

**Diplomatic Assurances – A judicial and political analysis of the
undermining of the principle of *non-refoulement***

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1 Introduction

In December 2001, the Swedish television programme “Kalla Fakta” uncovered the story of Ahmed Agiza and Muhammed El Zari, who after having been denied asylum in Sweden, were arrested by the police and deported in haste to Egypt. The two men were suspected of terrorist activities and even though Egypt was well-known to mistreat political opponents in general, and alleged Islamic terrorists in particular, the Swedish government decided to have them transferred. Both Agiza and El Zari later claimed that they were tortured in Egypt. The disclosure resulted in a massive outcry and the Swedish government were heavily criticised by a great number of both domestic and international actors for having violated its international law obligations and Agiza’s and El Zari’s human rights. Sweden, on the other hand, claimed that it had done whatever one could possibly require to ensure that the men were treated correctly, while also making sure that its national security was protected.

This claim sheds a light on an old conflict that has been reinforced by the emerge of the globalised threat from terrorism and the violent and repressive responses towards it; namely, how to at once respect state security and human rights. The attacks of 9/11 and the “Global War on Terrorism” (the GWoT) have created an atmosphere where this conflict has increased to a level so that it now seems unsolvable and where the proponents of each perspective seem to have less and less understanding for the arguments of the opponent. The main argument of many governments, as well as many others, is that human rights and democracy can only be ensured and protected by states and that this requires that threats against the states security have to be eliminated. The human rights advocates, on the contrary, claim that fundamental institutions such as democracy, the rule of law and human rights cannot be protected by the undermining of the same.

These differing apprehensions is a necessary context when discussion the possible development of this conflict; however, the factual situation at present is that states have an obligation, and a right, to respect and promote them both. The right of the state to control its frontiers has been articulated by the European Court of Human Rights:

The Court reiterates in the first place that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations

including the Convention [the European Convention of Human Rights], to control the entry, residence and expulsion of aliens.¹

However, this right is not absolute and there are many provisions in international law limiting it, whereof one such is the principle of *non-refoulement*. This obligation, expressed in a number of treaties (see below), basically means that a state shall refrain from, in any manner whatsoever, rendering a person to a country where he or she might face torture or ill-treatment. For this reason, Sweden should not have deported Agiza and El Zari to Egypt.

However, before the two Egyptians were deported, Sweden received a diplomatic assurance from Egypt, an aid-memoire wherein an Egyptian official assured that Egyptian law would be respected and the men treated humanely. The Swedish government argued that this assurance depleted the risk that the men would be tortured, and that, consequently, sending them to Egypt could not amount to *refoulement*. If Agiza and El Zari were to be tortured nonetheless, Sweden had fulfilled its legal obligations and the responsibility would be solely Egypt's.

This is but one example of how diplomatic assurances are used by governments as a tool to, in their view, juxtapose state security and human rights. However, the use of diplomatic assurances could also be regarded as a circumvention of the principle of *non-refoulement*. If the principle is to protect people from torture, what is this protection worth if an assurance not to torture from a state that is well-know to do just that, is considered enough?

Most previous studies have focused on the legal implications with diplomatic assurances. This have resulted in interesting analyses about whether they could ever be in accordance with international law or not, and, if the can, what the requirements would have to look like. However, this is a rather limited methodology; it offers an explanation, but no understanding of the concept. To understand where the use of diplomatic assurances stem from, and what it might result in, requires that they are put in a political context and analysed from a more theoretical perspective.

¹ *TI v. UK*, Application no. 43844/98, March 7, 2000, p. 14.

1.1 Objective/purpose

The purpose of this paper is to analyse the use of diplomatic assurances and its consequences for the principle of *non-refoulement*. First from a judicial perspective, analysing the legal implications of the method. Subsequently, I contextualize it theoretically and politically to understand how a systematic use of the method might undermine the principle of *non-refoulement*, and, furthermore, what political procedures that have led up to this. Using Gregor Noll's terminology (see below), the first part is about the politicisation of law and the second about the mystification of politics. The aim is to discuss how diplomatic assurances and the undermining of *non-refoulement* are not only judicially problematic, but also to discuss what wider implications this might have. The political analysis is used both as a background for understanding how this development has been possible, and to discuss what consequences it might have. Moreover, the objective is to show that diplomatic assurances are a part of a more complex system of de-humanising certain people and the creation of a permanent state of emergency. Finally, and hopefully, the intent is to analyse how this development could be reversed. Or, in legal terms, the paper starts out with a description of *de lege lata* and concludes with *de lege ferenda*.

1.2 Delimitations

Diplomatic assurances are a part of a complex system of methods, used to counter terrorism. I analyse the nexus between diplomatic assurances and the "Global War on Terrorism" (GWOt), and discuss the political context wherein the method is being used. However, there are many other important issues that also relate to this, such as indefinite detentions and extraordinary renditions. These too, are methods which have implications on the principle of *non-refoulement*, and for a more comprehensive understanding of how the GWOt is in conflict with this principle, both indefinite detentions and extraordinary renditions should have to be analysed. But so should, perhaps, all human rights implications the GWOt have unleashed. It is not only the principle of *non-refoulement* that is undermined; combating terrorism has led to many limitations and derogations from fundamental human rights all over the world. Whether this is a necessary process for strengthening the state's ability to counter a lethal enemy, or, instead, a role-back of the democratic principles the war is said to protect, has been subject to many debates. Since there is not room for an all too

extensive analysis of terrorism in this paper, I have limited the focal point to diplomatic assurances. Nevertheless, the method and its implications are analysed from a broad legal and political perspective in the context of a more general discussion about terrorism.

In the judicial section, the main focus is on international law. Domestic legal systems are highly relevant since it is they that form the ground for what is considered criminal or not, and also regulating the limits and possibilities for how state officials can act. But in this aspect too, I have had to delimit the scope of the paper. Since the most central norm in my analysis is the principle of *non-refoulement*, and this principle is derived from a number of international legal instruments, I have chosen to mainly focus on international law. What is used from national legal framework is preferentially case law and national courts' interpretations.

As for the theories I use to contextualize the judicial problems, I have turned to ideas that add an extra dimension to the understanding of the problems. Analysing a specific issue with the help of one or a few specific theories necessarily means that all other theories have to be excluded. This does not mean that these are not relevant or could contribute to the understanding as well. However, I have chosen the theories below with the intent to, with the help of them, connect the judicial debate about diplomatic assurances with a more theoretical discussion about terrorism. Furthermore, the theories are chosen because their close interrelation and their focus on political causes and possible outcomes. The exclusion of other theories consequently results in but one possible answer and my conclusions are therefore limited to the perspectives of the theories used. Nevertheless, I consider them to offer a fruitful understanding of how terrorism, seen as a political conflict, should be analysed to be handled properly.

1.3 Overview

This paper is divided into two sections. In the first I will analyse diplomatic assurances from a judicial perspective. The starting-point is, since this is a paper in international *law*, thus, a legal analysis. To be able to do this, I start out with a brief discussion about terrorism and the international legal framework. After that, I continue with a more comprehensive outlook on the principle of *non-refoulement*.

The main focus here is on the relevant sources and instruments where this principle is to be found.

After that has been established, I turn to a discussion about how this principle is under attack from different actors. From having been considered absolute, it has now started to erode. Especially due to the fact that many states consider it necessary to resort to extreme measures to combat terrorism. One such is diplomatic assurances. In the following part, I elaborate on this method and analyse its legal implications. Could it be seen as a useful tool for striking a balance between state security and human rights, or, should it, as some argue, be strictly prohibited by international law?

In the last part of the first section, I analyse whether a systematic use of diplomatic assurances might be a way to create a parallel set of norms, and because of this, undermine *non-refoulement*. Could it be that this absolute provision only covers some people and that the alleged terrorists are excluded? If the answer is yes, what are the legal implications for the system of norms that prohibits *refoulement*?

