of the human rights monitoring bodies. This is in sharp contrast to similar undertakings intended to avert the risk of torture or other forms of ill-treatment, discussed below.

### *Other risks*

The International Convention for the Protection of All Persons from Enforced Disappearance expressly prohibits transfers where there are substantial grounds for believing persons would be subjected to enforced disappearance, defined as

the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>54</sup>

Some human rights monitoring bodies have recently used language that would suggest a further broadening of the list of violations of fundamental rights, a risk of exposure to which could give rise to *refoulement*.<sup>55</sup> For example, in its aforementioned 2005 resolution on transfers, the Sub-Commission on Human

53 ECtHR, *S.R. v. Sweden*, Application No. 62806/00, Judgment of 23 April 2003. Similarly, although the question of the effect of Optional Protocol 13 was raised by the respondent state in *Bader v. Sweden*, the Court decided the application on other grounds and, consequently, did not address that issue. *Bader and others v. Sweden*, above note 48, para. 49. Additionally, the legal obligations or political commitments of a number of states, notably, but not exclusively, the members of the European Union and/or the Council of Europe preclude them from transferring persons to the possible imposition or execution of the death penalty. These include, for example, the aforementioned 1957 European Convention on Extradition; the EU Qualification Directive; the EU Directive on assistance in cases of transit for the purposes of removal by air; and the European Arrest Warrant (Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L190, 18.7.2002, pp. 1–20). National legislation often imposes additional limitations. See, e.g., the legislation referred to in Ruma Mandal, Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection'), UNHCR Legal and Protection Policy Research Series, PPLA/2005/2, June 2005.

54 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 2 and 16.

55 As long ago as 1989, in the *Soering* case, the European Court of Human Rights had noted that '[it did] not exclude that an issue might exceptionally be raised under Article 6 [right to fair trial] by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country'. *Soering v. The United Kingdom*, above note 20, para. 113. To date,

Rights added ‘extra-judicial killing’.<sup>56</sup> It also recommended – implying that in this respect no binding obligation yet existed – that persons should not be transferred to a state if there was a real risk of indefinite detention without trial or of any proceedings that may be brought against the person transferred being conducted in flagrant violation of international due process standards.<sup>57</sup>

With regard to children, in its General Comment No. 6, the Committee on the Rights of the Child affirmed that states must not transfer children if there are substantial grounds for believing that there is a risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Article 6 of the Convention on the Rights of the Child, on the right to life, and Article 37 prohibiting torture, cruel, inhuman or degrading treatment or punishment, the death penalty, or arbitrary deprivation of liberty.<sup>58</sup>

The Committee added that the risk of under-age recruitment and participation in hostilities entailed a high risk of irreparable harm and that states had to refrain from returning children if a real risk of under-age recruitment existed, including not only recruitment as a combatant but also to provide sexual services for the military or where there was a real risk of direct or indirect participation in hostilities.<sup>59</sup>

Mention should also be made of the 2007 report of the Human Rights Commission’s Working Group on Arbitrary Detention where, while stopping short of asserting that a risk of arbitrary deprivation of liberty already constituted one of the risks covered by the principle of *non-refoulement*, the Working Group emphasized the need for states to include this risk among the elements to be taken into consideration when considering the transfer of a person, particularly in the context of efforts to counter terrorism.<sup>60</sup>

## Under international humanitarian law

Under Article 45 of the Fourth Geneva Convention, the person must face risk of persecution for political opinions or religious beliefs for the prohibition on *non-refoulement* to apply.

Although the Convention does not define ‘persecution’, guidance can be obtained from the Statute of the International Criminal Court, which defines the crime against humanity of ‘persecution’ as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.<sup>61</sup> Also of relevance are the Elements of Crime of persecution

however, the Court has not had to decide a case relating to transfers to alleged flagrant denial of fair trial that did not involve the imposition of the death penalty.

56 UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2005/12, above note 34, para. 3.

57 *Ibid.*, para. 8.

58 Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, 3 June 2005, p. 6.

59 *Ibid.*

60 Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/4/40, 9 January 2007, para. 49.

61 1998 Statute of the International Criminal Court, Article 7(2)g.

as a crime against humanity under the Statute of the International Criminal Court<sup>62</sup> as well as the way the term has been interpreted in refugee law, in relation to the definition of refugee.<sup>63</sup>

The essence of persecution is the deprivation of certain fundamental rights – right to life, freedom and security of the person – on account of particular characteristics of a person, such as ethnicity, nationality, religion or political opinion.

As mentioned above, although they do not expressly refer to *non-refoulement*, Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention preclude transfers of prisoners of war and aliens in the territory of a state party to an international armed conflict respectively to a state that is unwilling to ensure that *all* the protections in the Third and Fourth Geneva Conventions are respected.

## The threshold of risk to be faced

The various treaties use slightly different expressions to refer to the level of risk to be faced for the principle of *non-refoulement* to apply.

The 1951 Refugee Convention prohibits sending refugees to territories where their life or freedom ‘*would be threatened*’ on one of the proscribed grounds.<sup>64</sup>

Article 45 of the Fourth Geneva Convention precludes transfers to a country where the person in question ‘*may have reason to fear*’ persecution.

Article 3(1) of the Convention against Torture prohibits transferring a person ‘*where there are substantial grounds for believing that he would be in danger of being subjected to torture*’.<sup>65</sup> In relation to the level of risk to be shown to exist, in General Comment No.1 the Committee against Torture explained that

... the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.<sup>66</sup>

62 Of particular relevance are elements 1–3. Preparatory Commission for the International Criminal Court, Addendum, Part II: Finalized draft text of the Elements of Crimes, Article 7 (1) (h), Crime against humanity of persecution, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000.

63 UNHCR, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Re-edited, January 1992, paras. 51–53.

64 Article II(3) of the OAU Convention adopts the same standard, prohibiting the transfer of a refugee if his or her life, physical integrity or liberty ‘*would be threatened*’.

65 Upon ratification of the Convention against Torture, the United States made the following interpretative declaration of Article 3: ‘... the United States understands the phrase, “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” as used in article 3 of the Convention, to mean “if it is more likely than not that he would be tortured”’ (emphasis added). The reasoning underlying this interpretation and its meaning are discussed at pp. 37–8 of the United States’ Response to the Committee against Torture’s List of issues to be considered during the examination of the second periodic report of the United States of America, above note 9.

66 Committee against Torture, General Comment No. 1, above note 22, para. 6.

Article 16(1) of the International Convention for the Protection of All Persons from Enforced Disappearance forbids the transfer of a person ‘where there are *substantial grounds for believing* that he or she would be in danger of being subjected to enforced disappearance’.

In interpreting the prohibitions of torture and other forms of ill-treatment under Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights, the Human Rights Committee and the European Court of Human Rights have adopted broadly similar language.

The Human Rights Committee has not been consistent in its formulation of the threshold of risk. In its General Comment No. 20 it stated that states parties to the Covenant ‘*must not expose individuals to the danger*’ of torture or cruel, inhuman or degrading treatment or punishment.<sup>67</sup> More recently, in General Comment No. 31, the Committee slightly modified this language and spoke of an obligation not to transfer persons ‘where *there are substantial grounds for believing that there is a real risk of irreparable harm*, such as that contemplated by articles 6 and 7 of the Covenant’.<sup>68</sup>

In its jurisprudence, on the other hand, the Committee has held that states must refrain from exposing individuals ‘*to a real risk*’ of violations of their rights under the Covenant.<sup>69</sup>

As for the European Court of Human Rights, in the case of *Soering* it held that an extradition decision could give rise to a violation of Article 3 of the Convention ‘*when substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk*’ of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.<sup>70</sup> In subsequent cases the Court adopted substantially identical language, which closely resembles that of Article 3(1) of the Convention against Torture.<sup>71</sup>

Although the expressions used by the instruments and the human rights monitoring bodies to describe the threshold of risk to be faced for the principle of *non-refoulement* to apply are not constant, it is unlikely that the slight variations in formulation make an actual difference in the assessment of risk.<sup>72</sup>

67 Human Rights Committee, General Comment No. 20, above note 16, para. 9.

68 Human Rights Committee, General Comment No. 31, above note 8, para. 12.

69 See, e.g., *Chitat Ng v. Canada*, above note 16, para. 14.1.

70 *Soering v. The United Kingdom*, above note 20, para. 91.

