

Use of Diplomatic Assurances in Terrorism-related Cases In Search of a Balance Between Security Concerns and Human Rights Obligations

In this paper, ICCT – The Hague Research Fellow Dr. Bibi van Ginkel and intern Federico Rojas analyse the different policies on diplomatic assurances in a number of countries that are representative of a certain trend and attempt to clarify the criteria that have to be fulfilled before assurance may be used. Key in the whole discussion surrounding the use of diplomatic assurances is finding the right balance between national security concerns and human rights obligations. The outcomes of the Expert Meeting on this topic, that took place on 22 March 2011, have been incorporated in this paper.

Introduction

In times of insecurity and terrorism threats, governments take several measures that intend to contribute to security, or at least to minimise the risks of insecurity. When dealing with suspected terrorists who are not nationals or against whom criminal charges are issued in third countries, governments might be more inclined to expel, return, extradite or otherwise transfer this individual to another country. However, in situations in which the expelled, returned or extradited individual is transferred to a country in which he runs the risk of being tortured or receiving some other form of ill-treatment, governments risk violating the prohibition of torture; more specifically the *non-refoulement* principle, which places a positive obligation on states to also prevent individuals from being subjected to the risk of torture. Hence, governments sometimes seek diplomatic assurances to guarantee that no ill-treatment or torture will take place after the transfer of the individual.

Human rights advocates have argued against the use of diplomatic assurances, because it might amount to a violation of the prohibition of torture. However, there is no uniform interpretation on the admissibility of diplomatic assurances by legal courts. Henceforth, States have different policies with regard to the usage of diplomatic assurances.

In this paper, we will focus on different policies that are representative of a certain trend and attempt to clarify the criteria that have to be fulfilled before diplomatic assurance can be used.

General Background

Introducing Diplomatic Assurances

Diplomatic assurances (DAs) were initially used by European countries to obtain guarantees from nations that employed the death penalty. "Seeking diplomatic assurances to protect human rights began as an earnest effort by European governments to protect the most fundamental right: the right to life. Governments in



countries where the death penalty is outlawed have long asked for guarantees against capital punishment from states like the US, before extraditing suspects.”¹

The 1990s witnessed a shift in the use of DAs toward the prevention of torture. The United Kingdom (UK) was involved in the landmark case of *Chahal v. UK*,² in which attempts to extradite a suspected terrorist to India were blocked by the European Court of Human Rights (ECtHR). The case established a legal precedent – the *Chahal Principle* – that reinforced the non-refoulement principle³ in Europe. It was also the first big setback to the UK’s aspirations to employ DAs as a systematic tool in the case of prisoner transfers.

The post-9/11 era has fuelled the debate surrounding the use of DAs. The United States (US) and the UK have been at the forefront of a wave of countries that began using DAs to justify transferring individuals to countries that have track records of implementing torture and other types of prisoner abuse. This has generally taken place in the context of fighting terrorism, given that the security risk of keeping suspected terrorists in the country is deemed to be too high. There are three different types of exchanges potentially involving the use of DAs:

- Extradition – formal procedure whereby a suspected criminal detained in one state is transferred to another state for trial, or, if the suspect has already been tried and convicted, to serve his/her sentence.⁴
- Deportation – the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial.⁵
- Extraordinary Rendition – extrajudicial transfer of a person from one State to another.⁶

There are three main types of DAs – diplomatic notes, exchange of letters and Memoranda of Understanding (MoUs). One could classify DAs as being either ‘soft’ or ‘hard’. Soft DAs tend to lack enforcement mechanisms and are often kept confidential. Hard DAs tend to provide enforcement mechanisms such as arranged visits to prisoners and documents may be declassified, as was the case with the UK’s MoUs with Jordan, Libya, and Lebanon. Nonetheless the strength and effectiveness of the enforcement mechanisms is still a matter of concern for governments.



Figure 1: Types of Transfers/Types of DAs

Main actors surrounding the use of DAs

The crux of the debate surrounding DAs involves the transfer of individuals from Western liberal democracies such as the US and the UK to predominantly Middle Eastern and North African countries, for instance Egypt and Lebanon. NGOs such as Human Rights Watch and Amnesty International have reported extensively that DAs have not prevented individuals from getting tortured once they are transferred to the receiving countries, and have denounced DAs as an ineffective tool with weak enforcement mechanisms and legal accountability. Whereas international courts have not yet gotten involved, regional courts such as the ECtHR and national

¹ Hall (2008), p.3.