This is where the next section overlaps and begins. This section centres on the political background of terrorism and, in particular, states' reactions to it. The assumption is that this section should be the context where the undermining of *non-refoulement* could be further analysed and dissected. Section two is at once a background, explaining how this development has been possible and what has been the force behind it, and an analysis of how the reactions to terrorism risk enhancing and increasing the conflict. The evaporation of *non-refoulement* is an illustrating example of how state security takes precedence over human rights.

In the first part of the second section, I describe Chantal Mouffe's theory of agonism. This is the theory with the least connection to diplomatic assurances and *non-refoulement*. The reason why Mouffe is important is because she offers an explanation to how the Western political systems have failed to acknowledge terrorism politically. This is a fundamental understanding, for later being able to grasp how diplomatic assurances could be seen as a part of what she describes as a widening gap between different collectives and a moralisation of the political.

In the next part, I focus on Andreas Behnke's application of Carl Schmitt's theory of the partisan as a subject that escalates conflicts, on today's global terrorists. Because both

Behnke's and Mouffe's theories emanate from Schmitt, and Behnke uses the same conceptual framework as Mouffe, his discussion could be described as somewhat of an operationalisation of Mouffe's theory of agonism. Through the analysis of the terrorist as a partisan, he offers an explanation of how the GWOt is constantly present, even when terrorism is discussed in legal and criminal terms.

The third part of the second section deals with Gregor Noll's application of the same idea on the partisan. His conclusions are similar to Behnke's, but he also shows how this development takes place in a context where the law is re-politicised and politics re-mystified. This is closely related to Mouffe's description of the moralisation of the political. The use of diplomatic assurances have to, applying Noll's theory to the first section of this paper, be understood as a result of political interests. These interests are affected by a mystified idea about terrorism. Moreover, Noll argues that this might, as described by Giorgio Agamben, lead to a permanent state of emergency, since the GWOt in this context is indefinite.

The fourth theory I use is the theory of securitisation. The basic assumption is that certain issues can be removed from the normal course of politics, to so called "high politics", through the act of securitisation. This, too, could be described as an operationalisation of the previous theories, since it tries to practically explain how a particular actor can frame a particular subject as securitised, and, by this, show how the undermining of *non-refoulement* is a natural result of the securitisation of terrorism.

Lastly, I follow Noll's thought on how the undermining of international law is no longer an exception, but perhaps the norm, and turn to a discussion about the state of emergency. Firstly, I try to show the connection between the theory of securitisation and Carl Schmitt's idea about the state of emergency. Subsequently, I conclude with Giorgio Agamben's critique of Schmitt. Agamben, whose starting point also is Schmitt, claims that Schmitt was right in his assumption that the state of emergency is a necessary tool for protecting the political system, and, as such, what constitutes the foundation for this system. However, according to Agamben, the state of emergency is becoming the norm instead of the exception. In the moralised conflict Mouffe describes, or the re-mystified politics that Noll distinguishes, the GWOt has no end. Therefore, it is probable that the state of emergency becomes permanent, legitimising

a de-humanisation of everyone not included in the community.

This is where, in the last part of this paper, the two sections finally, and most intensely, overlap. A systematic use of diplomatic assurances, together with all other measures undermining human rights, is a major part of the creation of a parallel legal and political system, offering different rights to different people. Some people, the alleged terrorist, are deprived of all their rights and permanently de-humanised. The problem with diplomatic assurances is, thus, not only their legal flaws, but most severe is how they increase the antagonism.

Section I – judicial analysis

2 Relevant laws for terrorism

The legal system of norms regarding terrorism is rather complex. There is no universally accepted definition of the concept and there are a wide variety of approaches to how it best should be dealt with. States are, to a certain extent, limited in how to prevent criminality. All states guided by the rule of law have regulations that restrict how the police, attorneys and courts are allowed to work. In addition to the general restrictions, there are certain crimes that can be particularly hard to prevent and investigate with normal procedures. Terrorism is one such, and the desire to create a special regime of laws and exclusions from existing norms can be irresistible. However, the risk is that this regime will collide with existing norms, especially human rights law (HRL). Furthermore, because of the political nature of terrorism, a creation of particular rules and exclusions might give the perpetrators the impression that they are political offenders rather than criminal. Thus, this kind of legislation runs the risk of legitimising what it strives to prevent.²

2.1 International Conventions

On the international level, terrorism has traditionally been regulated by prohibiting particular acts, such as hijacking of airplanes and taking hostages.³ But what distinguish terrorism from other kinds of criminality are not necessarily the methods,

² Warbrick, Collin, “The European Response to Terrorism in an Age of Human Rights”, in *European Journal of International Law*, 2004, Vol. 15, No. 5, p. 989.

³ See Bruin, Rene and Wouters, Kees, ‘Terrorism and the non-derogability of *non-refoulement*’, in *International Journal of Refugee Law*, 2003, Vol. 15, No. 1, p. 14, for a complete list.

but rather the intent (the *mens rea*). The acts are committed for a certain reason, which, of course, can differ, but trying to find one mutually agreed upon definition of this subjective prerequisite has proven to be very difficult.⁴ This is the reason why this more limited approach, which has criminalised one act at the time, has been the chosen option for the time being. The problem with this system is that states have ratified different treaties and implemented them in different ways. With no general definition, it has been very hard to fight international terrorism judicially, in part because of the lack of grounds for extradition and prosecution. But this judicial problem of finding a legal definition could also be seen as a symbol of how terrorism is perceived: because of the political nature of the issue, the barriers to reach a consensus are enormous.

The biggest threshold has been how to distinguish terrorism from legitimate resistance and freedom fighters. If terrorism is defined too broadly, it has been argued that the right to oppose oppression would be undermined. Whether acts of violence are legitimate or whether they are acts of terrorism ultimately lies in the eye of the beholder: “one man’s terrorist is another man’s freedom fighter”. Another controversial issue in agreeing upon a definition on terrorism has been whether state terrorism should be included or not. Whereas some have argued that this is just as important as preventing terrorism from non-state actors, others have claimed that the two should not be mixed up and that what would fall under the concept of state terrorism is already prohibited in other legal instruments.⁵

However, following the attacks of September 11, there seems to have been an increased effort to change the perspective and a will to come up with a generic definition of terrorist crimes. Cooperation has also increased in criminal law matters in general, which, too, helps in facilitating the impeachment of terrorists.⁶ Thanks to treaties such as the Convention for the Suppression of the Financing of Terrorism and the EU Framework Decision on Combating Terrorism, a more useful, but still limited, judicial definition now seems to be at hand.⁷ The common denominators of these

⁴ For a further description of this process, see Saul, Ben, “Attempts to define Terrorism in international law”, in *Netherlands International Law Review*, 2005, Vol 52 No. 1.

⁵ Higgins, Rosalyn, ‘The general international law of terrorism’, in Higgins, Rosalyn and Flory, Maurice (eds), 1997, *Terrorism and international law*, London: Routledge, pp. 14f.

⁶ One such example is the EU Framework Decision on the European Arrest Warrant, June 13, 2002.