71 See, e.g., ECtHR, *Vilvarajah and Others v. The United Kingdom*, above note 20, para. 115; ECtHR, *Chahal v. The United Kingdom*, above note 28, paras. 74 and 80; and ECtHR *T.I. v. The United Kingdom*, Application No. 43844/98, Judgment of 7 March 2000, p. 15.

72 According to Lauterpacht and Bethlehem, ‘[i]n practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Right Committee, the European Court of Human Rights, and the Committee against Torture ... have all indicated in one form or another that, whenever an issue of *refoulement* arises, the circumstances surrounding the case will be subjected to rigorous scrutiny’ (Lauterpacht and Bethlehem, above note 11, para. 247).

The following language has been suggested as reflecting the fullest formulation of the threshold of risk underlying *non-refoulement* as articulated in international practice:

circumstances in which substantial grounds can be shown for believing that the individuals would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment.<sup>73</sup>

## Who is protected?

### Under refugee law

Article 33 of the 1951 Refugee Convention prohibits the *refoulement* of a refugee – that is, someone who falls within the definition of refugee laid down in Article 1A<sup>74</sup> and who is not excluded from the protection of the Convention on the grounds set out in Article 1F.<sup>75</sup>

This does not mean that persons falling within the exclusion clause can be *refouled*. They do not benefit from refugee status and the consequent rights, including falling within UNHCR's mandate. But *as* by definition, they face a risk if returned, they may be entitled to protection from *refoulement* under human rights law and, if they are in a state experiencing armed conflict, international humanitarian law. The fact that they have been excluded from protection under refugee law does not affect their claim to protection under these bodies of law.

### Under human rights law

While the express prohibition in the American Convention on Human Rights only precludes the *refoulement* of aliens, the prohibition based on the risk of torture in

<sup>73</sup> *Ibid.*, para. 249.

<sup>74</sup> Article 1A of the Convention defines a refugee as 'any person who, owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country'. It is not necessary for a person to have been formally recognized as a refugee to benefit from the protection of the Convention. It is sufficient for him or her to meet the criteria of the definition. See, e.g., UNHCR EXCOM Conclusion No. 6 (XXVIII) 1977, *Non-refoulement*. Additionally, the lawfulness of a person's presence in the concerned state does not affect the application of the principle of *non-refoulement*. See, e.g., Convention relating to the Status of Refugees, 28 July 1951, Article 31.

<sup>75</sup> This provision excludes from the protection of the Convention:

any person with respect to whom there are serious reasons for considering that:

- he has committed a crime against peace, a war crime, or a crime against humanity ...
- he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- he has been guilty of acts contrary to the purposes and principles of the United Nations.

The OAU Refugee Convention is broader in scope than the 1951 Convention. Although it, too, contains exclusion clauses, Article II(3) provides that 'no person' may be *refouled*, presumably including those who fall within with exclusion clauses.



the Convention against Torture and implicit in instruments such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights applies to *all* persons within a state's effective control, regardless of their nationality or whether they have refugee status.

### Under international humanitarian law

The express prohibition of *refoulement* in Article 45 of the Fourth Geneva Convention applies to aliens in the territory of a state party to an international armed conflict, as does the broader protection in relation to transfers in the same provision. The equivalent provision in Article 12 of the Third Geneva Convention applies to prisoners of war.

The prohibition on torture and other forms of ill-treatment under international humanitarian law applies to all persons in the effective control of a party to a conflict. Consequently, to the extent that the interpretation of the prohibition of torture and other forms of ill-treatment in international humanitarian law is to be guided by the jurisprudence of the human rights monitoring bodies, *all* such persons are protected from transfers that may put them at risk of such treatment.

### Consequences of the different scope of application of the principle

#### *UNHCR's involvement*

The key consequence of this difference in scope of application of the principle relates to UNHCR's involvement on behalf of the persons concerned. The agency only has an express mandate to assist and protect persons falling within the 1951 Refugee Convention and stateless persons. Thus, persons who do not fall within the definition of refugee, or who are excluded from it, but who would be at risk if transferred, must also not be *refouled*, although ordinarily UNHCR will not intervene on their behalf nor assist in finding a durable solution for them.

#### *'Complementary protection'*

In terms of protection, failure to fall within the refugee definition, exclusion therefrom or falling within the exceptions to the principle of *non-refoulement* under refugee law do not affect a person's claim to protection from *refoulement* under human rights law and, if she or he is in a state experiencing armed conflict, international humanitarian law.<sup>76</sup> The term 'complementary protection' is often used to refer to the protection against transfer in such circumstances.

76 See, e.g., 'Factum of the Intervenor, UNHCR, Suresh v. Minister of Citizenship and Immigration; the Attorney-General of Canada', SCC No. 27790', *International Journal of Refugee Law* (2002), pp. 149 ff.

Some states have regulated the grounds for granting complementary protection and, importantly, specified the rights and status to which beneficiaries are entitled.<sup>77</sup> Regrettably, the more common situation is that persons benefiting from complementary protection, although not *refouled*, remain without formal status and rights, often in an uncertain and precarious legal situation.<sup>78</sup>

## An absolute principle

### Under refugee law

Under the 1951 Refugee Convention protection from *refoulement* may not 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.<sup>79</sup>

A discussion of the scope of application of this exception is beyond the scope of the present article.<sup>80</sup> For present purposes it is sufficient to point out that it is generally accepted that, given the humanitarian character of the prohibition of *refoulement* and the serious consequences to a refugee of being returned to a country where s/he is in danger, the exceptions must be interpreted restrictively and in strict compliance with due process of law.<sup>81</sup> Moreover, as already indicated, persons excluded from protection against *refoulement* under refugee law can still benefit from the principle under human rights law or international humanitarian law.

77 For example, by means of 'subsidiary protection' in the European Union pursuant to Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, [2004] OJ L304/12 ('the Qualification Directive'). For a recent discussion of the grounds on which complementary protection may be claimed and the consequent rights see Jane McAdam, 'Complementary protection and beyond: how states deal with human rights protection', *New Issues in Refugee Research*, UNHCR Working Paper No. 118, August 2005. See also Mandal, above note 53.

78 In recognition of the vulnerable situation in which such persons often find themselves, minimum standards of treatment for persons benefiting from complementary forms of protection were discussed by the Standing Committee of UNHCR's Executive Committee in 2000: *Complementary Forms of Protection: their Nature and Relationship to the International Refugee Protection Regime*, UN Doc. EC/50/SC/CRP.18, 9 June 2000.

79 Convention relating to the Status of Refugees (1951), Article 33(2). Later refugee law instruments, such as the OAU Refugee Convention and the Cartagena Declaration, do not contain any exceptions to the principle of *non-refoulement*.

80 For a discussion of exclusion, see UNHCR, Background Note on the Application of the Exclusion: Article 1F of the 1951 Convention relating to the Status of Refugees, Protection Policy and Legal Advice Section, Department of International Protection, HCR/GIP/03/05, 4 September 2003.

81 See Lauterpacht and Bethlehem, above note 11, at para. 159.

## Under human rights and international humanitarian law

*Non-refoulement* as a principle of human rights law allows no exceptions or derogation.

None of the treaty provisions expressly prohibiting *refoulement* contain exceptions. Moreover, inasmuch as it is a component part of the prohibition against torture and other forms of ill-treatment, *non-refoulement* benefits from the same absolute character. The absolute nature of the prohibition against torture has been expressly recognized in both the Convention against Torture itself and by the human rights monitoring bodies.<sup>82</sup>

The absolute nature of the prohibition of torture and other forms of ill-treatment, including the implicit *non-refoulement* dimension, was recently reaffirmed by the Human Rights Committee in its Concluding Observations on Canada's fifth periodic report. In reaction to a decision by the Supreme Court of Canada to deport a person deemed to constitute a threat to national security despite the existence of a risk that he may be ill-treated, the Committee stated that

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 ... 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.<sup>83</sup>

Similarly, in the recent case of *Saadi v. Italy*, relating to the deportation of a person accused of terrorist offences, the European Court of Human Rights reaffirmed the absolute nature of the prohibition of torture and inhuman or degrading treatment or punishment, from which no derogation is possible, even in the event of public emergencies threatening the life of the nation, and irrespective of the complainant's conduct.<sup>84</sup>

82 Article 2(2) of the Convention Against Torture provides that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'. See also Human Rights Committee General Comment No. 20, above note 16, at para. 3, and General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, UN Doc. CCPR/C/21/rev.1/add.6.