² European Court of Human Rights, *Chahal v. The U.K.*, (22414/93) [1996] ECHR 54 (15 November 1996)

³ The non-refoulement principle will be explained in detail in the following section

⁴ Schimmel (2007)

⁵ *Ibid.*

⁶ Garcia (2009)



courts such as the UK Special Immigrations Appeals Commission (SIAC) have set important legal precedents on the issue. Supervising organs such as the Committee Against Torture and the Human Rights Council have also entered the debate and there has been a general condemnation on the use of DAs by these organs so far.

National governments tend to frame the issue of DAs from a national security perspective and as a valuable tool in countering terrorism. DAs are essentially the best of three potentially bad choices – release the individual in the host country, keep the individual incarcerated indefinitely, or transfer him to another country while using DAs. NGOs tend to focus on the human rights aspect of DAs by putting an emphasis on the danger that the individuals face once they are transferred to the receiving countries. Supervising organs and regional courts remain sceptical of the extent to which DAs hold governments as legally accountable and stress the importance of following the non-refoulement principle, whereas national courts generally side with their government by emphasising the importance of national security.

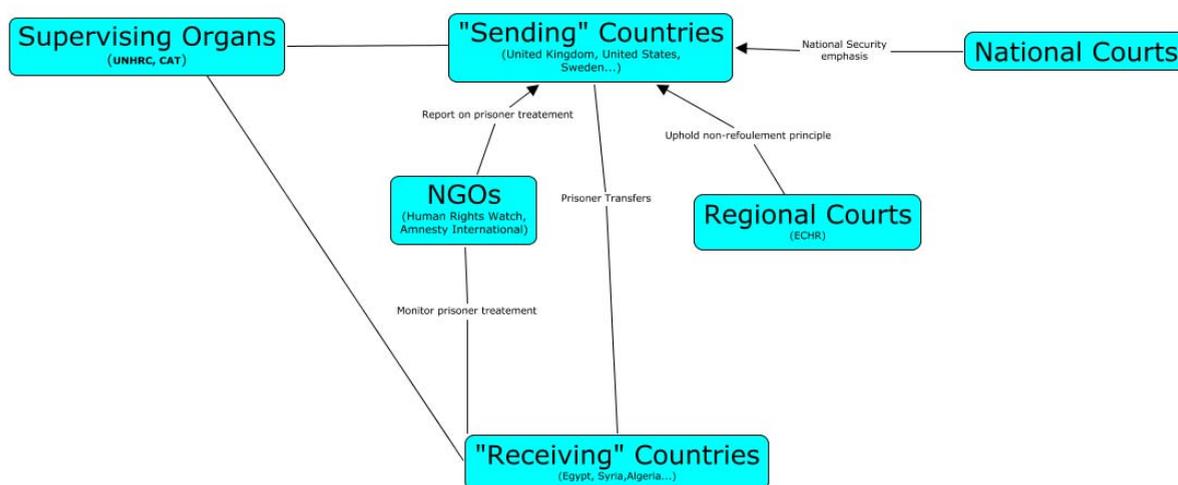


Figure 2: Main Actors in DAs debate

Policy Spectrum for the use of Diplomatic Assurances

Figure 3 is an hierarchical illustration of the position of various countries with regard to the usage of DAs.⁷ On one end of the spectrum are States that have an absolute prohibition on the use of DAs; at the other end are those that regularly use ‘soft’ DAs. It must be noted that the position of many states is not always crystal clear, and their place on the policy spectrum is based on a mixture of policy practice, official statements, and national legislation.

At the bottom of the pyramid, the Netherlands has been the only European country that has stated that DAs will not be used. Austria has not used DAs and although the government seems to have made attempts to use them on two occasions (when attempting to extradite Abd al-Rahman Bilasi-Ashri to Egypt⁸) the claim still stands that Austria will not make use of the instrument.

Slovakia’s position is not yet clear, but Mustapha Labsi’s pending deportation to Algeria suggests a narrow margin of use is possible. In Denmark, an Expert Committee determined that although DAs are problematic, they may be used in exceptional circumstances.

