E. TORTURE AND DIPLOMATIC ASSURANCES

The potential tension between a state's need to protect its citizens from national security risks and to respect fundamental human rights is well illustrated by current controversies over the use of 'diplomatic assurances' in the context of deportation and transfer procedures. International human rights law prohibits states from sending a person to a country where he or she will be subject to torture. In light of that obligation, several governments have chosen to seek assurances from the receiving state that the individual will not be subject to ill treatment. This practice has received greater attention in recent years in cases arising out of terrorist threats and armed conflicts. Several states have attempted to use diplomatic assurances to remove individuals allegedly involved in terrorism to other countries, including Canada (to Sri Lanka), Germany (to Turkey), Italy (to Tunisia), Spain (to Russia), Sweden (to Egypt), the United States (to Tajikistan) and the United Kingdom (to Jordan). In the armed conflict in Afghanistan, Australian, British, Canadian and US forces have transferred hundreds of individuals into the hands of Afghan authorities where they have been subject to torture. A Canadian diplomatic who served 17 months in Afghanistan sent political shockwaves when he testified before Parliament in 2009 stating: 'According to our information, the likelihood is that all Afghans we handed over were tortured'; 'The most common forms of torture were beatings, whipping with power cables, and the use of electricity. Also common was sleep deprivation, use of temperature extremes, use of knives and open flames, and sexual abuse, that is, rape'; 'Some of these Afghans may have been foot soldiers or day fighters, but many were just local people, farmers, truck drivers, tailors, peasants, random human beings in the wrong place at the wrong time, young men in their fields and villages, who were completely innocent but were nevertheless rounded up'. In recent years, the Committee on the Convention Against Torture and the Special Rapporteur on Torture have reminded other members of the International Security Assistance Force in Afghanistan — such as Denmark, Norway and Sweden — of their international human rights obligations in transferring detainees within their effective custody to the custody of any other state.

The principal obligation is enshrined in Article 3 of the Convention Against Torture, which provides:

> 1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

According to standard accounts of international human rights law, this obligation is considered a norm of customary international law subject neither to limitations for national security reasons nor to derogation in times of public emergency. Thus, while human rights law might allow some rights to be qualified in the face of national security concerns, the general nature of this particular obligation aligns completely with the rights-based interest. That said, the standard of proof — 'substantial grounds' — does provide states some freedom of action. In that respect, the rule might be understood to internalize a trade-off between the risk to the individual and competing state interests.

Notably, the principle of non-refoulement is also considered a cornerstone of international refugee law.[25] The 1951 Refugee Convention expresses the obligation *with* a significant proviso for national security concerns:

> Article 33
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

In interpreting the national security proviso, the UN Office of the High Commissioner for Refugees (UNHCR) has stated:

- 'as Article 33 (2) is an exception to a principle, it is to be interpreted and implemented in a restrictive manner';
- 'given the seriousness of an expulsion for the refugee, such a decision should involve a careful examination of the question of proportionality between the danger to the security of the community or the gravity of the crime, and the persecution feared. The application of this exception must be the ultima ratio (the last recourse) to deal with a case reasonably';

[25] A corresponding obligation is contained in the law of armed conflict (POW Convention, Art. 12; Civilians Convention, Art. 45; Additional Protocol II, Art. 5).

- '[r]ead in conjunction with Articles 31 and 32 of the 1951 Convention,[26] a State should allow a refugee a reasonable period of time and all necessary facilities to obtain admission into another country, and initiate refoulement only when all efforts to obtain admission into another country have failed';[27]
- '[t]he provisions of Article 33(2) of the 1951 Convention do not affect the host State's non-refoulement obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture'.[28]

With respect to the issue of diplomatic assurances, the UNHCR stated in a 2006 Note on Diplomatic Assurances and International Refugee Protection:

> Diplomatic assurances should be given no weight when a refugee who enjoys the protection of Article 33(1) of the 1951 Convention is being refouled, directly or indirectly, to the country of origin or former habitual residence. The reason for this is that the country of refuge has already made a determination in the individual case and has recognized the refugee to have a well-founded fear of being persecuted in the country of origin. Once the country of refuge has made this finding, it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for assurance that the refugee will be well-treated upon refoulement.

International authorities that are focused on legal obligations that arise out of the global human rights regime have expressed a range of possible approaches with respect to the use of diplomatic assurances in cases of torture. For the purpose of clarification, we group these approaches according to the following five levels.