83 Human Rights Committee, Concluding Observations: Canada, 2 November 2005, UN Doc. CCPR/C/CAN/CO/5, para. 15. The same Supreme Court decision also attracted strong criticism from the Committee against Torture: Committee against Torture, Concluding Observations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 4(a).

84 *Saadi v. Italy*, above note 13, para. 127. The case before the European Court of *Chahal v. The United Kingdom* also related to the deportation of a person for alleged involvement in terrorist activities. Emphasizing that it was aware of the difficulties faced by states in protecting themselves from terrorist violence the European Court of Human Rights nonetheless held that:

even in these circumstances the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the

Importantly, in this case the Court also rejected the argument made by the United Kingdom, which had intervened in the proceedings, that a distinction should be drawn between situations where the ill-treatment was being inflicted directly by the state party to the European Convention and those where the ill-treatment was being inflicted by a third state, to which the applicant was being transferred. The United Kingdom argued that, in the latter situation, the protection against ill-treatment of the individual concerned had to be weighed against the interests of the community as a whole. The Court forcefully rejected this approach, pointing out that the protection against *non-refoulement* under the European Convention on Human Rights was broader than that under the 1951 Refugee Convention inasmuch as the conduct of the person concerned, however undesirable or dangerous, was not something to be taken into account.<sup>85</sup>

The Court also rejected as incompatible with the absolute nature of the prohibition of torture and other forms of ill-treatment, the intervening state's argument that in cases where the applicant presented a threat to national security, stronger evidence had to be adduced to prove the existence of risk of ill-treatment. In the Court's view, the fact that a person may cause a serious risk to the community if not returned, did not reduce in any way the risk of ill-treatment that she or he may be subjected to upon return; accordingly it would be incorrect to require a higher standard of proof to be met.<sup>86</sup>

Under international humanitarian law the principle of *non-refoulement* as it expressly appears in Article 45(4) of the Fourth Geneva Convention is equally absolute,<sup>87</sup> as is its broader implicit formulation in Article 12 of the Third Geneva Convention and in Article 45(3).

## The procedural dimension

One fundamental aspect of the principle of *non-refoulement* that, until recently, had received only limited attention and scrutiny is its procedural dimension: the minimum due process rights enabling individuals to challenge decisions to transfer them, which, in their view, this would expose them to a real risk of violation

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, whatever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 ... if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. (*Chahal v. The United Kingdom*, above note 28, paras. 79–80)

85 *Saadi v. Italy*, above note 13, para. 138.

86 *Ibid.*, para. 140.

87 The absolute nature of the principle is forcefully affirmed in Jean Pictet (ed.), *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958), p. 269.

of their fundamental rights. This procedural dimension is essential to the actual practical implementation of the protection afforded by the principle of *non-refoulement*. It appears expressly in the Refugee Convention but has an equally strong basis under human rights law.<sup>88</sup>

### Authority responsible for determining the existence of a risk

It is for the national authorities of the state with effective control of the person concerned to determine whether a real risk of violation of fundamental rights exists should the transfer take place. The existence of the risk must be determined on objective grounds, on the basis of information that the state has or ought to have. Although, in most instances, the person concerned is likely to have expressed their concerns in relation to the transfer, it is not necessary for him or her to have done so for states' obligations under the principle of *non-refoulement* to arise. Even in circumstances where the person concerned does not, or is not in a position to express his or her fears, the sending state must itself assess whether a risk exists.

In the case of *non-refoulement* as a principle of refugee law, the assessment of the existence of a risk is usually carried during refugee status determination procedures before local courts or tribunals. In certain circumstances it may be UNHCR that carries out the refugee status determination at a state's request.<sup>89</sup>

National authorities also make the determination of the existence of a risk under *non-refoulement* as a principle of human rights law. Some states have established special procedures for reviewing entitlement to this complementary protection, but, in most, proposed transfers must be challenged before the ordinary courts responsible for the review of administrative decisions.<sup>90</sup>

### The right to challenge the transfer decision

It is uncontroversial that a person facing potential *refoulement* must be given the opportunity to challenge the decision to transfer him or her.

The requirement that an expulsion may only be carried out in pursuance 'of a decision reached in accordance with due process of law' is expressly foreseen in the 1951 Refugee Convention.<sup>91</sup>

The right of individuals to challenge decisions to transfer them and the observance of due process safeguards in proceedings that could lead to *refoulement* is also required by human rights law, as has been highlighted by various human rights monitoring bodies. Article 13 of the International Covenant on Civil and

88 On this last point see, for example, Lauterpacht and Bethlehem, above note 11, para. 159.

89 General guidance on refugee status determination procedures and standards can be found in UNHCR, *Refugee Protection: A Guide to International Refugee Law*, UNHCR Handbook for Parliamentarians, No.2, 2001, and in *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, above note 63.

90 See, e.g., Mandal, above note 53, and McAdam, above note 77.

91 Convention relating to the Status of Refugees (1951), Article 32(2).

Political Rights allows the expulsion of aliens lawfully in the territory of a State Party only in pursuance of a decision reached in accordance with law. It also requires that, except when compelling reasons of national security otherwise require, such persons be allowed to submit the reasons against their expulsion and to have their case reviewed by, and be represented for the purpose before, a competent authority. The aim of this provision is to ensure for every alien lawfully in the territory of a State Party an *individual* decision as to removal and to avoid arbitrary expulsions.<sup>92</sup> Article 1 of Protocol No. 7 to the European Convention on Human Rights contains similar procedural safeguards to be granted to aliens in expulsion proceedings.

These are the only two provisions expressly to mention a right of review; however, this right to 'due process' in challenging transfer decisions has been interpreted as applying to all persons in a state's effective control and not just aliens lawfully in the territory of the transferring state.

The European Court of Human Rights has developed this dimension of the principle of *non-refoulement* on the basis of the right to an effective remedy under national law for violations of the Convention. In situations where a transfer may expose a person to a risk of torture or other forms of ill-treatment the Court has applied stringent criteria as to the form such a remedy must take. For example, in the *Chahal* case, it held that

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees that it affords are relevant in determining whether the remedy before it is effective.<sup>93</sup>

With regard to other elements of the procedure, the Court noted

... that in the proceedings before the advisory panel the applicant was not entitled, *inter alia*, to legal representation, that he was only given an outline of

92 Human Rights Committee General Comment No. 15, The position of aliens under the Covenant, 11 April 1986, para. 10. The Human Rights Committee also pointed out that this provision applies to *all* procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. *Ibid.*, para. 9.

93 *Chahal v. The United Kingdom*, above note 28, paras. 151–152. Applying this test to the facts of the case before it, the Court noted that neither the advisory panel of the court of appeal nor the courts could review the Home Secretary's decision to deport the applicant. Their role was limited to satisfying themselves that the former had balanced the risk to the applicant against the danger he posed to national security. In view of this, the Court concluded that the courts could not be considered as providing effective remedies as required by Article 13 of the Convention. *Ibid.*, para. 153.

the grounds for the notice of the intention to deport, and that the panel had no power of decision and that its advice to the Home Secretary was not binding and not disclosed. In these circumstances the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13.<sup>94</sup>

Until recently other human rights monitoring bodies had not addressed this dimension of the principle in the same level of detail. For example, in a 1996 case relating to the transfer of a person suspected of terrorist activities effected by a direct handover from police force to police force without the intervention of a judicial authority, the Committee against Torture had found a violation of Article 3 of the Convention and of the detainee's rights. It had highlighted the need for transfers fully to respect the rights and fundamental freedoms of the individuals concerned – including those to due process – but had not entered into the details of what these were.<sup>95</sup>

In recent years greater emphasis has been placed on this procedural dimension of the prohibition of *refoulement*. For example, the Committee against Torture did so in a 2005 decision relating to the transfer of an Egyptian national from Sweden to Egypt, approaching it, like the European Court of Human Rights, in the context of the right to a remedy. Having noted that Article 3 of the Convention against Torture should be interpreted so as to encompass a remedy for its breach, the Committee held that

... in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to a remedy requires, after the event, an effective, independent and impartial investigation of such allegations. The nature of *refoulement* is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, *the right to an effective remedy contained in article 3* requires, *in this context, 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.*<sup>96</sup>

Without spelling out the minimum elements with which it considered that the transfer review procedure should comply, in 2006 the Committee against Torture also emphasized the right of individuals detained outside US territory – in this case Guantánamo, Afghanistan and Iraq – to challenge transfer decisions.<sup>97</sup>

94 *Ibid.*, para. 154.