⁷ This overview is predominantly derived from the Amnesty International report titled “Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture”

⁸ The ECHR got involved in blocking his extradition. For more information check: European Court of Human Rights, *Bilasi-Ashri v. Austria*, 3314/02, 26 November 2002



Sweden's rhetoric largely centres on allowing DAs only for a narrow margin of use. However, the Agiza/al-Zari cases⁹ have damaged Sweden's reputation on this issue. Amnesty International argues that, as of yet, not enough restrictions have been implemented to ensure that similar mistakes do not happen again. Germany until recently did not have an uniform policy on DAs; the usage was decided on a case-by-case basis. However, the 2009 *Residence Act* stipulated guidelines for their use, which has subsequently drawn criticism from NGOs. Italy has in the past deported individuals deemed by the government to be a threat to national security without due process and has used DAs in the past.

Amnesty International notes that Canada and Australia employ DAs for certain types of national security transfers, while the UK has established a systematic use of DAs – namely MoUs with various countries. However, the MoUs contain relatively strong guidelines and call for enforcement mechanisms.

The US is known for employing 'soft' DAs, especially during the George W. Bush Administration and its extensive, extraordinary rendition policy. Consequently, the US has been accused of using DAs as a justification for transferring individuals to countries where it is likely that they might be abused or tortured. The term 'regular use' in Figure 3 should be understood in relation to the absolute number of times that DAs are used in comparison to the number of times DAs are used in other states. The term does not reflect the amount of potential transfers in relation to the amount of cases in which DAs are used.

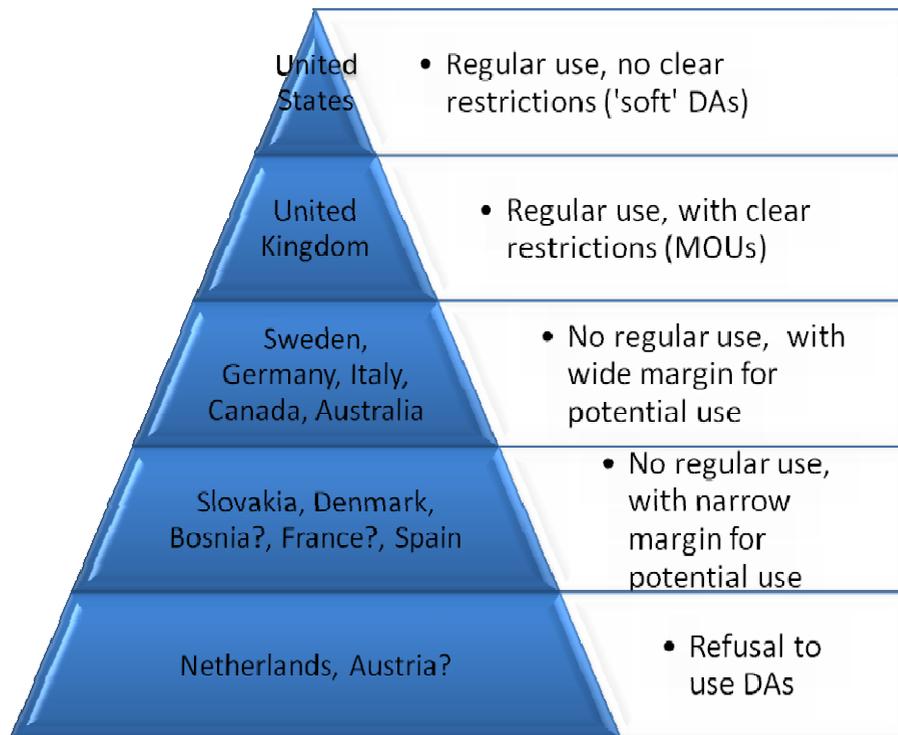


Figure 3: Policy Spectrum on DAs

Legal Boundaries

Neither international nor European law refer to the use of DAs in an explicit manner; hence, the assumption should be made that DAs are allowed as long as their use does not conflict with the boundaries that are set by treaties and legislation surrounding the protection of civil and political rights, the protection of refugees, and

⁹ These cases will be further discussed in Section IV



the protection against torture. At the core of these legal boundaries is the principle of non-refoulement, which places clear restrictions on the transfer of individuals from one country to another.

The non-refoulement principle is derived from two general sources of law – the 1951 *Convention Relating to the Status of Refugees* (Refugee Convention) and the 1984 *Convention Against Torture* (CAT). Article 33 of the Refugee Convention, entitled “Prohibition of Expulsion or Return”, states:

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

Article 3 of the CAT states:

- “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.”