Level 1: Categorical and comprehensive approach: prohibits any use of diplomatic assurances to address torture.

Level 2: Categorical approach based on individual risk: prohibits use of diplomatic assurances when the person is likely to be subject to torture.

Level 3: Categorical approach based on country conditions: prohibits use of diplomatic assurances when torture is practiced systematically in the receiving state.

Level 4: Valid but not central factor: diplomatic assurances are a valid factor in considering, and reducing, the risk of torture but should never be a central factor.

Level 5: Unqualified, valid factor: diplomatic assurances are a valid factor in considering, and reducing, the risk of torture in all cases.

[26] Article 31(2), which addresses the issue of refugees unlawfully in the country of refuge, provides: 'The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country'. And, Art. 3, which address the issue of expulsion, provides:

> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> ...
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country....

[27] UN High Commissioner for Refugees, Note on the Principle of Non-Refoulement (1997).

[28] UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007).

Level 1

The strongest position — Level 1 — has been expressed most forcefully by the former High Commissioner for Human Rights (2004–2008) Louise Arbour. She stated that the existence of such bilateral arrangements has 'an acutely corrosive effect' on the global regime against torture and '[t]he fact that some governments conclude legally nonbinding agreements with other governments on a matter that is at the core of several legally binding UN instruments threatens to empty international human rights law of its content' (L. Arbour, 'No Exceptions to the Ban on Torture', *NY Times*, 6 Dec. 2005). She also provided one of the most extensive arguments against diplomatic assurances in a 2006 speech before the British Institute of International and Comparative Law and Chatham House:[29]

> Some have postulated that diplomatic assurances could work if effective post-return monitoring mechanisms were put in place. Based on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, are often reluctant to speak about their suffering, or are not believed if they do. Although efforts could be made to improve on the practice of seeking these assurances, in my view it is fundamentally flawed in several ways. First, we must acknowledge that diplomatic assurances would presumably only be sought after an assessment has been made that there is a risk of torture in the receiving State. Otherwise the demarche would be both useless and insulting.
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> Secondly, . . . while receiving States are under binding legal obligations to respect and protect human rights, including the prohibition of torture, they often are far from fully implementing their obligations, resulting in widespread violations. It is difficult to make a case that if a Government does not comply with binding law it will respect legally non-binding bilateral agreements that are concluded on the basis of trust only, without enforcement or sanctions if violated.
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> Thirdly, even though all persons are entitled to the equal protection of existing treaties, assurances basically create a two-class system amongst those transferred, attempting to provide special bilateral protection and monitoring for a selected few while ignoring the plight of many others in detention. By seeking assurances for a chosen few, sending Governments could in fact be seen as condoning torture and cruel, inhuman or degrading treatment by acknowledging that these practices exist in the receiving State but conveniently ignoring their systemic nature.
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> In the end we are back to the same fundamental question: why are these people sent to countries where they face the risk of torture? They may be sent to face trial, or simply to be held in custody, possibly indefinitely, or to be interrogated with the hope that the interrogation abroad will yield more information than the methods that could be used at home. The last two scenarios involve, at best, legal avoidance: suspects will be transferred because what will be done to them abroad could not legally be done at home. I fail to see any justification for any State to be a party to such practice. If they are transferred to face trial, prudence would dictate

[29] L. Arbour, 'In Our Name and on Our Behalf', 55 Int'l. & Comp. L.Q. 511 (2006); see also A/HRC/4/88.

> that their transfer should not be tainted with illegality since in many countries this could lead to the courts declining to exercise jurisdiction.

Arbour's successor, Navanethem Pillay the current High Commissioner for Human Rights has also adopted a strong position against diplomatic assurances. She, however, has not elaborated her position. In a 2010 joint publication with the Asia Pacific Forum of National Human Rights Institutions (a regional membership organization of national human rights commissions) and the Association for the Prevention of Torture (an NGO), the High Commissioner stated:

> The principle of non-refoulement is an illustration of the absolute prohibition of torture and other forms of ill-treatment. It has been undermined in recent years by the practice of some States to seek diplomatic assurances when there are known risks that the person being returned may be subjected to torture or ill-treatment.... This practice is considered to violate the principle of non-refoulement and is not permissible.

(See also, OHCHR, Fact Sheet 32: Human Rights, Terrorism and Counter-terrorism Fact Sheet (2008), at 35.) This statement might be classified as a Level 1 or Level 2 standard.