95 Committee against Torture, *Josu Arkauz Arana v. France*, Communication No. 63/1997, Views of the Committee against Torture of 16 December 1996, para. 11(5). The Committee against Torture had already expressed its concern at the practice of the police to hand over individuals to their counterparts in another country when it considered France's second periodic report pursuant to Article 19 of the Convention. Report of the Committee against Torture, UN Doc. A/53/44, 16 September 1998, para. 143.

96 Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, Views of the Committee against Torture of 20 May 2005, para. 13.7 (emphasis added).

97 In its Conclusions and Observations on the United States' second periodic report the Committee simply stated that 'the State party should always ensure that suspects have the possibility to challenge decisions of *refoulement*'. Committee against Torture, Conclusions and Recommendations: United States of America, above note 9, para. 20.

The Human Rights Committee has also placed increasing emphasis on the procedural dimension of the principle. For example, in the 2006 case of *Mansour Ahani v. Canada*, it stated that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, 'the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture'.<sup>98</sup>

The issue was also addressed by the Inter-American Commission on Human Rights in its 2005 decision reiterating and extending the precautionary measures imposed in respect to the detainees held in Guantánamo.<sup>99</sup> On this point, the Commission affirmed that the obligation of *non-refoulement*

... also necessarily requires that persons who may face a risk of torture cannot be rejected at the border or expelled without an adequate, individualized examination of their circumstances even if they do not qualify as refugees, and that the process requires the strictest adherence to all applicable safeguards, including the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent.<sup>100</sup>

Similarly, in his interim report of 2004, the Special Rapporteur on Torture expressed serious concern at the increase in practices that, in his view, undermined the principle of *non-refoulement*, including the handing over of persons by the authorities of one country to their counterparts in other countries without the intervention of a judicial authority. He emphasized the need for 'proceedings leading to expulsion to respect appropriate legal safeguards, at the very least a hearing before a judicial instance and the right of appeal'.<sup>101</sup>

98 Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1051/2002, Views of the Human Rights Committee of 15 June 2004, paras. 10.6–10.8.

99 Inter-American Commission on Human Rights, *Extension of Precautionary Measures (N. 259) regarding Detainees in Guantánamo Bay, Cuba*, decision of 28 October 2005, available at [www.asil.org/pdfs/ilibmeasures051115.pdf](http://www.asil.org/pdfs/ilibmeasures051115.pdf) (last visited 16 October 2008). See also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (2002), para. 394.

100 *Ibid.*, p.9. To discharge this obligation the Commission requested the United States to 'take the measures necessary to ensure that detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantánamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred and that diplomatic assurances are not used to circumvent the State's *non-refoulement* obligation'. *Ibid.*, p. 10. The Commission returned to this issue in its 2006 resolution on Guantánamo, where, *inter alia*, it urged the United States to ensure that persons who may face a risk of torture or other forms of ill-treatment if transferred from Guantánamo were 'provided an adequate, individualised examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker'. Inter-American Commission on Human Rights, Resolution No. 2/06 on Guantánamo Bay Precautionary Measures of 28 July 2006, para. 4.

101 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 29.



At the European level, in addition to the jurisprudence of the European Court of Human Rights, the procedural dimension of the principle of *non-refoulement* was highlighted in a Recommendation by the Council of Europe's Commissioner for Human Rights in 2001, where he reaffirmed that

The right of effective remedy [under Article 13 of the European Convention] must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the [Convention] is alleged.<sup>102</sup>

The point was also addressed by Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism during two meetings held in 2005 and 2006,<sup>103</sup> and by the President of the European Committee for the Prevention of Torture in reaction to a memorandum of understanding on deportations the United Kingdom had concluded with Jordan.<sup>104</sup>

Although the present article does not review national jurisprudence, as an exception reference will be made to the decision of the Canadian Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, where the procedural safeguards to be ensured in deportation proceedings where the risk of torture is asserted were considered in detail.<sup>105</sup>

102 Recommendation of the Commissioner for Human Rights concerning The Rights Of Aliens Wishing To Enter A Council Of Europe Member State And The Enforcement Of Expulsion Orders, CommDH/Rec(2001)1, 19 September 2001, para. 11.

103 After reaffirming states' obligation not to expel an individual where there are substantial grounds to believe that she or he will be subject to a real risk of torture or inhuman or degrading treatment or punishment, the specialists emphasized that the assessment of the existence of a risk had to be carried out on a case-by-case basis and that sending states should not rely upon lists of 'safe' or 'unsafe' states. Council of Europe, Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Meeting Report, 1st Meeting, Strasbourg, DH-S-TER(2005)018, 7–9 December 2005, and Meeting Report, 2nd Meeting, Strasbourg, DH-S-TER(2006)005, 29–31 March 2006.

104 The President, *inter alia*, emphasized the need for any intended deportation to be open to challenge before an independent authority, and for such proceedings to have suspensive effect. Letter sent by the President of the Committee for the Prevention of Torture to the United Kingdom authorities concerning a Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan reached on 10 August 2005 regulating the provision of undertakings in respect of specified persons prior to deportations, 21 October 2005, Appendix to the Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 20 to 25 November 2005, 10 August 2006, CPT/Inf (2006) 28. The Committee for the Prevention of Torture also addressed the procedural dimension in its 15 report on its activities where it stated that '[i]t should also be emphasized that prior to return, any deportation procedure involving diplomatic assurances must be open to challenge before an independent authority, and any such challenge must have a suspensive effect on the carrying out of the deportation. This is the only way of ensuring rigorous and timely scrutiny of the safety of the arrangements envisaged in a given case'. 15th General Report on the CPT's Activities, covering the period 1 August 2004 to 31 July 2005, Strasbourg, 22 September 2005, para. 41.

105 Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1. The Court based its reasoning on Section 7 of the Canadian Charter of Rights and Freedoms, which stipulates that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

In the Court's view the applicable procedural protections did not extend to requiring the minister responsible for the deportation decision to conduct a full oral hearing or a complete judicial process. However, the applicant was nonetheless entitled to significant rights, including being informed of the case to be met; receiving the material on which the minister was basing the decision, subject to reduced disclosure for valid reasons, such as safeguarding confidential public security documents; and the opportunity to respond to the case presented to the minister. However, in the absence of access to the material on which the minister had based much of her decision, the applicant and his counsel had no knowledge of which factors they specifically needed to address, nor did they have an opportunity for correcting factual inaccuracies or mischaracterizations. Submissions also had to be accepted from an applicant after he had been provided with an opportunity to examine the material being used against him. The Court also found that the applicant had to be given an opportunity to challenge the information before the minister. Thus, he should be permitted to present evidence as to the risk of torture on return. Finally, where the minister was relying on written assurances from a foreign government that a person would not be tortured, that person had to be given an opportunity to present evidence and make submissions as to the value of such assurances.<sup>106</sup>

On the basis of the existing jurisprudence and other guidance from the human rights supervisory bodies, it can be concluded that at present the procedural safeguards to be ensured to persons facing transfers include the following minimum elements:

- once a decision to transfer a person has been taken she or he must be informed of this in a timely manner;
- if she or he expresses concern that she or he may risk ill-treatment, the well-foundedness of such fears must be reviewed on a case-by-case basis by a body that is independent of the authority that took the decision;
- such review must have a suspensive effect on the transfer;<sup>107</sup>
- the person concerned must have the opportunity to make representations to the body reviewing the decision;
- she or he should be assisted by counsel; and
- she or he should be able to appeal the reviewing body's decision.<sup>108</sup>

These 'principles of fundamental justice' reflect minimum procedural safeguards under international human rights law.