The American Society of International Law (ASIL) argues that CAT contains stronger provisions for the non-refoulement principle than the Refugee Convention. “Unlike the Refugee Convention, the CAT’s non-refoulement obligation is absolute: a state cannot exclude anyone from the provision’s protection, even if he poses a security threat or has committed a criminal act.”¹⁰

Three other important pieces of legislation restrict the use of DAs, namely the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the European Arrest Warrant (EAW). Whereas they may not deal with the non-refoulement principle directly, they contain human rights and transfer restrictions that may be applicable for limiting the use of DAs. Article 7 of the ICCPR stipulates:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

The United Nations Human Rights Committee, the supervising organ of the ICCPR, in its authoritative General Comment no. 20 on Article 7, did make a link to the principle of non-refoulement when it stated: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.”¹¹

In the European context there are two relevant legal documents applicable to this issue, namely the Council of Europe’s ECHR and the EU’s EAW. In article 3 of the ECHR, it is stated that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” In paragraph 13 of the preamble of the EAW, it is phrased as follows: “No person should be removed, expelled or extradited to a State where there is a

¹⁰ Deeks (2008)

¹¹ The United Nations Human Rights Committee, General Comment No. 20 on Article 7, 1992, par. 9

serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”¹²

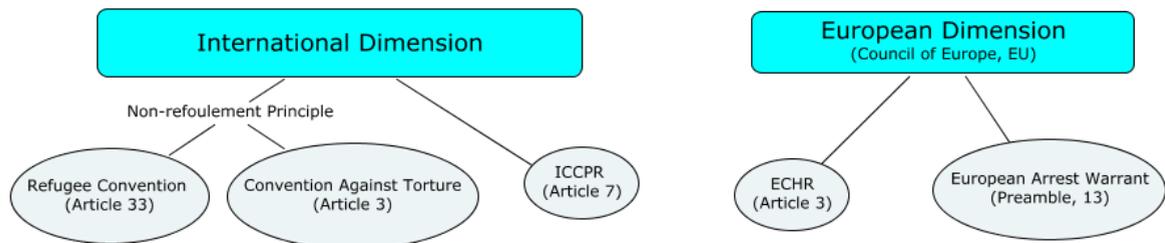


Figure 4: Legal Boundaries

The Legal Battle

Key Legal Precedents

*Chahal v. UK*¹³ was a landmark case for Article 3 of European Convention on Human Rights. The ECtHR ruled that the return to India of Karamjit Singh Chahal, an alleged Sikh militant, would violate the UK’s obligations under Article 3. This was despite assurances from the Indian government that Chahal would not suffer mistreatment under Indian authorities. The Court established that the DAs negotiated in that case did not provide an adequate guarantee when torture is endemic and an enduring problem. This ruling has become known as the Chahal Principle. This principle was essential in reinforcing the importance of non-refoulement in Europe.

In *Suresh v. Canada*,¹⁴ the Canadian Supreme Court prevented Manickavasagam Suresh – a member of the Tamil Tigers being held in Canadian custody – from being extradited to Sri Lanka. However, the Court ruled that whereas international law contains an absolute ban on returning detainees to countries where there is a risk of torture, the possibility may be present under exceptional circumstances relating to national security.’ Whereas the establishment of a “Suresh Principle” has not fully materialised, the ruling embodies the core arguments by national governments regarding the importance of national security when deciding on the transfer of individuals.

In *Saadi v. Italy*,¹⁵ the ECtHR reinforced the Chahal principle by blocking Italy’s attempt to deport Nassim Saadi – a suspected Al Qaeda member – back to Tunisia. The Court ruled that deportation to Tunisia would violate Article 3 of the ECHR and the importance of upholding the Chahal principle was referred to numerous times in the ruling. Countries such as the UK got involved in the case and argued that the Chahal principle should be scaled down on national security grounds (see also Textbox II).¹⁶ Moeckli remarked in this respect: “[I]f *Saadi* is indeed to be considered a ‘landmark ruling’, this is not so much because of what the Court argued but because the judgment was handed down in the face of constant calls for a ‘new balance’. The more difficult issues arising from states’ attempts to deport terrorist suspects – such as the relevance of diplomatic assurances or the notion of a ‘flagrant denial of justice’ in the receiving country – are still to be addressed by the Court.”¹⁷

Textbox I: Infamous cases

The cases below are regularly used as examples by opponents of DAs to prove the weaknesses of DAs as tools to prevent torture and prisoner abuse:

¹² EU Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant

¹³ European Court of Human Rights. *Chahal v. The U.K*

¹⁴ Canadian Minister of Citizenship and Immigration, *Suresh v. Canada*. [2002] 1 S.C.R. 3

¹⁵ European Court of Human Rights, *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008

¹⁶ This is further discussed in the textbox on the “UK Challenge”

¹⁷ Moeckli (2008)



Maher Arar

Maher Arar was a suspected member of Al Qaeda, apprehended by US authorities in September 2002 at JFK airport while on his way home to Canada. Arar had dual Syrian/Canadian citizenship and allegedly told American authorities that he would be tortured in Syria if returned and should therefore be sent to Canada. Despite his warnings, Arar was sent to Syria after 2 weeks in detention.¹⁸ He was released from custody after 10 months of being detained without charge, during which he was allegedly tortured repeatedly, despite the fact that Canadian authorities were allowed to conduct several visits to his Syrian prison. The US authorities claimed they received assurances from the Syrian government that Arar would not be subjected to torture upon return. The Department of State has refused to disclose information based on “state’s secrets”,¹⁹ and refuses to cooperate with Canadian authorities as well. Upon release, Arar discussed why he did not reveal he was being tortured during visits from Canadian officials:

“I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again ... The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there.”²⁰

Ahmed Agiza and Mohammed al-Zari

Agiza and al-Zari were Egyptian asylum seekers that were forcibly returned to Cairo in December 2001 after being captured on Swedish soil. US officials have been accused of conducting the transfer, making it one of the first major cases of extraordinary rendition.²¹ The Egyptian government’s DAs included promises that the detainees would not be tortured nor sentenced to death, as well as granting access for Swedish officials to monitor their situation. Subsequent visits by Swedish officials took place but always in the presence of Egyptian officials. Human Rights Watch claims there are strong suspicions they have been tortured.²² Former UN Special Rapporteur on Torture Manfred Nowak stated:

“The Agiza case is the first case of extraordinary rendition to provide us with a statement of law at the international level. In this case the diplomatic assurances procured were insufficient to protect against the manifest risk of torture and were therefore unenforceable. It is the opinion of the Special Rapporteur that post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”²³

Moreover, the Council of Europe’s Commissioner on Human Rights stated:

“‘Diplomatic assurances’, whereby receiving states promise not to torture specific individuals if returned are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced. Such pledges are not credible and have also turned out to be ineffective in well-documented cases. 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 kind.”²⁴

Legal Spectrum

On one end of the legal spectrum, various NGOs, such as Amnesty International and Human Rights Watch, state that transfers on the basis of DAs are a clear violation of the non-refoulement principle. The argument used is that DAs allegedly do not have strong enforcement mechanisms and the receiving countries are not legally liable for not respecting them. Furthermore, they argue that the use of DAs is paradoxical in nature in that they consist of an acknowledgement by the sending country that the receiving country is unreliable where it concerns proper prisoner treatment, which renders the DAs futile as they require the good will of the receiving country. In essence, what the argument seems to boil down to is that these NGOs feel that individuals should not be transferred to countries like Egypt and Syria under any circumstances, given that their past use of torture is sufficient to prove that they cannot be trusted to abide by DAs.²⁵ Hence, these NGOs argue for the strongest possible use of the Chahal Principle and therefore also non-refoulement.

On the other end of the spectrum stands the Suresh Principle. The Canadian Supreme Court argued that although international law contains an absolute ban on returning detainees to countries where there is a risk of torture, it may be allowed in exceptional circumstances relating to the protection of national security.

¹⁸ Hall (2008)

¹⁹ For more information, check Arar’s lawsuit against the United States in: United States District Court for the Eastern District of New York, *Maher Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D. N.Y. 2006)

²⁰ Hall (2008), p.8

²¹ Human Rights Watch (2005)

²² *Ibid.*

²³ Organisation on Security and Conflict in Europe (2007), p.13

²⁴ *Ibid.*

²⁵ See also the textbox on “Infamous Cases”



Although Suresh was never extradited to Sri Lanka and the Canadian government is not known for using DAs, the Suresh principle is significant in that this is the only time a court has sanctioned the possibility of a transfer in cases where torture may be likely. In essence, the Court argued that the non-refoulement principle is *not* absolute.