⁷ International Convention for the Suppression of the Financing of Terrorism, article 2; and EU

definitions are that they refer to, (1) certain expressed acts that, (2) must be committed with a special intent, *dolus specialis*, for the act to amount to terrorism.⁸ Antonio Casese even argues that a universally accepted definition of terrorism exists in international law today.⁹ This is, however, not a very common understanding. Nevertheless, the international community has definitely strengthened its effort to combat terrorism as a criminal offence.¹⁰

2.2 UN Security Council Resolutions

There have been a number of resolutions stemming from the United Nations Security Council regarding international terrorism. The majority have focused on recommendations and information, so called soft law instruments, but some have also included state obligations, i.e. hard law. According to the UN Charter, articles 25 and 48(1), the Security Council has the right to adopt legally binding decisions. These decisions have traditionally been limited to particular events, both geographically and in time. Consequently, the Security Council has previously not been a law-making institution, in the sense that they introduced new universally binding norms.¹¹

However, with resolution 1373¹², the Security Council could be said to have created new precedence. Paul Czasz describes the effects of the resolution as follows:

[A]s resolution 1373, while inspired by the attacks of September 11, 2001, is not specifically related to them (though they are mentioned in the preamble) and lacks any explicit or implicit time limitation, a significant portion of the resolution can be said to establish new binding rules of international law – rather than mere commands relating to a particular situation – and, moreover, even creates a mechanism for monitoring compliance with them.¹³

Thus, resolution 1373 includes internationally binding norms that regulates how states *shall* combat terrorism. What is highly problematic, though, is the lack of a

Framework decision on Combating Terrorism, article 1.

⁸ In the Convention for the Suppression on the Financing of Terrorism these are: (1) seriously intimidating a population; or (2) unduly compelling a Government or international organisation to perform or abstain from performing any act. The EU Framework Decision also adds: or (3) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

⁹ Casese, Antonio, 2005, *International Law*, Second Edition, Oxford: Oxford University Press, p. 449, referring to UN GA res. 49/60.

¹⁰ Bruin and Wouters, 2003, p. 6.

¹¹ Szasz, Paul, “The Security Council starts legislating”, in *The American Journal of International Law*, 2002, Vol. 96, No. 4, p. 901.

¹² UN SC res. 1373, September 28, 2001.

¹³ Szasz, 2002, p. 902.

comprehensive definition of terrorism. Nowhere in the resolution is this to be found and neither in any other of the resolutions that concerns terrorism.¹⁴ Obliging states to take action against something that is not defined clearly encourages complications. Firstly, states may feel compelled to interpret the term very inclusively in order to uphold their obligations. Secondly, this could be exploited as a good excuse to strike down on political opponents and other groups by allowing for states themselves to define terrorism.

2.3 The Rome Statute of the International Criminal Court

The Rome Statute is the founding document of the International Criminal Court (ICC). In this treaty, the jurisdiction for the court is determined. It contains four categories of crimes¹⁵, whereof terrorism is not explicitly expressed. Nevertheless, many have argued that terrorism often could fall under the category crimes against humanity, depending of the severity of the terrorist act.¹⁶ To amount to crimes against humanity the act has to be directed at a civilian population, be part of a widespread or systematic attack and the perpetrator has to be aware that his or her act is a part of this complex of attacks. An important notion is that the act could be *either* widespread or systematic.

The last of the criteria, the subjective, can be hard to prove. It is not enough with a criminal intent, knowledge about the act itself; the awareness has to include a sense of how this act constitutes a part of the overall context.¹⁷ Roberta Arnold, however, argues that the nature of terrorism as such necessarily promote a particular policy, and, therefore, should be rather easy to fit within the subjective prerequisite.¹⁸ This overall policy does not have to be promoted by a state; it is enough that the actor is

¹⁴ Such as SC res 1456, January 20, 2003.

¹⁵ Genocide, crimes against humanity, war crimes and aggression, Rome Statute, article 5.

¹⁶ A terrorist act could, moreover, constitute a war crime in the event of an armed conflict. See n24 for a discussion about *non-refoulement* in armed conflicts.

¹⁷ There are a vast number of case law discussing this mental element of the crime, especially from the ICTY and ICTR. For a further analysis, see, for instance, van den Herik, Larissa J., 2005, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden: Martinus Nijhoff Publishers.

¹⁸ Arnold, Roberta, 'Terrorism as a Crime Against Humanity under the ICC Statute', in Nesi, Guisepppe (ed.), 2006, *International Cooperation in Counter-terrorism. The United Nations and Regional Organisations in the Fight Against Terrorism*, Cornwall: MPG Book Ltd, p. 126.

powerful enough to exercise acts that are widespread or systematic.¹⁹

It has also been questioned whether one single terrorist attack is sufficient to amount to being widespread or systematic. How this requirement should be interpreted is not obvious at all, but one way of arguing is that most international terrorist attacks should be seen as a part of an ongoing terrorist campaign; especially the ones that can be attributed to Al Qaeda. How close this nexus between different terrorist acts have to be, to be regarded as a policy in legal terms, is yet to be decided.²⁰ It could also be argued that, for instance, the attacks of 9/11 consisted of many attacks at different locations, and therefore widespread enough to be considered a crime against humanity in itself.²¹

Consequently, one or more terrorist attacks could constitute a crime against humanity. As such, the perpetrator can be prosecuted before the ICC, if the responsible state is unable or unwilling to do so.²²

2.4 Is a legal definition of terrorism necessary?

It is important to stress that a legal definition of terrorism does not in itself prevent the problems. To compare with national legislation, it is rather common that politicians adopt new laws to demonstrate how concerned they are. Law making is usually the easiest way to convince the public that the problem is being dealt with. The trouble is that the legal framework is merely words until it is implemented and used in practice. However, when it comes to regulating terrorism at the international level, the difficulty has not so much been to take action, but rather what action that should be taken. For this reason, a legal definition could affect the manners in which terrorism is perceived. It would not just define it as criminal matter, but also reduce the large grey legal areas that exist today. Furthermore, a non-existing definition leaves it open to the powerful states to more or less do as they please.²³

Even though close legal cooperation exists and there seems to be a consensus that

¹⁹, Arnold, 2006, p. 125.

²⁰ This is the same kind of reasoning as presented in the theory of accumulation of events, which has been used as an argument for pre-emptive self-defence.

²¹ Arnold, 2006, p. 125.

²² Rome Statute of the International Criminal Court, article 17(1).

²³ Sorel, Jean-Marc, "Some Questions About The Definition Of Terrorism And The Fight Against Its Financing", in *European Journal of International Law*, 2003, Vol. 14, No. 2.

terrorist crimes have to be prevented, there is still an ambiguity on how this should be done. For many states, the judicial methods have been viewed as too limited and too restrictive. First of all, terrorism has been seen as a military threat, requiring armed reprisals and attacks. Secondly, a variety of judicial amendments and changes have been introduced. Both these tendencies have been heavily criticized by human rights advocates, politicians, scholars and civil society groups and organisations for interfering with fundamental human rights.

This paper focuses on the legal implications that have arisen due to states' attempts to maintain security and the consequences this has had on human rights; or more specifically, on the principle of *non-refoulement* and the risk of undermining this principle by the use of diplomatic assurances. Nevertheless, the war rhetoric and claims that the struggle against terrorism should be perceived as an armed conflict is a most important background for understanding the legal situation.

3 The principle of *non-refoulement* – legal framework²⁴

The principle of *non-refoulement* is recognized in a number of important human right treaties. It is also considered to be a part of international customary law. The scope of the protection differs slightly in the different conventions, but the most fundamental meaning of the principle protects a person from being transferred, in any manner whatsoever, to a country where he or she could risk being subjected to torture. This protection is absolute, which means that if the risk is real, no exceptions are allowed. Thus, whether the person in question is a security risk or not does not matter.