<sup>106</sup> *Ibid.*, paras. 121–123.

<sup>107</sup> See, e.g., the decision of the European Court of Human Rights in *Jabari v. Turkey* where the Court found that a refugee status determination procedure that did not have suspensive effect on the deportation and which did not permit a review of the merits of an application violated Article 13 of the Convention (right to a remedy). ECtHR, *Jabari v. Turkey*, Final judgment of 11 October 2000.

<sup>108</sup> The right to appeal a negative refugee status determination decision is well-established. See, e.g., EXCOM Conclusion No. 8 (XXVIII), 1977, Determination of Refugee Status, para. e. There is, however, far less international practice supporting a similar right to appeal a transfer decision on the basis of *non-refoulement* as a principle of human rights law. For the practice of selected states at the national level, see Mandal, above note 53.

## Issues to be taken into account when assessing the risk

Some of the instruments that expressly address *non-refoulement* provide some guidance on the issues that should be considered by the bodies entrusted with assessing the well-foundedness of the risk. Most notably, Article 3(2) of the Convention against Torture provides that

for the purpose of determining whether there are [substantial grounds for believing that the person concerned would be in danger of being subjected to torture] the competent authorities will 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.

In its General Comment No. 1 the Committee against Torture provided the following non-exhaustive list of the particularly pertinent information it would consider when reviewing the merits of an application claiming risk:

- (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights ... ?
- (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
- (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
- (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
- (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the state in question?
- (f) Is there any evidence as to the credibility of the author?
- (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?<sup>109</sup>

The Committee's list can provide useful guidance for national authorities engaged in similar assessments.

## What does the principle of *non-refoulement* require states to do in practice?

In simple and general terms, the principle of *non-refoulement* requires a state that is planning to transfer a person to assess whether a real risk exists that s/he may be

<sup>109</sup> Committee against Torture, General Comment No. 1, above note 22, para. 5–8.

exposed to the relevant violations of fundamental human rights. If the risk is considered to exist, the person must not be transferred. If the risk is determined not to exist, to meet its obligations the state must

- inform the person concerned in a timely manner of the intended transfer;
- give the person the opportunity to express any concerns that s/he may face the proscribed violations of fundamental human rights after the transfer;
- suspend the transfer if such concerns are expressed;
- assess the well-foundedness of the concerns – that is, the existence of the real risk – on an individual basis by a body independent from the one that took the transfer decision, and that affords the person concerned minimum judicial guarantees; and
- offer the person concerned the possibility of claiming refugee status.

If the refugee claim is successful, a durable solution will have to be found, which can take the form of local integration or resettlement in a third state. UNHCR can play an important role in finding resettlement solutions.

If the asylum claim is unsuccessful, but complementary protection is granted, the person concerned must not be transferred and an alternative solution will have to be found. This could be local release or transfer to a third state, provided there is no risk of secondary *refoulement*.

## Post-transfer responsibilities

The nature of the post-transfer responsibilities of the sending state depends on whether or not the transfer was effected in violation of the principle of *non-refoulement*.

### Responsibilities following a transfer in violation of the principle of *non-refoulement*

States that transfer persons in violation of the principle of *non-refoulement* may have two forms of post-transfer obligations: first, and more simply as a matter of law, the obligation to make reparations; and, second, they may have ongoing responsibilities towards the persons transferred, although questions remain as to the manner in which such responsibilities must be discharged.

A violation of an obligation under international law gives rise to an obligation to make reparation.<sup>110</sup> The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if it had not been committed. Reparation can take various forms, including

110 Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case (Germany v. Poland) (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 ('ILC Articles on State Responsibility'), UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

restitution, compensation or satisfaction. These remedies can be applied either singly or in combination in response to a particular violation.<sup>111</sup>

Naturally, this obligation also applies to violations of the principle of *non-refoulement*. Although this obligation is unquestionable, actual practice indicating the form reparation should take is limited and consists principally of the findings and recommendations of human rights courts and other supervisory bodies.

One of the reasons for the limited practice is that the human rights monitoring bodies have tended to address *refoulement* before the transfer of the person concerned. Transfer proceedings are suspended pending the body's review of the case. If the human rights monitoring body determines that transfer would violate the principle of *non-refoulement*, it directs that it should not take place.<sup>112</sup> As the majority of decisions operate preventively, the question of reparations has infrequently arisen.

In the cases decided *after* a transfer, until quite recently the tendency was to make a finding of breach of the relevant treaty and, possibly, award compensation as the sole form of reparation.<sup>113</sup>

Although they have never spoken in terms of ongoing responsibilities, the treaty-monitoring bodies have on occasion requested sending states to take some form of follow-up measures. For example, in *Ng v. Canada*, having determined that the petitioner's transfer to proceedings that could lead to the imposition of the death penalty violated Article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee called upon Canada to make such representations as were still possible to avoid the imposition of the death penalty and to ensure that a similar situation did not arise in the future.<sup>114</sup>

In *Ahani v. Canada*, following a deportation that exposed the applicant to the risk of torture, the Human Rights Committee called upon Canada to make reparations, should it be established that the applicant had been subjected to torture, but did not specify the form they should take. Also, somewhat unrealistically, considering he was no longer within Canada's effective control, it

111 See ILC Articles on State Responsibility, Articles 31–34.

112 See, e.g., *Chahal v. The United Kingdom*, above note 28, para. 107.

113 See, e.g., ECtHR, *Shamayev and 12 others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005, where the European Court of Human Rights awarded financial compensation to those claimants who had been transferred in violation of Article 3 of the Convention. This focus on compensation could partly be due to the nature of reparations that these bodies are authorized to award. For example, under Article 50 of the European Convention on Human Rights, the European Court can only award 'just satisfaction', which it has consistently interpreted as being limited to compensation. The powers of the Human Rights Committee are even more limited: Article 5(4) of the First Optional Protocol to the International Covenant on Civil and Political Rights only authorizes it to forward its views as to the existence of a violation to the claimant and State Party concerned.

114 *Chitat Ng v. Canada*, above note 16, para. 18. See also *Roger Judge v. Canada*, another case in which the claimant had been extradited in breach of the Covenant to proceedings that could lead to the imposition of the death penalty in the United States, where the Human Rights Committee held that an appropriate remedy for the violation would include the making of representations as are possible to prevent that carrying out of the death penalty. *Roger Judge v. Canada*, above note 51, para. 12.

requested the respondent state 'to take such steps as may be appropriate to ensure that the [applicant] is not, in the future, subjected to torture'.<sup>115</sup>

Similarly, in 2006, in its review of the United States second and third periodic report, the Committee specifically addressed the issue of responsibilities following *refoulement*. It stated that:

The State party should conduct thorough and independent investigations into the allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no situation will recur, and provide appropriate remedy to the victims.<sup>116</sup>

The Committee against Torture has also started to turn its attention to reparations and other post-transfer responsibilities. For example, in *Brada v. France*, having determined that the claimant's expulsion to Algeria had violated Article 3 of the Convention against Torture, the Committee against Torture requested France to report back to it not only the measures taken to compensate the claimant, but also information on his current whereabouts and well-being.<sup>117</sup>

Despite the limitations of their competences, human rights supervisory bodies have commenced to look beyond the award of compensation to other post-transfer responsibilities that may be of greater protective value to persons who were still at risk of torture, ill-treatment or arbitrary deprivation of life. Their focus has been on the provision of information on the whereabouts and well-being of the persons in question, and on the receipt of undertakings from the receiving state as to their treatment or the imposition of the death penalty. To date they have stopped short of demanding the return of the persons in question.