Scholarly opinion varies, but there appears to be a general consensus that although the current system of DAs falls short in terms of effectiveness and legal power, advances can be made that could create a strong DA system with enforcement mechanisms and legal accountability. When discussing the use of MoUs, Constanze Schimmel for example states that “[I]legally speaking, the removing state has only a limited ability to enforce a DA. This criticism can be evaded by making the assurance legally binding and setting up a commission which can, in the case of a breach of the assurance, make a legally binding decision against the detaining state. However, there are no current developments to make assurances in MoUs legally binding in this regard.”²⁶ Olof Hasselberg explores some of the general criticisms on DAs that are made by NGOs, which include the notion that diplomacy is an art that by nature is conducted secretly and thus a transparent system of DAs will be very tough to establish.²⁷ He lists five general problems that are associated with DAs – trust, denial, monitoring, enforcement, remedies, and disclosure.²⁸

Additionally, reference must be made to the Philadelphia District Court ruling in *Khouzam v. Hogan*, which may turn out to be an interesting precedent.²⁹ The Court blocked Khouzam’s deportation to Egypt by refusing to hand him over to federal authorities, arguing that it wanted to examine the DAs offered by the Egyptian government. Since the US government refused to disclose them, the Court ruled against Khouzam’s deportation. Even though other Courts have not followed up on this potential precedent, we can discern the legal argument involved in this decision – that independent courts should examine the terms of the DAs before an individual is transferred.

Textbox II: The UK Challenge

The UK has been at the forefront of pushing for the establishment of a systematic practice of DAs, largely based on strong MoUs. The UK currently has MoU arrangements with Jordan (August 2005), Lebanon (December 2005), Algeria (July 2006) and Ethiopia (December 2008). In an attempt to display transparency and accountability, the UK has declassified its MoUs with Jordan, Libya, and Lebanon.³⁰ The arrangement with Libya is no longer in operation. However, the UK government has also attempted to weaken the strict interpretation of the ECtHR’s Chahal principle and the country’s SIAC has further supported the government’s position on this issue. The UK government’s legal arguments in *Saadi v. Italy* and the SIAC’s ruling on *Omar Othman’s* (a.k.a. Abu Qatada) case illustrate this point.

During *Saadi v. Italy* (2006), in which the ECtHR blocked Italy’s attempt to transfer Saadi to Tunisia, the UK listed several legal arguments attempting to weaken the Chahal Principle, which can be seen in the court decision (they were all rejected by the court). They include:

- “Right to life” argument based on protecting own citizens
- “Implied positive obligation” argument – leads to conclusion that applicant’s rights must be weighed against community
- “Balancing” argument - in the face of the current threat from terrorism, a new balance must be struck between individual rights and collective security
- “Higher standard of proof” argument - where an applicant poses a threat to national security, the standard of proof should be modified and the applicant should be required to adduce stronger evidence that there is a risk of ill-treatment.

The SIAC has also shown a propensity toward weakening the Chahal principle. In its ruling³¹ on allowing the deportation of Abu Qatada back to Jordan, the court stated that:

²⁶ Schimmel (2007)

²⁷ *Ibid.*

²⁸ Hasselberg (2009)

²⁹ US District Court for the Middle District of Pennsylvania, *Sameh Sami S. Khouzam v. Thomas H. Hogan*, et al., 3:CV-07-0992

³⁰ All the MoUs are available at the *Foreign & Commonwealth Office* section of the UK government website:

MoU with Jordan, <http://www.fco.gov.uk/resources/en/pdf/jordan-mou>, (Last visited on 24 February 2011);

MoU with Libya, <http://www.fco.gov.uk/resources/en/pdf/libya-mou>, (Last visited on 24 February 2011);

MoU with Lebanon, <http://www.fco.gov.uk/resources/en/pdf/lebanon-mou> (Last visited on 24 February 2011)

³¹ United Kingdom Special Immigration Appeals Commission (SIAC), *Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department*. SC/15/2005