However, the burden of proving whether there is a real risk of subjection to torture lies with the returnee. Proving what might happen in the future to a particular person if transferred to another country is difficult as it is a hypothetical question. But once

²⁴ Due to the necessity of limitations, I have excluded from this paper the discussion about *non-refoulement* in armed conflicts. To keep it short, in an armed conflict International Humanitarian Law (*jus in bello*) regulates the behaviour of the parties to the conflict. However, Human Rights Law is still relevant and the risk of a conflict between the two systems of norms is plausible. There is an extensive debate how to solve this, but as a starting point, IHL should prevail due to *lex specialis*. Nevertheless, fundamental human rights, such as the principle of *non-refoulement*, are non-derogable even in situations of armed conflicts. For a further discussion about the relation between the two, see Provost, René, 2002, *International Human Right and Humanitarian Law*, Cambridge: Cambridge University Press. For a further discussion about *non-refoulement* in IHL, see Droege, Cordula, 2008, "Transfers detainees: legal framework, *non-refoulement* and contemporary challenges", in *International Review of the Red Cross*, Vol. 90.

this has been done,

the burden falls on the state to show a cessation of circumstances which caused the person to seek asylum. The issue is thus not a temporary change in the State concerned but a genuine and lasting one there. People should not be forcibly returned under some special individual arrangement. What should be required is that there has been a proper and overall change in the State concerned.²⁵

Thus, according to Goodwin-Gill and Husain, finding guidance to their interpretation in article 1C of the Refugee Convention, if it has been established that the risk is real, the reasons for this risk have to be removed properly. The person cannot, therefore, be transferred until a genuine and lasting change of circumstances has occurred.²⁶

How the transfer is conducted is irrelevant. It has been argued that extradition would be excluded from the prohibition, at least regarding the Refugee Convention. But from the wordings of this convention it is quite clear that this could not be true. Article 33 reads: ‘No Contracting State shall expel or return (‘refouler’) a refugee in *any manner whatsoever*’ (emphasis added). Thus, this means that *any* kind of transfer is prohibited, including extradition. Moreover, in the Convention against Torture, extradition is expressly forbidden.²⁷

3.1 Refugee Law - the 1951 Convention relating to the Status of Refugees

Since many of the cases regarding the use of diplomatic assurances have included individuals claiming refugee status, I consider this to be a relevant starting-point. *Non-refoulement* does not only concern refugees and asylum seekers. However, these will most likely suffer the worst consequences if their protection from *refoulement* is undermined. The state’s obligation to provide protection to refugees, that fulfils the requirements of the Convention are, from a legal perspective, quite clear. Nevertheless, when the focus in world politics is increasingly pointed at state security, refugees and asylum seekers risk being labelled as security risks, and therefore their protection is forfeited in the name of security.²⁸ For this reason, migration has been

²⁵ *Non-Refoulement Under Threat*, Proceedings of a Seminar Held Jointly By The Redress Trust (Redress) And The Immigration Law Practitioners' Association (ILPA), May 16, 2006, p. 11.

²⁶ Whether diplomatic assurances could be considered as such or not is what this paper is all about. See below. Article 1C in the 1951 Refugee Convention regulates cessation of refugee status, stating that protection shall be offered as long as the reasons for it remain.

²⁷ For a more comprehensive discussion about *non-refoulement* and extradition, see Lauterpacht and Bethlehem in Fellner, Türk and Nicholson (ed), 2003, *Refugee Protection in International Law*, Cambridge: Cambridge University Press, pp. 122ff.

²⁸ See, for instance SC res. 1373. But also see the declaration annexed to SC res. 1456, adopted on

articulated as a security risk, and, perhaps, securitised.²⁹

3.1.1 Article 33

Article 33 prohibits *refoulement*. It offers protection that is at the same time more restricted and wider than *non-refoulement* in most other legal documents. Firstly, the convention's objective is to provide protection to those who fulfil the criteria for refugee status.³⁰ Secondly, in 33(2) an explicit exemption is included, stating that in the assessment whether protection should be granted or not, the state should also take into consideration the possible security risks. It reads: "The benefit of the present provision [article 33(1)] 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"³¹. This implies that a weighing is intended between the refugee's need of protection and the state's security.

However, the scope of the protection is also wider. The state is prohibited to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on accounts of the same grounds as refugee status should be offered.³² There are many parts of the article that can be analysed, but for the purpose of this paper, what is important is the connection to refugee status. There is not enough space for an elaboration on that subject here, but to conclude, the protection offered has been described by Guy S. Goodwin-Gill as follows:

Non-refoulement extends in principle, therefore, to every individual who has a well-founded fear of persecution, or where there are substantial grounds for believing that her or she would be in danger of torture, inhuman or degrading treatment or punishment if returned to a particular country.³³

Of great importance for the exclusion clause in article 33(2) is how to balance the

January 20, 2003, where references to HRL and refugee law are expressed.

²⁹ Boswell Christina, 2007, *The securitisation of migration: a risky strategy for European States*, Danish Institute for International Studies, <http://www.ciaonet.org/pbei/diis/diis9636/index.html> (161009). See part 2 of this paper for an elaboration on the theory of securitisation.

³⁰ See the Preamble of the Refugee Convention.

³¹ Refugee Convention, article 33(2).

³² Article 33 (1). The five relevant grounds identified in the Convention are: race, religion, nationality, membership of a particular social group and political opinion.

³³ Goodwin-Gill, 2007, *The refugee in international law*, third edition, Oxford: Oxford University Press, p. 234.

security risks to the state against the risk of torture to the individual. According to Goodwin-Gill, the nature of the security threat has to be determined individually in each and every case. Therefore, the state cannot decide that suspicion of, or a conviction of a particular offence or activity *as such* would be enough to exclude the person from protection. In refugee law, the international standards and the humanitarian intent require an individual assessment.³⁴ For this reason, the seriousness of the security threat has to stand in proportion to the risk for the person intended to be returned.³⁵

This view is, however, not unquestioned. State practice as well as some doctrinal works implies that no proportionality test should be included.³⁶ This means that if the requirements of 33(2) are fulfilled, then a transfer of the person cannot be considered *refouler*. How the two paragraphs in article 33 are related and should be interpreted is thus not clear. Whether or not the exception in 33(2) is absolute or not, the practice of some states to use particular crimes as an exclusion clause is not in accordance with the requirement to always make an *individual* assessment.³⁷

The protection from *refoulement* also includes a responsibility not to transfer a person to a country if there is a risk of a subsequent transfer to another unsafe country. Thus, article 33 prohibits indirect removal, or “chain *refoulement*”, where a state otherwise would only be responsible for what would happen in the first receiving country.³⁸

3.1.2 Article 1F

Article 33 has to be read in conjunction with article 1F. 1F stipulates that a person, for a few particular reasons, could be excluded from refugee status even though he or she otherwise fulfils the conditions. The underlying assumption is that if a person has committed any of the expressed acts, he or she is not worthy of protection under the Refugee Convention. As with any exception to protection for humanitarian reasons, it

³⁴ Lauterpacht and Bethlehem, 2003, p. 118.

³⁵ Goodwin-Gill, 2007, pp. 239-241.

³⁶ According to Lauterpacht, Greenwood, Lee and Oppenheimer, this interpretation also follows from the drafting history (the Travaux préparatoires), Lauterpacht et al (eds.), 2007, *International Law Reports*, Volume 131, Cambridge: Cambridge University Press, pp. 402-406.

³⁷ This would also seem to show that the EU’s use of “Safe Third Countries”, where asylum-seekers from those selected countries are automatically returned without an individual assessment, is violating international refugee law. See *TI v. UK*, n1 above.

³⁸ Lauterpacht and Bethlehem, 2003, p. 122. See also the German Constitutional Court in its decision of May 14, 1996 (2 BvR 1938/93 and 2 BvR 2315/93).

has to be interpreted narrowly and the “gravity of the offence in question [should be] weighed against the consequences of exclusion”³⁹. It is particularly 1F(b) and 1F(c) that are of importance in terrorism cases, even though a terrorist act could amount to a war crime or a crime against humanity, which are two of the grounds for exclusion under 1F(a). However, one major difference between article 1F and article 33 is that whereas 33(2) is supposed to exclude future threats, 1F is about limiting the protection for reasons of actions in the past. 1F should therefore not be used as a mean for state security, but only in cases where the committed acts are so grave that the person does not deserve refugee protection.