### Responsibilities following a transfer that did not violate the principle of *non-refoulement*

International humanitarian law alone addresses post-transfer responsibilities in cases where the transfer *did not* violate the principle of *non-refoulement*. As stated above, Article 12 of the Third Geneva Convention precludes the transfer of prisoners of war to a state that is not a party to the Convention or that is not willing or able to apply it. It goes on to provide that, even in cases where all these pre-requisites are met,

... if [the] Power [to which the prisoners of war are transferred] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall

<sup>115</sup> *Mansour Ahani v. Canada*, above note 98, para. 12.

<sup>116</sup> Human Rights Committee, Concluding Observations: United States of America, above note 8, para. 16.

<sup>117</sup> Committee against Torture, *Mafhoud Brada v. France*, Communication No. 195/2002, Views of the Committee against Torture of 17 May 2005, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 15.

request the return of the prisoners of war. Such requests must be complied with.<sup>118</sup>

According to the *Commentary* to the Third Geneva Convention, the receiving state would be failing to carry out the provisions of the Convention 'in an important respect' if it committed grave breaches of the Third Geneva Convention against the prisoners of war or failed to ensure the general conditions of internment laid down in the Convention as to quarters, food, hygiene, labour and working pay in an important respect.<sup>119</sup>

The 'effective measures to correct the situation' that transferring states are required to take include the provision of direct assistance, such as food supplies or medical staff and equipment, which the receiving state is obliged to accept.<sup>120</sup> The *Commentary* adds that

If these measures nevertheless prove inadequate, if the poor treatment given to prisoners is not caused merely by temporary difficulties but by ill-will on the part of the receiving Power, or if for any other reason the situation cannot be remedied, the power which originally transferred the prisoners must request that they be returned to it. In no case may the receiving Power refuse to comply with this request, to which it must respond as rapidly as possible.<sup>121</sup>

The approach under international humanitarian law is thus significantly broader than that under human rights law. Not only does it impose residual responsibilities on sending states even in relation to transfers of persons that did not violate the principle of *non-refoulement*, but the remedial action that may be required is far more onerous and can include demanding the return of the persons concerned. An essential prerequisite for the sending state to discharge its ongoing obligations is the establishment of a system that enables it to monitor the situation of the persons transferred.

118 This provision of the Third Geneva Convention is mirrored in Article 45(3) of the Fourth Geneva Convention, which offers the same protection to aliens in the territory of a state party to an international armed conflict.

119 Pictet, above note 20. With regard to the equivalent provision in the Fourth Geneva Convention, according to the *Commentary*, violations of Articles 27, 28 and 30 to 34 of the Fourth Geneva Convention would give rise to an obligation upon the transferring state to take remedial measures. Additionally, if the persons concerned were deprived of their liberty, specific reference is made to the provisions relating to internment and, in particular, those relating to civil capacity, maintenance, food, clothing hygiene and medical attention, religious and intellectual activities, correspondence and relief. Pictet, above note 87, pp. 268–9.

120 *Ibid.*, p. 139. By way of example, the *Commentary* refers to an instance in August 1945 – a time before Article 12 of the Third Geneva Convention had been adopted – when the ICRC drew the attention of the United States to the difficult situation of German prisoners of war whom the United States had transferred to the French authorities, because of the general shortage of foodstuffs in France. Following this intervention, the United States placed large quantities of foodstuffs and clothing at the disposal of the ICRC for distribution to prisoner-of-war camps in France.

121 *Ibid.*

## The effect of 'diplomatic assurances'

A final issue to be considered is the effect on state's obligations under the principle of *non-refoulement* of so-called 'diplomatic assurances'. These are undertakings given by the receiving state to the sending state, to the effect that the person concerned will not be subjected to torture or other forms of ill-treatment or to the imposition or execution of the death penalty. Such assurances aim to remove the risk underlying the claim of *refoulement*. States are increasingly resorting to such assurances in an attempt to avert the risk of torture or other forms of ill-treatment in order to meet or, in the view of critics, to side-step their obligations under the principle of *non-refoulement*.<sup>122</sup>

Assurances can take a variety of forms. They may be written undertakings in formal agreements such as *notes verbales* or memoranda of understanding, or assurances given less formally, including orally, through diplomatic channels. The present article employs the generic terms 'assurances' and 'undertakings' interchangeably to refer to all such agreements.

Assurances are often resorted to in relation to the death penalty by states that consider that their human rights obligations preclude them from transferring persons to the possibility of such punishment. It is generally accepted that an undertaking not to seek the death penalty or to impose or execute it is an effective way of avoiding the risk of the death penalty and that transfers carried out after the receipt of such assurances do not violate the principle of *refoulement*.

The effect of diplomatic assurances on transfers with regard to ill-treatment is much more problematic.<sup>123</sup> From a protection point of view, many of the concerns expressed are extremely valid, as the actual effectiveness of such

122 For critical reviews of transfers effected by states in reliance on such assurances see, e.g., Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, April 2004; Human Rights Watch, *Still at Risk, Diplomatic Assurances No Safeguard Against Torture*, April 2005; Center for Human Rights and Global Justice, NYU Law, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'*, 2004; Centre for Human Rights and Global Justice, NYU Law, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush*, January 2005; and Amnesty International, *Afghanistan – Detainees transferred to torture: ISAF Complicity?*, November 2007, ASA 11/011/2007; and Human Rights Watch, *Not the Way Forward: British Policy on Diplomatic Assurances*, October 2008. For the other side of the argument see, for example, Kate Jones, 'Deportations with Assurances: Addressing Key Criticisms', *International and Comparative Law Quarterly*, Vol 57 (2008), 183 and Ashley Deeks, 'Promises Not to Torture: Diplomatic Assurances in U.S. Courts', ASIL Discussion Paper Series, December 2008.

123 Human rights supervisory bodies have focused on assurances relating to ill-treatment. Interestingly, in its report of 2007 the Working Group on Arbitrary Detention addressed the question of assurances in relation to the lawfulness of detention and fair trial, including the practice of what it referred to as 'reverse diplomatic assurances': undertakings by the receiving state that the transferred person will be deprived of his/her liberty even absent criminal charges or other legal basis for detention. These undertakings are found in some agreements relating to the transfer of persons held in the context of the 'Global War on Terror'. The Working Group noted that states could not accept detainees under such conditions without seriously violating their obligations under international human rights law. This being said, it noted that not all commitments by the receiving state to take measures to prevent a person suspected of constituting a threat to the sending state had to be rejected. For example, it might be acceptable for a receiving state to undertake to keep a person returned to its territory under surveillance, as long as such surveillance did not amount to a deprivation of liberty without charges; was not so



assurances is questionable. While it is straightforward to determine whether a state has complied with an undertaking not to seek, impose or execute the death penalty, it is much more difficult to monitor compliance with an undertaking not to ill-treat persons deprived of their liberty, as such treatment will take place behind closed doors and its occurrence is likely to be denied.

Although, as will be seen, the human rights supervisory bodies have placed some faith in post-transfer monitoring mechanisms, serious doubts exist as to whether it is possible to establish a truly reliable and effective mechanism. Additionally, it is likely that only a very limited number of persons in any particular place of detention are likely to be monitored pursuant to the assurances. In view of this, it will be virtually impossible for any allegations of ill-treatment to be communicated by the monitoring body to the sending state and detaining state ‘anonymously’ – that is, without indicating the source, thus putting the persons at risk of reprisals for having informed the monitoring body of the ill-treatment. Finally, if assurances are violated it is not clear what, if any, remedy is available to the individual concerned. This problem is compounded by the frequent successful invocation of state secrecy where victims of ill-treatment in such circumstances have sought a remedy before the courts of the receiving state.

From a legal point of view, some of the criticisms levied at the assurances are misplaced. For example, it is sometimes stated that they are not binding. This cannot be asserted in a generalized manner. Whether or not they are binding depends on the intention of the parties. Often the undertakings are given in what is clearly intended to be a binding agreement.<sup>124</sup> Instead, the problem relates to whether they are reliable – that is, whether they can remove the risk that appears to exist and gives rise to the potential *refoulement*.