- “If the Appellant were convicted, he would serve his sentence in an ordinary prison such as Jweideh and not a GID facility. An ordinary inmate would experience uncomfortable and unpleasant conditions at times, sometimes with inadequate food, water and sanitation. No doubt he could at times experience some harshness, even beatings, from the guards. However, these general conditions would not reach the high level required for a breach Article 3 [emphasis added], and were not said to do so.”
- “Opposition in principle to MOUs because they may undermine longer term attempts to achieve more general adherence to international human rights obligations may or may not be justified; they could advance the cause of human rights through the protection of individuals becoming an example of what should be done. But it is not for us to take a view upon that. It is not a relevant concern for us. [emphasis added]”
- “ECtHR authority, such as Chahal and Mamatkulov, shows that reliance can lawfully be placed on such assurances; the weight to be given to them depends upon the circumstances of each case. [emphasis added]” The question to which they are addressed is whether there is a real risk of treatment which would breach Article 3, and possibly Articles 5 and 6, taking them into account. It is a fallacy to treat the ECHR obligation on the removing state as one which requires a guarantee, let alone a legally enforceable one, that there would be no risk at all of a breach of Article 3 in the receiving state.”
- “So whilst it is true that there are no specific sanctions for breaches, and the MOU is *certainly not legally enforceable* [emphasis added], there are sound reasons why Jordan would comply and seek to avoid breaches. The MOU would be an important factor in the way in which Jordan conducted itself. It would be one basis upon which the Government instructed the GID to ensure that it behaved properly and upon which it would avoid interference with the judiciary.”

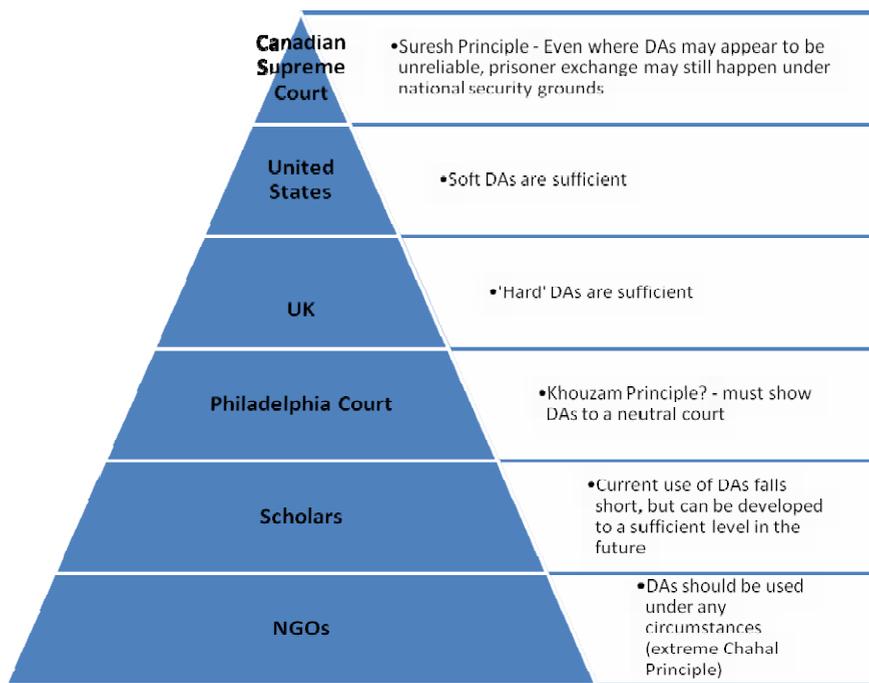


Figure 5: Legal Spectrum

As discussed in the “UK Challenge” textbox, the UK government has argued that a case by case assessment is required to determine whether the use of DAs can remove the risk of mistreatment as stated by article 3 ECHR. Nonetheless, unlike the US, the UK does seek to establish ‘hard’ DAs in the form of MoUs, and has campaigned to strengthen the enforcement mechanisms under MoUs. These assurances cover general matters such as treatment upon return, whether in detention or otherwise, and access to justice. Within these framework arrangements, the UK government seeks specific and tailored assurances for each individual on a case by case basis, where their safety on return is considered to be at risk. The MoUs with Jordan, Lebanon and Ethiopia also make provisions for monitoring bodies to verify the application of the assurances given by the receiving state. The monitoring tasks are usually appointed jointly by the two governments to a NGO in the receiving state. The US on the other hand has championed the use of ‘soft’ DAs when transferring individuals and has remained secretive when it comes to the details of its DAs with other countries. The US seems to



argue that soft DAs are enough to avoid breaking the non-refoulement principle. See for an overview of the legal spectrum Figure 5.

Room for Compromise?

Let us suppose a transparent international system of DAs is created in which strong enforcement mechanisms are in place and legal accountability for all parties is present. If this were the case, the bulk of the criticisms surrounding the use of DAs would no longer apply; the receiving countries would be liable under international law if they were to torture their prisoners as would the sending countries for having transferred them, the deterrent factor for the receiving governments not to torture would be much stronger, and independent courts and tribunals could play a bigger role. In principle, this would seem to satisfy all actors involved in the DAs debate.