Level 2

Other international authorities adopt as a standard that diplomatic assurances cannot be used to counteract the risk that a particular individual would be in danger of torture or ill-treatment (Level 2). In other words, if the antecedent condition is that the transfer would be proscribed by international human rights law — e.g., Article 3 of the Convention Against Torture — the sending state could not use a diplomatic assurance to overcome that prohibition. This legal standard closely approximates a categorical prohibition, because the standard eliminates the option of diplomatic assurance in the very cases in which a sending state would consider the measure most useful.

The office of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has become the most influential authority for the Level 2 position. As early as 1996, the then-Special Rapporteur on Torture, Sir Nigel Rodley addressed the issue. The Special Rapporteur sent an urgent appeal on behalf of an Algerian national residing in Canada whose deportation to Algeria appeared imminent. The detainee was reportedly a member of a militant opposition group in Algeria and had previously been tortured by the Algerian police. The Special Rapporteur explained:

> In view of all the circumstances the Special Rapporteur appealed to the Government not to deport Saadi Bouslimani or, if he were to be deported, to seek, and take measures to ensure compliance with, assurances from the Government of Algeria that he would not be subjected to torture or any other ill-treatment.
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> ... [T]he Government informed the Special Rapporteur that the case of Saadi Bouslimani had been analysed very carefully by the authorities, who had concluded

> . . . that, should he return to Algeria, there was no objective risk that he would be subjected to torture. . . . [T]he Government [stated] that it would not be appropriate to seek assurances from the Algerian Government that Mr. Bouslimani would not be subjected to torture or ill-treatment, because to do so would amount to questioning the willingness of the Algerian Government to comply with the obligations it had assumed when it ratified the International Covenant on Civil and Political Rights and the Convention against Torture. . . . [T]he Special Rapporteur replied that in the case of an individual who is to be sent to a country where he fears torture and where the latter reportedly occurs, it is perfectly appropriate and not uncommon to seek relevant assurances from the Government in question. The intent in seeking such assurances was not to call into question the commitment of the receiving Government to fulfil its treaty obligations, but rather to make that Government aware of the concerns that have been expressed with respect to the case and thereby to reduce the potential risk to the deported person. Futhermore, the standard of proof demanded by the Government of Canada was that of a direct personal risk of torture to Mr. Bouslimani. If this standard were always to be applicable for obtaining assurances from a receiving Government, then there would never be a need to obtain assurances, since the level of risk would preclude the person concerned from being sent back in the first place.
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> At a later date, the Special Rapporteur learned that Saadi Bouslimani had been deported to a third country.

The next Special Rapporteur on Torture (2002–2004) Theo van Boven explicitly set forth a Level 3 approach, which we discuss below. His successor as Special Rapporteur (2004–2010) Manfred Nowak, set forth a Level 2 standard over the course of several statements. One of Nowak's most important statements on the subject outlined a set of specific concerns about the validity and effectiveness of diplomatic assurances. In a presentation before the Council of Europe, he stated the following concerns:

> (a) The principle of non-refoulement (CAT, art. 3; ECHR, art. 3; (ICCPR), art. 7) is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture;
> (b) Diplomatic assurances are sought from countries with a proven record of systematic torture, i.e. the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practicing torture. In most cases, those individuals in relation to whom diplomatic assurances are being sought belong to a high-risk group ("Islamic fundamentalists");
> (c) It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries;
> (d) Diplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary international law should comply with non-binding assurances. Another important

> question in this regard is whether the authority providing such diplomatic assurances has the power to enforce them vis-à-vis its own security forces;
> (e) Post-return monitoring mechanisms are no guarantee against torture — even the best monitoring mechanisms (e.g. ICRC and [European Committee for the Prevention of Torture]) are not 'watertight' safeguards against torture;
> (f) The individual concerned has no recourse if assurances are violated;
> (g) In most cases, diplomatic assurances do not contain any sanctions in case they are violated, i.e. there is no accountability of the requested or requesting State, and therefore the perpetrators of torture are not brought to justice;
> (h) Both States have a common interest in denying that returned persons were subjected to torture. Therefore, where States have identified independent organizations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State.
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> In conclusion, the Special Rapporteur stated that diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement....

Nowak's statements also indicate how closely the Level 2 standard approaches an absolute prohibition on diplomatic assurances (Level 1). As another example, in 2009, he stated:

> As [the Special Rapporteur] has pointed out on numerous occasions, diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement. Further, diplomatic assurances are unreliable and ineffective in protection against torture and ill-treatment. 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 upon return.