It is uncontroversial that the receipt of such undertakings does not affect states’ obligations under the principle of *non-refoulement*. In particular, it does not affect a person’s right to challenge the decision to transfer him or her and the state’s duty to ensure that the well-foundedness of the concerns expressed is reviewed by an independent body. The issue which, until recently remained unclear, is the weight, if any, to be given to such assurances in removing the risk underlying the claim of *refoulement* by the review body. This question has received considerable attention from human rights supervisory bodies in recent years. Although, initially there was a divergence of views, there now appears to be an emerging consensus as to the position to be adopted.<sup>125</sup> The determining factor in deciding how much

intrusive as to violate other fundamental rights and was subject to periodic review. Report of the Working Group on Arbitrary Deprivation of Liberty, 9 January 2007, paras. 53–58.

124 Questions of the enforceability of the agreements at the national level may arise, particularly within federal states, as was the case, for example, in the United States in the proceedings that gave rise to the *Avena* case before the International Court of Justice. ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. The United States of America)*, 31 March 2004.

125 With regard to *non-refoulement* under refugee law, the position is clear-cut: undertakings are not to be given any weight when a refugee is being *refouled*, directly or indirectly, to his/her country of origin or former habitual residence. They also cannot be used to deny asylum-seekers access to refugee status

weight is to be given to the assurances is whether there is a systematic practice of torture in the receiving state.

The question of assurances has come before the European Court of Human Rights on numerous occasions. The Court has never condemned the practice outright, nor has it adopted a general position.<sup>126</sup> Instead, it has addressed the reliability of the assurances on a case-by-case basis, basing its conclusion on the general situation in the receiving state and the particular circumstances of the applicant.<sup>127</sup>

To date, the Committee against Torture has also not adopted a general position on the compatibility and effect of diplomatic assurances on states' obligations under the Convention against Torture. In its jurisprudence, the fact that diplomatic assurances have been received is but one factor among many taken into account by the Committee in evaluating the existence of a risk of torture.<sup>128</sup>

More recently, as states made increased resort to assurances, the Committee against Torture began scrutinizing them more closely.<sup>129</sup> For example,

determination proceedings. *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006.

126 The question of the effect of assurances came squarely before the Court in the *Mamatkulov* case. However, the Court did not expressly rule on the compatibility of the assurances with the principle of *non-refoulement*. Instead, it found that on the basis of the facts before it, it was unable to conclude that substantial grounds existed at the time of the transfer for believing that the applicants faced a real risk of torture or ill-treatment. ECtHR, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005.

127 For example, in the abovementioned *Chahal* case, in view of the situation prevailing in India at the time and, in particular, of the fact that ill-treatment by certain members of the security forces was a 'recalcitrant and enduring problem', as well of the applicant's background, the Court was not persuaded that the assurances given by the receiving state that the applicant would not be ill-treated were sufficient to remove the risk. *Chahal v. The United Kingdom*, above note 28, para. 105. See also *Saadi v. Italy*, above note 13, para. 148. The Court has, in fact, itself relied upon assurances to lift its request to a sending state to refrain from effecting a transfer pending its review of an application. In the *Shamayev* case having been seized of the case of the imminent extradition from Georgia to Russia of a number of Chechens on terrorism charges, the Court had requested Georgia not to effect the transfer pending its review of the case. Upon receiving assurances from Russia that the death penalty would not be imposed; that the Chechens' health and safety would be protected; that they would be guaranteed unhindered access to medical care and legal representation; that they would have unhindered access to the European Court of Human Rights, and free correspondence with it; that the Court would have unhindered access and possibility of communication with them, including the possibility of visiting them, the Court had lifted the request, thus *itself* relying on the undertakings. *Shamayev and 12 others v. Georgia and Russia*, above note 113.

128 See, e.g., Committee against Torture, *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*, Communication No. 199/2002, Views of the Committee against Torture of 17 November 2003, UN Doc. CAT/C/31/D/199/2002, para. 12.2. In the case of *Agiza v. Sweden*, which came before the Committee after the applicant had been transferred to Egypt and ill-treated, the Committee merely noted that the procurement of diplomatic assurances, which had no effective mechanism for enforcement, had not sufficed as a matter of practice to protect the applicant from the manifest risk of torture. It did not address the question of the weight, if any, that Sweden should have given to the assurances in determining whether to transfer the applicant. *Agiza v. Sweden*, above note 96, para. 13.4.

129 For example, in its review of the United Kingdom's fourth periodic report in 2004, the Committee expressed concern at 'the State party'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 and thus cannot be assessed for compatibility with article 3 of the Convention'. Committee against

it addressed the issue of diplomatic assurances in 2006, in its Conclusions and Recommendations on the United States' second periodic report. It expressed concern at the use of assurances, the secrecy of such procedures, and the absence of judicial scrutiny and of monitoring mechanisms to assess whether the assurances had been honoured. In view of this, it recommended that

When determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the State party should only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.<sup>130</sup>

The Human Rights Committee also considered diplomatic assurances in its review of the United States' second and third periodic reports in 2006. It recommended that

The State party should exercise the utmost care in the use of diplomatic assurances, and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and rigorously the fate of the affected individuals. The State party should further recognize that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be.<sup>131</sup>

Successive UN Special Rapporteurs on Torture have adopted a progressively stricter line. In his interim report of 2002 the then Rapporteur, Theo van Boven, used language implying that unequivocal guarantees not to ill-treat a person *could* be relied upon, provided a system had been established to monitor the treatment of the persons transferred.<sup>132</sup>

He returned to the question of assurances in his interim report of 2004. In reaction to the fact that in the two years since his previous report he had come across a number of instances where there were strong indications that assurances

Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, above note 9, para. 4(d). For the United Kingdom's response to these recommendations see Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture, above note 31, paras. 49–69.

130 Committee against Torture, Conclusions and Recommendations: United States of America, above note 9, para. 21.

131 Human Rights Committee, Concluding Observations: United States of America, above note 8, para. 16.

132 Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002, UN Doc. A/57/173, para. 35.

had not been respected, he set out his position in greater detail. He was of the view that

In circumstances where this definition of 'systematic practice of torture' [as interpreted by the Committee against Torture] applies ... the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.<sup>133</sup>

With regard to other situations, having reiterated his call of two years earlier that the assurances contain unequivocal guarantees and a monitoring mechanism, he suggested a number of requirements that the diplomatic assurances should fulfil to make them 'solid, meaningful and verifiable'.<sup>134</sup> In particular, he noted that

assurances should as a minimum include provisions with respect to prompt access to a lawyer ... recording (preferably video-recording) of all interrogation sessions and recording the identity of all persons present ... prompt and independent medical examination ... and forbidding incommunicado detention or detention at undisclosed places ...

Finally, a system of effective monitoring is to be put in place so as to ensure that assurances are trustworthy and reliable. Such monitoring should be prompt, regular and include private interviews. Independent persons or organizations should be entrusted with this task and they should report regularly to the responsible authorities of the sending and the receiving States.<sup>135</sup>

The most recent Special Rapporteur, Manfred Nowak, who took up the position in 2004, has adopted a stricter line on diplomatic assurances.<sup>136</sup> In August 2005 he issued a critical statement in response to the announcement by the United Kingdom that it intended to deport persons to their states of nationality on the basis of bilateral agreements in which assurances had been obtained that the persons concerned would not be subjected to torture or ill-treatment. The Special Rapporteur expressed concern at this new practice, which, in his view, was an attempt to circumvent the principle of *non-refoulement*. In his view, the fact that assurances were obtained was evidence of the fact that the sending state perceived a serious risk of the deportee being subjected to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances were not an appropriate tool to

133 Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 1 September 2004, UN Doc. A/59/324, para. 37.

134 *Ibid.*, para. 40.

135 *Ibid.*, paras. 41–42.