Nevertheless, the exclusion clause has been revitalized because of the GWoT. In Resolution 1373, the Security Council stated that all states should ensure that terrorists do not abuse refugee status. The exclusion from refugee status can be devastating for the person seeking protection. For instance, the Swedish state referred to 1F when concluding that Agiza and El Zari should not be protected by the Refugee convention.⁴⁰ 1F(b) excludes anyone that has committed a serious non-political crime outside the country of refuge before applying for refugee status. Whether terrorism should be considered as political acts or not is a matter of uncountable discussions, but most states argue that this is not so.⁴¹ Indeed, some states have explicitly declared that terrorism should be a reason for denial of refugee status.⁴²

This “mechanistic approach” is also problematic, since there is no room for an individual assessment. This is, as mentioned above, a corner stone in refugee law. Thus, even though a person has committed a terrorist crime, this should not be enough to be excluded as such. Each case has to be reviewed on its own terms and with all relevant information taken into consideration.⁴³ The individual assessment is even more important in the situation where denial is based solely on membership of an alleged terrorist organisation. Membership cannot, on its own, be the reason for denial of refugee status.⁴⁴

³⁹ UNHCR *Guidelines No. 5*, “Exclusion”, para. 24.

⁴⁰ The *Agiza* and *El Zari* cases will be discussed more thoroughly below.

⁴¹ For a further discussion about the problems of defining terrorism as non-political, see section two of this paper.

⁴² Goodwin-Gill, 2007, pp. 181f.

⁴³ Goodwin-Gill, 2007, pp. 183f.

⁴⁴ Gilbert, Geoff, “Exclusion (Article 1F)”, in Feller, Turk and Nicholsson (eds), 2003, *Refugee*

Equally problematic is the question of where and when the crime should have been committed. It is absolutely clear from the wording of the article that it only applies to crimes committed before refugee status was granted and outside the country of refuge. However, there are examples where states have considered it to be in accordance with 1F to not only deny, but withdraw refugee status for a crime committed after protection was given.⁴⁵

Article 1F(c) denies refugee status for anyone who is “guilty of acts contrary to the purpose of and principles of the United Nations”⁴⁶. Once again, whether a particular terrorist act falls under this provision or not has to be determined in the case at hand, and not by a mechanical approach. Thus, the Security Council resolution 1373, stating that acts, methods and practices of terrorism are contrary to the purpose and principles of the United Nations, is not in accordance with refugee law. Another problem with this resolution, which was mentioned above, is that while it requires states not to provide refugee status for anyone engaged in terrorist activities, there is no general definition of what these activities consist of. The lack of a generic definition makes this provision extremely vague and gives the state a wide margin of appreciation. As Goodwin-Gill notes, “[a]rticle 1F(c) of the Convention is potentially very wide”⁴⁷. But he continues:

While ‘terrorism’ may indeed be contrary to the purpose and principle of the United Nations and therefore a basis for exclusion under article 1F(c), conformity with international obligations requires that decisions to exclude or subsequently to annul a decision of refugee status be taken in accordance with appropriate procedural guarantees. Article 1F(c) ought only to be applied, therefore, when there are serious reasons to consider that the individual concerned has committed an offence specifically identified by the international community as one which must be addressed in the fight against terrorism, and only by way of a procedure conforming to due process and the State’s obligation generally in international law.⁴⁸

Article 1F thus deprives a person of the protection that otherwise should have been granted. However, what the state should do with the person is not mentioned in the article. He or she is still protected by the principle of *non-refoulement*. This means that even if the state can refuse any additional responsibility, it cannot return or expel

Protection in International Law, UNHCR’s Global Consultations on International Protection, Cambridge: Cambridge University Press, p. 470.

⁴⁵ See, for instance the case in SIAC, *KK v. The Secretary of the State for the Home Department*, 2004, UKIAT 00101. See also Goodwin-Gill, 2007, p. 171 and pp. 191f.

⁴⁶ Refugee Convention, art. 1F(c).

⁴⁷ Goodwin-Gill, 2007, p. 190.

⁴⁸ Goodwin-Gill, 2007, p. 197.

the person. Consequently, the alleged terrorist has the right to stay if there is a real risk that he or she may be subjected to torture, and even if the Refugee Convention does not apply, the person is still protected by all the complementary protection that can be found in HRL in general.

3.2 Human Rights Law - Convention against Torture

The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment also contains an explicit prohibition against *refoulement*. It is ratified by a great number of states and is thus an important treaty in the international law complex. Article 1 of the convention contains a definition of torture and in article 3 there is an expressed prohibition to transfer a person to a country where he or she would be in danger of being subjected to torture. For the ban of torture to function properly, no state can thus circumvent it by transferring a person to a country less eager to respect its international obligations.⁴⁹

The Committee against Torture (CAT) has made clear that the protection offered by the convention is absolute. Thus, no exceptions what so ever are to be made if the requirements in article 3 are fulfilled. This means that the question of state security is irrelevant.⁵⁰

3.3 International Covenant on Civil and Political Rights

ICCPR, together with ICESCR, are probably the most important human rights treaties. ICCPR also provides a prohibition on torture in article 7. The covenant does not, however, contain an explicit provision of *non-refoulement*, but according to The Human Rights Committee (HRC), the *non-refoulement* obligation is inherent in article 7.⁵¹ The Committee has also stated that the protection should be indirect, so that “chain *refoulement*” is not allowed.⁵²

3.4 European Convention on Human Rights

As in the ICCPR, the ECHR contains a ban on torture, in article 3, but it has no article on *non-refoulement*. This prohibition could however be found in the case law of the

⁴⁹ *Still at risk*, Report by Human Right Watch, 2005, p. 8.

⁵⁰ *Tapia Paez v. Sweden*, Communication No. 39/1996, April 28, 1997.

⁵¹ UN Human Rights Committee General Comment No. 20 (1992).

⁵² UN human Rights Committee General Comment No. 31 (2004).

European Court of Human Rights (ECtHR). In *Chahal v. United Kingdom*⁵³ the court concluded that *non-refoulement* is an integral part of article 3. The court also made clear that the prohibition is absolute. Hence, there is no room left for proportionality or reasoning about whether the person is a security risk. In the same judgement, the court also stated that the protection is equally valid if the threat of torture emanates from non-state agents, and that it is not enough that the assuring state acts in good faith in terms of securing the person, if it is not actually capable of providing effective protection. The necessary assessment concerns whether the risk is real or not.

3.5 Customary international law

The widespread ban on torture in international treaty law and the practice of states to regard torture as unacceptable has formed a compelling, *jus cogens*, rule of international customary law. This means that all states are bound by the ban on torture whether they have signed and ratified relevant conventions or not. It is also a crime of universal jurisdiction and has an *erga omnes* character. This means that all states have not just an obligation to refrain from conducting it, they are also obliged to prevent torture wherever it is committed.

Because of this very strong and undisputed norm, the prohibition against *non-refoulement* is also considered forbidden under international customary law. Like the courts and committees have argued (as mentioned above), the prohibition against torture should not be able to be circumvented by outsourcing torture to other states. It has even been argued that *non-refoulement* too should be considered a *jus cogens* norm.⁵⁴ However, this does not seem to be the most common understanding today.

3.6 Limitation and derogation

Human Rights are not only questioned from a theoretical perspective and undermined by state practice. Neither from a judicial point of view are they absolute; they could either be subject to derogations or limitations. Limitations are clearly expressed in the relevant article as to how and under what circumstances this particular right can be limited. It also has to serve a legitimate purpose and be necessary and proportionate in

⁵³ *Chahal v. United Kingdom*, Application No. 70/1995/576/662, November 15, 1996.