However, this is not necessarily the case when it comes to NGOs and human rights activists. They fear that a successful DAs system could be counter-productive to their efforts of an absolute ban on torture. “Even if an assurance could be constructed so that the returned person’s rights would be fully respected, the use of diplomatic assurances, and MoUs in particular, might create a parallel system, which undermines the absolute ban on torture for some people. This would result in a situation in which one system of international law is protecting people from torture and the return to a country where they might face it, and another set of rules for alleged terrorists.”³² Julia Hall of Amnesty International speaks of ‘an island of legality in a sea of illegality’. This is the Catch – 22 that the most stringent opponents of DAs currently face.

Such a view creates a major rupture within the debate and leaves considerably little room for compromise. Essentially, the difficulty in finding room for compromise also originates in the divergence of levels on which the debate is conducted. Especially the inequality of the macro versus the micro arguments confuses the search for a compromise. It is rather difficult to find a compromise between the macro arguments of the use of DAs as a tool for foreign policy to reinforce human rights, or the focus on security risks for the sending state, versus the micro level arguments of the individual that is in need of protection for violations of the prohibition of torture or the principle of non-refoulement and the personal risk that torture or inhuman treatment is conducted against a particular individual. The foreign policy argument that is for instance used with respect to the MoU model advocated by the UK, could however well be placed against the macro argument of NGOs opposing the use of DAs by pointing to the general prohibition of torture and the non-refoulement principle, which would inherently make the need for any additional arrangement such as a MoU absolute, unless you recognise the risk of abuse exists, in which case one should fully refrain from deportation or extradition.

Conclusions & Recommendations

On 5 April 2011, the ECtHR issued a judgement in the case of *Toumi v. Italy*, in which it concluded that Italy has violated article 3 ECHR by deporting mr. Toumi to Tunisia.³³ Italy had negotiated DAs with Tunisia that stipulate that the applicant’s dignity should be respected, a fair trial should be guaranteed and a right of visit and medical treatment should be upheld. The Court, however, ruled that the DAs were not sufficient to eliminate the risk of torture and ill-treatment, since there were substantial grounds for believing that mr. Toumi faced a real risk of being subjected to treatment contrary to article 3 ECHR. One of the reasons brought forward by the Court was the fact that allegations of ill-treatment in other cases were not investigated by the competent authorities in Tunisia and that the government was reluctant to cooperate with independent human rights organisations.

This case shows once again that DAs can never be considered a sufficient guarantee that respect for the prohibition of torture and respect for the non-refoulement principle are adhered to *per se*.

³² Hasselberg (2009)

³³ European Court of Human Rights, Chamber Judgement in the case of *Toumi v. Italy*, Application no. 25716/09, 5 April 2011.



While the differences in the debate have not been solved, there are, however, some general points on which agreement has been reached, and which can be translated to the following recommendations:

- The use of DAs is perceived by governments as the best of several bad options, and should therefore only be used reluctantly because of all the risks. Each case should be assessed on its own merits, and general policies in that respect should be avoided. In this respect, it might be advisable to take into account the recommendations made by the former UN Special Rapporteur on Torture, prof. Van Boven, who acknowledged that situations and cases could exist in which a resort to DAs is not ruled out. He did, however, also stress the importance of certain essential requirements that should be incorporated in the DAs, and furthermore underlined the importance of an effective monitoring system.³⁴
- Improve other measures in order to avoid the need for DAs and counter impunity. Investing in capacity building in the receiving states to improve the circumstances of detention, and to reform the judicial system are considered more sustainable solutions to the problem.
- Insist on stronger collaboration between national governments and NGOs. Currently, both sides tend to operate separately, and more collective efforts could be made between the two.
- The European Union can and should play a more powerful role. Whereas the European Court of Human Rights is heavily involved in cases of DAs, other EU bodies have generally remained in the periphery.
- Enforcement mechanisms for DAs should continue to be developed and strengthened. All sides seemed to agree that more could be done to ensure that countries comply with DAs. It should moreover be clear what the consequences of a breach of DAs can entail, and states should act on it.
- Do not scale down the non-refoulement and Chahal principles on any level, and ensuring that they are preserved and reinforced should continue to be a top priority for all parties involved.

³⁴ Report submitted by the Special Rapporteur of the Commission on Human Rights on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, to the General Assembly, UN Doc. A/59/324, 1 September 2004, par. 40-42.



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