136 In his statement to the Commission on Human Rights in 2005, he reiterated the view, already expressed by his predecessor, that diplomatic assurances are not adequate means to satisfy the principle of *non-refoulement* in relation to transfers to countries where torture is *systematically* practiced. UN Press Release, Statement of the Special Rapporteur on Torture, Manfred Nowak to the 61st Session of the UN Commission on Human Rights, 4 April 2005, available at [www.ohchr.org/english/press/newsFrameset-2.htm](http://www.ohchr.org/english/press/newsFrameset-2.htm) (last visited 15 October 2008).

eradicate this risk. His statement called on states to refrain from seeking diplomatic assurances or concluding memoranda of understanding to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill-treatment.<sup>137</sup>

Manfred Nowak also devoted a significant part of his report to the 2005 UN General Assembly to the issue of *non-refoulement* and diplomatic assurances. After reviewing the practice of human rights treaty monitoring bodies, he expressed the view that post-return monitoring mechanisms did little to mitigate the risk of torture and had proved ineffective in both safeguarding against torture and as a mechanism of accountability.<sup>138</sup> He concluded his report with the following strong criticism of diplomatic assurances:

diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are usually sought from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment.<sup>139</sup>

Successive General Assembly resolutions on torture have referred to diplomatic assurances in a general manner, stating that where resorted to, they do not release states from their obligations under international human rights law, humanitarian law and refugee law.<sup>140</sup>

137 Ibid.

138 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. 60/316, 30 August 2005, para. 46.

139 Ibid., para. 51. This statement could be interpreted as meaning that assurances must never be given any weight, including in relation to transfers to states where there is not a systematic practice of torture. However, at a meeting of Council of Europe Specialists on Human Rights convened to discuss diplomatic assurances, in response to a specific question as to whether diplomatic assurances in respect of countries with no substantial risk of torture might be permissible, Mr Nowak appeared to adopt a softer stance, replying that such additional guarantees, under the condition that they did not aim to circumvent international obligations of *non-refoulement*, would not be harmful. Council of Europe, Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Meeting Report, 1st Meeting, above note 103, para. 3.

140 See, e.g., General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/60/148, 16 December 2005, para. 8; General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/61/153, 19 December 2006, para. 9; and General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/62/148, 18 December 2005, para. 12. The Human Rights Council has been equally general. See, e.g., Human Rights Council Resolution 8/8, Torture and other cruel, inhuman or degrading treatment or punishment, 18 June 2008, para. 6(d).

The Sub-Commission on Human Rights, on the other hand, addressed the question of diplomatic assurances in considerable detail in its resolution 2005/12 on transfers. It confirmed that

4. ... where torture or cruel, inhuman or degrading treatment is widespread or systematic in a particular State, especially where such practice has been determined to exist by a human rights treaty body or a special procedure of the Commission on Human Rights, there is presumption that any person subject to transfer would face a real risk of being subjected to such treatment and recommends that, in such circumstances, the presumption shall not be displaced by any assurance, undertaking or other commitment made by the authorities of the State to which the individual is to be transferred;

...

6. *Strongly recommends* that, in situations where there is a real risk of torture or cruel, inhuman or degrading treatment in a particular case, no transfer shall be carried out unless:

- (a) The State authorities effecting the transfer seek and receive credible and effective assurances, undertakings or other binding commitments from the State to which the person is to be transferred that he or she will not be subjected to torture or cruel, inhuman or degrading treatment;
- (b) Provision is made, in writing, for the authorities of the transferring State to be able to make regular visits to the person transferred in his/her normal place of detention, with the possibility of medical examination, and for the visits to include interviews in private during which the transferring authorities shall ascertain how the person who has been transferred is being treated;
- (c) The authorities of the transferring State undertake, in writing, to make the regular visits referred to.<sup>141</sup>

At the regional level, in addition to the jurisprudence of the European Court of Human Rights outlined above, diplomatic assurances have also recently been addressed by the Committee for the Prevention of Torture – the monitoring body of the European Convention for the Prevention of Torture;<sup>142</sup> the Council of Europe's Group of Specialists on Human Rights and the Fight against

141 Sub-Commission on Human Rights resolution 2005/12, above note 34, paras. 4–6.

142 The Committee did not reach a conclusion on the legitimacy of diplomatic assurances, pointing out that the risk faced and the reliability of the assurances received would have to be assessed on the basis of the specific circumstances of every case. With regard to monitoring mechanisms, it stated that it still had to see convincing proposals for an effective and workable mechanism. In its view, such a mechanism could have to incorporate some key guarantees, including the right of independent and suitably qualified persons to visit the individual concerned at any time, without prior notice, and to interview him/her in private in a place of their choosing. The mechanism would also have to offer means of ensuring that immediate remedial action is taken, in the event of it coming to light that assurances given were not being respected. 15th General Report on the CPT's Activities, covering the period 1 August 2004 to 31 July 2005, Strasbourg, 22 September 2005, paras. 38–42.

Terrorism;<sup>143</sup> the Council of Europe's Venice Commission in its report on secret detention facilities and inter-state transport of prisoners;<sup>144</sup> and the Inter-American Commission on Human Rights.<sup>145</sup>

In view of the above, the human rights supervisory bodies are unanimous in their view that diplomatic assurances cannot be used to circumvent *non-refoulement* obligations, and that, most notably, they do not affect individuals' right to the review of the well-foundedness of their fears by an independent review body. Instead, they are a factor among many to be considered by such bodies. There also appears to be consensus that the weight to be given to them varies according to the situation in the receiving state. In relation to transfers to states where there is a 'systematic practice of torture', assurances do not remove the risk of ill-treatment and must not be given any weight. With regard to transfers to other

143 Council of Europe, Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Meeting Report, 1st Meeting, above note 101; and, Meeting Report, 2nd Meeting, above note 101. The Group met twice to discuss diplomatic assurances in the context of the fight against terrorism. Its discussions focused on expulsions where there was a risk of torture, cruel, inhuman or degrading treatment or punishment. It was also requested to consider the appropriateness of developing a Council of Europe legal instrument on diplomatic assurances. At the end of the second meeting, in March 2006, the Group emphasized a number of points, including that:

- iii. States must not expel an individual where there are substantial grounds to believe that he or she will be subject to a real risk of treatment contrary to Article 3 [of the European Convention on Human Rights];
- iv. the assessment [of the existence of the risk] must be carried out on a case-by-case basis. There should be no list of 'safe' or 'unsafe' States;
- v. the existence of diplomatic assurances in a particular case does not relieve the sending States of their obligation not to expel if there are substantial grounds to believe that there is a real risk of treatment contrary to Article 3 [of the European Convention on Human Rights]. In other words, diplomatic assurances are not an alternative to a full risk assessment.

However, the Group was unable to reach agreement on the potential role and impact of assurances to mitigate or eliminate the risk of torture or other forms of ill-treatment. In view of the significant divergence of views, the Group decided that it was inappropriate for the Council of Europe to draft a legal instrument on the topic. Meeting Report, 2nd Meeting, Strasbourg, 29–31 March 2006, DH-S-TER(2006)005, paras. 9–17. For a summary of the arguments made by the Group by the UN Special Rapporteur on the Question of Torture, see the Report of the Special Rapporteur on the Question of Torture, UN Doc. E/CN.4/2006/6, 23 December 2005 at paras. 31–32.

144 On the issue of diplomatic assurances the Commission concluded that '[d]iplomatic assurances must be legally binding on the issuing State and must be unequivocal in terms; when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to these categories'. Opinion on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-State Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, Venice, 17–18 March 2006, Opinion No.363/2005, CL-AD(2006)009, para. 159, Conclusion g. See also the discussion at paras. 141–142.

145 The Commission addressed the issue in relation to the detainees held at Guantánamo in a decision on precautionary measures, where it stated that '[w]here there are substantial grounds for believing that [a detainee] would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred or removed and that diplomatic assurances are not used to circumvent the State's non-refoulement obligation'. Inter-American Commission on Human Rights' decision on precautionary measures for the detainees at Guantánamo Bay, above note 97, p. 10. The point was reiterated in a resolution on the same topic. Inter-American Commission on Human Rights, Resolution No. 1/06 on Guantánamo Bay Precautionary Measures of 28 July 2006, para. 4.

states, some weight can be given to assurances provided they include some form of post-transfer monitoring mechanism. Although the Special Rapporteur on Torture has spoken out against resort to diplomatic assurances in *any* circumstances, rejecting the value of post-transfer monitoring mechanisms, at present other supervisory bodies have not adopted a similarly categorical position.