⁵⁴ Alain Jean, "The Jus Cogens Nature of Nonrefoulement", in *International Journal of Refugee Law*, 2001, vol. 13.

relation to that purpose. Derogation, on the other hand, is a temporary suspension of a particular obligation. For instance, a state might find it necessary to derogate from the prohibition on arbitrary detention and arrestment, in case of a public emergency.⁵⁵ This is not prohibited *per se*, but there are several conditions that have to be fulfilled for this to be valid.⁵⁶

However, some human rights are non-derogable.⁵⁷ All *jus cogens* norms are of such character, but it could also be explicitly expressed in the relevant article. The absolute character of *non-refoulement* against torture, as described above, has been affirmed by CAT, ECtHR and HRC. Thus, the only expressed limitation to *non-refoulement* can be found in the Refugee Convention. This could, in some cases, mean that a transfer of a person to a country where he or she might face persecution would be in accordance with international law. Then again, since the protection against *non-refoulement* where the person is risking to be subjected to torture, is absolute according to HRL, *non-refoulement* in those situations is indeed non-derogable and without exclusions.⁵⁸

4 But under attack?

The principle of *non-refoulement* and its validity has been questioned many times. In a refugee law perspective, this has for instance happened in situations of mass refugee influx, i.e. large-scale movements of people crossing the border to a country to seek protection.⁵⁹ States have in these cases argued that rejection at the border would not amount to *refoulement*. This claim has, however, always been opposed by UNHCR and other actors.⁶⁰ As mentioned above, neither is it a proper understanding that extradition would be excluded from the prohibition against *refoulement*.

⁵⁵ ICCPR, article 9.

⁵⁶ ICCPR, article 4.

⁵⁷ Lemmens, P, 'Respecting Human Rights in the Fight against Terrorism', in Fijnaut, Cyrille, Wouters, Jan and Naert, Frederik (eds.), 2004, *Legal Instrument in the Fight Against International Terrorism, A Transatlantic Dialogue*, Leiden: Martinus Nijhoff Publishers.

⁵⁸ Bruin and Wouters, 2003. See also *Promotion and protection of human rights. Protection of human rights and fundamental freedoms while countering terrorism*, report by The UN High Commissioner for Human Rights, E/CN.4/2005/103.

⁵⁹ Two illustrating examples are the 1981 US Haitian interdiction programme and the Turkish threat to close its borders for Iraqi Kurds 1991. See Goodwin-Gill, 2007, pp. 246ff and pp. 242f.

⁶⁰ See UNHCR: *The scope of international protection in mass influx*, <http://www.unhcr.org/3ae68cc018.html> (visited 21/10/09) and Hathaway, James, 2005, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, p. 360.

4.1 A balancing act

Nevertheless, as a result of perceived terrorist threats, a number of governments have made reservations to the absolute nature of *non-refoulement*. They claim that there is a need for exceptions or a more flexible interpretation of the prohibition, taking state security into consideration. What they argue is that since the government is responsible for the security of its citizens, this sometimes has to prevail over the rights of the individual; particularly due to the fact that security also could be understood as a human right. From this perspective, different kinds of human rights sometimes collide and the only solution is to balance them against each other.

These arguments were presented before ECtHR in the cases of *Saadi*⁶¹ and *Ramzy*⁶². Even though the court clearly rejected this view, it has provided the governments with arguments by referring to terrorism as a violation of human rights.⁶³ States have also, as aforementioned, claimed that this would be in accordance with their obligations put on them by the Security Council in resolutions such as 1373.⁶⁴ Thus, there seem to be a tendency towards arguing that the absolute prohibition has to be made relative, so that states can ensure their citizens protection. This view has also been supported by a Working document by the European Commission claiming that there are reasons to change the nature of *non-refoulement* and that a balancing act might be necessary.⁶⁵

4.2 National case law

The standpoint that *non-refoulement* has to be weighed against other interests has in most cases been rejected by courts. However, there are a few, important, judgements demonstrating that the courts too have considered it necessary to review the character of the prohibition. The most discussed is the *Suresh*⁶⁶ case from the Supreme Court in Canada. In this judgment, the court concluded that the individual's human rights have to be weighed against other interests and obligations of the state. The court stated: "We do not exclude the possibility that in exceptional circumstances, deportation to

⁶¹ *Saadi v. Italy*, Application No. 37201/06, February 28, 2008.

⁶² *Ramzy v. Netherlands*, Application No. 25424/05, May 27, 2008.

⁶³ *Ireland v. United Kingdom*, ECHR, January 18, 1978, para. 149. See also Warbrick, 2004, p. 992.

⁶⁴ For instance, Sweden in the *Agiza* case, CAT/C/34/D/233/2003, para. 4.9.

⁶⁵ "The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments" (COM (2001) 743 final).

⁶⁶ *Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada*, 2002, SCC 1, File No. 27790, January 11, 2002. SIAC's position will be discussed more thoroughly below.

face torture might be justified”⁶⁷. The expression “exceptional circumstances” indicates that exclusions from the protection should only be used when absolutely necessary. Nonetheless, it is a distinct change of reasoning compared to the understanding that the prohibition is absolute.

The absolute nature of *non-refoulement* has also been challenged by the United Kingdom Special Immigration Appeals Commission (SIAC), for example in a decision from 2007.⁶⁸ SIAC herein criticized the *Chahal* case for not allowing a more flexible interpretation of the prohibition.

Even though these are judgements from national courts, they are important because of how the courts have reasoned and very illustrating examples of how courts too are affected by general changes in the public opinion. Furthermore, national case law is an important source of information when refugee and human rights issues are analysed. The judgements do not have any kind of international precedence and are not directly affecting international law, but they can, at least indirectly, affect the *opinion juris*. Moreover, most legal conflicts are solved on a national level, and this case law usually reflects the status of human rights in general.

4.3 What to do?

Why is it, then, that states react like this and start questioning the absolute character of *non-refoulement*? One does not need a law-degree to answer that rather naïve question: terrorism *is* a security threat in many states and states *do* have a responsibility to protect their citizens.⁶⁹ Human rights are not rights for an abstract idea of the individual, but for real and existing persons. Thus, human rights are worth nothing if those persons are dead. Or as Michael Ignatieff puts it: “A democracy has no more important purpose than the protection of its members, and rights exists to safeguard that purpose. Civil liberty, the chief justice of the U.S. Supreme Court has written, means the liberty of a citizen, not the abstract liberty of an individual in the

⁶⁷ *Suresh*, para 78.

⁶⁸ *DD and AS v. The Secretary of the State for the Home Department*, SC/42 and 50/2005, April 27, 2007. This decision was, however, appealed and rejected by the court of appeal. See below.

⁶⁹ Lemmens argues that this obligation can be derived from a number of documents, by for instance the UN General Assembly, HRC and the Council of Europe. Lemmens, 2004, p. 224.

state of nature”.⁷⁰

4.3.1 *Aut dedere aut judicare*

Therefore, a government has to act if it suspects terrorist activities. However, the question is *how* it should, and could, act. A starting-point is the principle of *aut dedere aut judicare*, extradite or prosecute. A state that harbours a fugitive should either prosecute or surrender the fugitive to the state where he or she is wanted. The preferred option is usually to extradite the person since in most situations it is easier and better to investigate and prosecute the act in the country where it was committed.⁷¹

However, the principle of *non-refoulement* sometimes prohibits extradition and in those situations prosecution is the only option.⁷² The problem is that the nature of terrorist activities can make it very complicated to carry out a trial and reach a conviction through normal criminal proceedings. There are a number of problems with indictments of terrorist crimes. Firstly, the lack of an international generic definition makes extradition problematic, since most extradition agreement contains requirements of double criminality and exceptions for political crimes. This means that the activity has to be criminal in both states and that the sending state can refuse to extradite if it considers the crime political. It also obstructs prosecution in the state where the suspect is located, if the activity is criminal in the state that wants the person extradited, but not in the state of refuge. Thus, this state has no grounds to prosecute the person.

Secondly, security threats are necessarily about trying to predict the future, whereas criminal charges are for acts already committed. The person might be suspected to be

⁷⁰ Ignatieff, Michael, 2004, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, p. 2.