Nowak's position — that diplomatic assurances are never acceptable when there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return — has directly influenced other institutions. His conclusions have been explicitly followed, for example by the European Parliament (European Parliament Resolution 2006/2027(INI)) at para. 32 ('call[ing] on the Member States to reject altogether reliance on diplomatic assurances against torture, as recommended by Manfred Nowak') and by the UN Working Group on Arbitrary Detention (A/HRC/4/40).

The same standard has also been applied by other international authorities, including the Committee Against Torture, the Inter-American Commission for Human Rights and a group of UN human rights mandate-holders. In 2009, in response to Spain's position that the return of individuals to their home state on the basis of diplomatic assurances did not violate the Convention, the Committee stated: 'under no circumstances must diplomatic guarantees be used as a safeguard against torture or

ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.' At the same time, the Committee outlined a set of reporting requirements in the event of the state party's use of diplomatic assurances that do not violate the Convention: 'If the State party resorts to diplomatic guarantees in any situation other than those excluded under article 3 of the Convention, it must provide in its next report to the Committee information on the number of cases of extradition or expulsion that have been subject to the receipt of diplomatic assurances or guarantees since the consideration of this report; the State party's minimum requirements for such assurances or guarantees; follow-up action taken subsequently in such cases; and the enforceability of the assurances or guarantees given.' The Committee has adopted the same language in reviewing the practices of other states parties (e.g., Australia in 2008; Germany in 2011). The Inter-American Commission has also adopted the same general standard in considering the US Government's transfers of individuals from Guantánamo. Also in the context of Guantánamo detainees, a group of five UN human rights mandate-holders — the Chair of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture (Nowak), the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the right to health — issued a joint statement (months after a more famous and lengthier report by the group), which adopted a standard on diplomatic assurances consistent with Level 2. The group stated: 'It is also of utmost importance that the detainees are not returned to countries where they are at risk of torture or other serious human rights violations, such as disappearance, summary executions or arbitrary detention, in accordance with the principle of non-refoulement. Where such a risk does exist, it cannot be overcome by seeking so-called "diplomatic assurances"'. Finally, Nowak's successor, the current Special Rapporteur on Torture Juan Méndez has adopted a Level 2 standard that potentially expands its scope compared with prior iterations. Specifically, in 2011, Méndez stated: 'diplomatic assurance has been proven to be unreliable, and cannot be considered an effective safeguard against torture and ill-treatment, particularly in States where there are *reasonable grounds* to believe that a person would face the danger of being subjected to torture or ill-treatment. Like his predecessor, the Special Rapporteur regards the practice of diplomatic assurances "as an attempt to circumvent the absolute prohibition of torture and nonrefoulement"' (emphasis added).

Level 3

As mentioned above, the Special Rapporteur on Torture (2001–2004) Theo van Boven adopted a Level 3 standard. In a report to the General Assembly in 2004, he explained:

> The factors and circumstances contained in articles 3 and 20 of the Convention [Against Torture], in terms of a "consistent pattern of gross, flagrant or mass violations of human rights" and the "systematic practice of torture", cover common ground, although the former term is broader in scope and not clearly defined. Thanks to the efforts of the Committee against Torture, the latter term provides,

> for present purposes, more concrete guidance, encompassing torture both as a State policy and as a practice by public authorities over which a Government has no effective control. In circumstances where this definition of "systematic practice of torture" applies, the Special Rapporteur believes that the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.

Notably in an interim report to the General Assembly two years earlier, van Boven appeared to set forth a Level 5 approach by referring to the need for diplomatic assurances in cases of transferring terrorist detainees and by discussing the modalities (e.g., the need for monitoring) of such assurances (A/57/173 2002). In his 2004 report, van Boven qualified his earlier position explaining that it applied to 'situations and cases where resort to diplomatic assurances should not be ruled out a prior'. Nowak also adopted a Level 3 standard (E/CN.4/2006/6), and he explained as well that the standard did not exclude the acceptance of assurances 'in respect of countries with no substantial risk of torture' and 'under the condition that they are not aimed at circumventing international obligations of non-refoulement' (Council of Europe, Steering Committee for Human Rights, Meeting Report, Strasbourg, DH-STER(2005)018, 7–9 Dec. 2005; Gillard 2008).

Most famously, the UN Committee for the Convention Against Torture adopted a Level 3 standard in its review of the United States periodic report. The Committee stated: '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' (emphasis added).