⁷¹ This discussion concerns the situation where a person is suspected of a crime in one country but resides in another. This is how the situation might be if the person is accused of terrorism, for example in the *Agiza* case (see below). However, the alleged terrorist might not be accused of any crime, but still considered a safety threat. In those situations, the state have to prosecute or *expel* the person, but this too could be hindered by the obligation not to *refoule*.

⁷² Or, rather, the only realistic option. The government could, of course, do nothing, but this is hardly a good choice. Another alternative that has been tried is so called indefinite detention, i.e. locking the person up without a proper trial and without a specified time limit. This is, however, an infringement of most human rights treaties. Finally, like all suspected, the alleged terrorist could be kept under surveillance by the police, and even though this is how many states act, this is usually not considered as safe enough.

a major threat to security even though no crime has been committed yet, and since prosecution for predicted criminality is not a custom in the rule of law, just being a threat might not be enough.

Thirdly, terrorist crimes can be very hard to prove. Many a times, the evidence is obtained from other states (especially the requesting one) and it usually concerns issues considered to be matters of state security, and for this reason classified information. If this evidence were to be used in normal criminal proceedings it would have to be revealed to the public and this is something that most states could not accept. Thus, in some cases it might both be impossible to prosecute or to extradite the person for prosecution. What, then, should the state do?

5 Diplomatic assurances

5.1 Background

One proposed solution to the problem of respecting the individual's human rights while also maintaining state security has been to obtain so called diplomatic assurances. The idea is that the receiving state assures that the transferred person will not be subjected to torture. This promise or agreement⁷³ is said to remove the risk of torture, and a transfer would therefore not be infringing the prohibition to *refouler*. The decisive factor is if the assurance manages to reduce the risk enough.⁷⁴ For this to be done, something extra must be *added*. All states are bound by the prohibition on torture. If a diplomatic assurance is used to prevent torture, an extra layer of protection must be added on top of the already existing norms.

This method have been used on several occasions, both as a single promise in one particular case, on an ad hoc basis, and in a more systematic way where a kind of agreement between two states regulates future transfers from one state to the other, and wherein the receiving state assures not to torture the people concerned. The second approach is often referred to as memoranda of understanding (MOU).

The practice of seeking assurances is a rather old custom and not a new method invented to manage the terrorist threat. Two illustrating examples are provided by

⁷³ The legal nature of an assurance, whether it should be considered a promise or a legally binding agreement, is discussed below.

⁷⁴ *Soering v. United Kingdom*, Application No. 14038/88, July 7, 1989, para. 98.

Eric Metcalfe.⁷⁵ The first tells about Lord Derby in UK, who, in 1876, refused to allow the extradition of a person wanted for forgery in US, unless the American government would provide assurances that he would only be tried for this offence, and nothing else. The US rejected this request, and thus, the man where never extradited. The second example tells the story of 35 000 Jews that that were transferred from Slovakia to Poland in 1942. Along with the transfer, the Slovakian government asked for a humane and decent treatment of them. This wish was assured by Eichman before the removal. The Slovakian government continuously requested to be able to visit the Polish ghettos to make sure that the Jews were treated in accordance with the assurance. When Eichman, after a few months, finally answered the Slovakian representative, he declined the request and said that most of the Jews where no longer alive.⁷⁶

It is, perhaps, a bit unfair to compare this last example to the assurances issued today. But it does, indeed, illustrate how important it is to judge the validity of the promise or agreement by its context. One cannot claim to have fulfilled one's obligations just by relying on an assurance not to torture; the assurance can only be relied on if there are reasons for that.

5.2 Diplomatic assurances and capital punishment

Diplomatic assurances have often been used in situations where one state, in which death penalty is used, request for the extradition of a person from a state where it has been abolished. However, there are some important differences between assuring not to execute a specific punishment, considered perfectly legal in the receiving state, in a particular situation, and to assure not to torture. Firstly, as mentioned, capital punishment is an acceptable penalty in many parts of the world, whereas torture is strictly forbidden according to more or less all legal systems. There is no ban on the death penalty in international law in contrast to torture. Thus, if there is a suspicion that torture is practised, the receiving government is supposed to promise to refrain from something it is already prohibited to do.

Moreover, no governments ever admit the use of torture. This is something that takes

⁷⁵ Metcalfe, Eric, "The false promise of assurances against torture", *The Justice Journal*, 2009, Vol. 6 No. 1.

⁷⁶ Metcalfe, 2009, pp. 64-65.

place in the dark. Therefore, monitoring the treatment is extremely difficult and the receiving state will most definitely deny any occurrence. Consequently, using diplomatic assurances to avoid torture is very different from agreeing not to execute a death penalty.

5.3 Conducted secretly

As mentioned above, diplomatic assurances are an old custom, but it has been resorted to increasingly because of the GWOt; in particular to enable transfers even though there is a suspicion of torture in the receiving state. However, it is very hard to get to know any details about the assurances and the transfers, since they usually are conducted in secrecy. Torture and removals are seldom discussed openly by states, and when combined with diplomacy the situation turns even more clandestine.

5.3.1 The cases of Agiza and El Zari

An illustrating example is the assurance that Sweden received from Egypt before the deportation of Ahmed Agiza and Mohammed El Zari, wherein Egypt assured that the men's human rights would be respected. This transfer has been widely criticized for a number of reasons. Firstly, the two men were never informed about the accusations against them and had no means to appeal the decision to expel them.⁷⁷ Secondly, the way the transfer was exercised has been criticized both from a Swedish and an international legal perspective for the use of excessive force and the involvement of American CIA agents, but also because of the haste in which the deportation was conducted.⁷⁸ Thirdly, the Swedish government tried its best to prevent the investigation by the journalists which revealed the whole case to the public, by classifying important information and supposedly also by misleading them.⁷⁹ Fourthly, the Swedish government did not admit to the CAT that the men had been

⁷⁷ It is not the first time that Sweden withholds information from asylum seekers about accusations, making it impossible to respond to it. Sweden has been criticized by CAT several times for this. See *Alternative Report to the Human Rights Committee*, report by The Swedish NGO Foundation for Human Rights and The Swedish Helsinki Committee for Human Rights, 2002, p. 7. Furthermore, the lack of a possibility to appeal the government's decision has been considered in breach of international law, due to the fact "that the government could not guarantee impartiality". See Borg, Dominika, 2006, *The War on Terror and the Institution of Human Rights – Can the Two be Combined?*, Working Papers No. 102, Department of Eurasian Studies, Uppsala University, p. 38.

⁷⁸ See *Review of the Enforcement by the Security Police of a Government Decision to Expel Two Egyptian Citizens*, Adjudication of March 22, 2005, by Chief Parliamentary Ombudsman Mats Melin, Registration No. 2169-2004 and CAT/C/34/D/233/2003, p. 34.

⁷⁹ Borg, 2006, p. 43.

tortured, even though Agiza's testimony about having been tortured was part of their own classified report.

Sweden was later declared in breach of its obligation to cooperate with the committee, art. 22, by not revealing all relevant information.⁸⁰ The Swedish government defended this stand by, *inter alia*, arguing that a public release of the information could have led to reprisals against Agiza in Egypt. If this is not an obvious indication that Egypt should not be trusted, one could wonder how low the standards of protection from torture should be.

4.3.2 Diplomacy

These cases will be discussed further below, but the examples clearly show the problems with the lack of information when states resort to diplomatic assurances. This should, however, not come as a surprise. Diplomacy is by nature an art conducted in secret. For this reason, agreements stemming from diplomatic discussions and meetings are difficult to rely on, and from a legal perspective they should not be considered effective safeguards against torture.