Other international authorities have also adopted a Level 3 approach but with less precision in the legal standard. Indeed, some of these instances include elements of a Level 1 standard by suggesting that diplomatic assurances would never be appropriate. For example, the Council of Europe Commissioner on Human Rights Thomas Hammarberg stated that diplomatic assurances 'are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced. . . . The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kinds', and that 'respect for such promises is very difficult to monitor. It is absolutely wrong to put individuals at risk through testing such dubious assurances' (2008). The previous Commissioner for Human Rights, Alvaro Gil-Robles, stated in 2004: 'The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains. As the UN Special Rapporteur on

Torture [Van Boven] has noted, such assurances must be unequivocal and a system to monitor such assurances must be in place. When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment.'

Finally, the former UN Sub-Commission on the Promotion and Protection of Human Rights adopted a Level 3 standard in a resolution passed in 2005. An important feature of the resolution is that it also appears squarely to reject a Level 2 approach. The resolution states that the Sub-Commission:

> 4. *Confirms* that 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;
> 5. *Also confirms* that in other cases, where a real risk of torture is determined to exist in a particular case, in no circumstances shall a transfer of the individual be effected;
> 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:
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> (*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;
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> (*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;
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> (*c*) The authorities of the transferring State undertake, in writing, to make the regular visits referred to.

Level 4

The first UN Special Rapporteur on Human Rights and Counterterrorism, Martin Sheinin, adopted a weaker stance compared to his UN counterparts. He initially signaled a strong stance in 2005 report in which he referred to diplomatic assurances as an example of 'the most alarming "new trend" related to counter-terrorism measures [which] is the increased questioning or compromising of the absolute prohibition of torture and all forms of cruel, inhuman or degrading treatment.' In 2007, however, the Special Rapporteur explicitly endorsed a Level 4 approach:

> In the view of the Special Rapporteur diplomatic assurances can, at best, be taken into account as one of the several factors to be addressed in the individual assessment of the risk. Furthermore, such assessment must be subject to effective and independent, preferably judicial, safeguards. Mindful of the fact that diplomatic assurances against torture or inhuman treatment, even when accompanied by post-removal monitoring, tend not to work in practice, the Special Rapporteur discourages the creation of removal or resettlement mechanisms where such assurances would play a central role.

A year later, in a field mission to Spain, Sheinin alternated to a marginally stronger position stating: 'the Special Rapporteur recalls that there is widespread agreement that diplomatic assurances do not work in respect of the risk of torture or other ill-treatment, as has been stated in a number of individual cases considered by international human rights bodies.' (See also Joint Statement by UN Special Rapporteurs on Torture, Manfred Nowak, and on Human Rights and Counter-Terrorism, Martin Scheinin on Fate of Guantánamo Detainees, 21 July 2010.)

Level 5

According to some commentators, the Human Rights Committee has adopted a standard that regards diplomatic assurances as a valid consideration in all cases evaluating the risk of torture (e.g., Johnston 2011). The key text is a landmark determination by the Human Rights Committee in *Alzery v. Sweden* (Communication No. 1416/2005 (10 November 2006)). In that decision the Committee suggested that as a supervisory body it 'must consider all relevant elements' in a risk analysis including assurances. However, the committee also heavily scrutinized the substance of the assurances and determined that the government had erroneously relied on the arrangements. The issue involved a decision by the Government of Sweden to return an Egyptian national, Mohammed Alzery, to Egypt. Sweden had determined that Alzery, allegedly a leader of an organization implicated in terrorist activities in Egypt, could not be returned due to the likelihood that he would be tortured. Swedish authorities then arranged for diplomatic assurances with the Government of Egypt and returned Alzery on that basis. Once in Egyptian custody, Alzery was allegedly subject to weeks of harsh interrogation and torture including electric shocks applied to his genitals, nipples and ears. The Committee issued the following Views:

> 11.3 . . . In determining the risk of such treatment in the present case, the Committee must consider all relevant elements, including the general situation of human rights in a State. The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.
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> . . .
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> 11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective

> implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

Notably, the Human Rights Committee has separately suggested a sliding scale approach to evaluating diplomatic assurances, which could be compatible with a Level 3 analysis. In its 2006 review of the United States periodic report, the Committee recommended: '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.' The Committee adopted the same framework in its review of Sweden's state party report in 2009 (but cf. Concluding Observations — Denmark 2008).