Diplomacy is not only secretive. Another important setback when relying on diplomacy for the protection of human rights has to do with its purpose. As described by Human Rights Watch: "Diplomats are often quite candid that their top priority is to ensure friendly relations with other states, sometime at the expense of confronting governments about possible human rights violations, including about breaches of pre-agreed diplomatic assurances"⁸¹. Or, as Agiza's counsel put it before CAT: "Human rights protection is not amenable to diplomacy"⁸². Thus, if the protection of an individual's human rights requires the exposure of acts such as torture in the receiving state, the risk of undermining the friendly relationship between the states might affect the sending state to prioritise a good relation.

⁸⁰ See n64, above. Sweden was also, which is mostly important, declared to have violated the prohibition of *non-refoulement* by returning Agiza to Egypt. See below.

⁸¹ *Still at risk*, p. 19.

⁸² n64, para. 11.15.

5.4 Legal nature

How the assurances are constructed and what they contain differs a lot. It could either be a single assurance for one particular situation, or a more general agreement between two states regulating all removals. As mentioned above, the assurance Sweden obtained from Egypt was limited to the two persons which were about to be transferred just then. The British government has, as an alternative, negotiated with Jordan, Algeria, Lebanon and Libya and concluded so called memorandums of understanding (MOUs), which could be described as a framework agreement stipulating a mutual understanding that human rights shall be respected when a person is transferred from one state to the other.

One important issue is whether diplomatic assurances should be considered a treaty or not, according to international law standards. The reason for this is that if the assurance is determined to be a treaty, it will be legally binding for the parties. On the other hand, the assurance could be considered a mere promise with no legal effects whatsoever.

5.4.1 *The Vienna Convention on the Law of Treaties*

To determine the character of an assurance, we have to turn to the Vienna Convention on the Law of Treaties (VCLT), and the interpretations of the convention in the International Law Commission's Draft Articles⁸³ and in the case law of the International Court of Justice (ICJ)⁸⁴. The decisive element is not the title of the agreement or how it is referred to, but the intent of the parties. If the intent is that the agreement shall be “governed under international law”⁸⁵, it is a legally binding treaty.

Whether diplomatic assurances should be perceived as hard or soft law is debated. For instance, Noll argues that non-binding agreements would be meaningless. As mentioned above, what is decisive is whether the risk of torture is removed or not. According to Noll, this risk assessment is only affected if the assurance is actually binding for the parties.⁸⁶ Otherwise, the transfer is yet another violation of the human

⁸³ Watts, Arthur, 1999, *The International Law Commission, 1949-1998, Volume 2*, Oxford: Oxford University Press, p. 623.

⁸⁴ *New Zealand v. France*, General List No. 59, December 20, 1974, para. 46.

⁸⁵ VCLT, art. 2(1)(a).

⁸⁶ Noll, Gregor, "Diplomatic Assurances and the Silence of Human Rights Law", in *Melbourne*

rights law already proved too ineffective in these situations. This conclusion is supported by Larsaeus, who, while criticizing Noll's reasoning, agrees on the fact that the assurances have to be considered legally binding:

The fact that the nature of the arrangement, as a legally binding agreement or a political 'understanding', is seemingly up to the parties' discretion raises serious issues in relation to the fundamental requirement of legal certainty. The better view, I suggest, is that an assurance must, at a minimum, be unequivocally binding as law for it to provide an added value.⁸⁷

Thus, it cannot be left to the parties themselves to interpret the agreement, since this undermines the safeguards provided by it. For a diplomatic assurance to reduce the risk of torture enough to be resorted to when there is a suspicion that torture would otherwise occur, the assurance has to be legally binding.

5.4.2 Political pressure

This view is, however, questioned. It has been argued that diplomatic assurances should be seen as a non-binding agreement, solely putting political pressure on the receiving state to fulfil its obligations. Even though the prohibition on torture has the character of *erga omnes*, an obligation towards the whole world community, this is considered too vague to prevent states from practice torture. The practice of torture in some states is well known, and it is obvious that other, powerful states could have used their political influence to prevent this habit. However, if the responsibility is no-one's in particular, but all states', it might be that it is too generally constructed to have an impact.

If, on the other hand, a state suspected of practising torture assures another particular state not to torture a particular person, the political pressure should, according to this perspective, be higher. This has, for instance, been argued by the British government, to be a reason why their MOU with Algeria should allow for the return of an Algerian citizen, even though Algeria is known to practice torture.⁸⁸ This argument was accepted by SIAC, which also reaffirmed this conclusion in respect to UK's MOU with Jordan:

Journal of International Law, 2006, 6, 7(1), section III.

⁸⁷ Larsaeus, Nina, 2006, *The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment*, RSC Working Paper No. 3, Queen Elizabeth House, Department of International Development, University of Oxford, p. 12.

⁸⁸ The Home Office in *BB v. Secretary of State for the Home Department*, (SC/39/2005), December 5, 2006, para. 18.

The answer here [...] is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure to of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country.⁸⁹

Then again, nothing has prevented the UK from using its political power to prevent either Algeria or Jordan from practising torture previously. Why this, all the sudden, would be of such importance, is, perhaps, a bit uncertain.⁹⁰ Turning instead to the case law of the ECtHR, it too has concluded that each and every case has to be determined on its own merits and that all relevant factors have to be regarded. Thus, a non-binding diplomatic assurance should be taken into account in risk assessment as well as a legally binding. However, it seems like the court's understanding of what is a sufficient assurance to eliminate the risk of torture is somewhat stricter than SIAC's⁹¹, and ECtHR has not yet discussed the legal nature of diplomatic assurances.

5.4.3 Non-binding because of their content?

The United Nations Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Robert K. Goldman, and the United Nations Special Rapporteur on Torture, Manfred Nowak, also considers diplomatic assurances not to be legally binding, since they lack mechanisms for enforcement and sanctions if violated.⁹² This is also the view of Goodwin-Gill and Raza Husain, arguing that “diplomatic assurances effectively add nothing to the receiving States’ obligations, while in no way diminishing those of the sending State”⁹³. The receiving state is already bound by the a non-derogable prohibition on torture, and the sending state is obliged not to return a person to a country where there is a real risk of torture, whatever that state assures. Even though they seem to agree with governments that diplomatic assurances should be considered non-binding, their conclusions are contradictory. Whereas the governments argue that the assurances

⁸⁹ *Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department*, (SC/15/2005), February 26, 2007, para. 508.

⁹⁰ Metcalfe, 2009, p. 87.

⁹¹ See *Saadi v. Italy*, n60.

⁹² UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2005/103, February 7, 2005, para. 57 and UN Commission on Human Rights, Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, December 23, 2005, Para. 31(d).

⁹³ Goodwin-Gill and Husain, Raza, “Overview of History and Current Scope of Non-Refoulement, and Current Attacks on the Principle”, in *Non-Refoulement Under Threat*, Annex 1, section 1, n25.

should be given weight anyhow, these experts see this as a reason to dismiss the method completely.

In my view, the assurance does not offer much of a protection or added value if it is not legally binding. Even though political pressure and friendly relations can affect a state's behaviour to the extent that the risk of torture is diminished, this is hardly sufficient to reduce the risk enough. As will be discussed further below, all the problems contained in a diplomatic assurance – such as monitoring, enforcement, denial, the lack of motivation to expose any breaches – cannot be resolved if the legal status of the agreement is uncertain. Furthermore, the assurance has to contain more obligations than solely reiterating provisions in HRL the parties are already bound by. But this is, perhaps, more of a normative discussion, arguing what status the assurances *should* have to be given any weight in the risk assessment. Or, the *de lege ferenda* perspective. What status diplomatic assurances de facto have, *de lege lata*, is yet to be determined.

5.5 Endorsing or rejecting the method

Diplomatic assurances have been discussed a lot, by academics, courts and committees, NGOs and state representatives. It is rather clear that while most NGOs and human rights advocates consider them to violate international law *per se*, many states see them as an important and useful, if yet somewhat problematic, tool for balancing their conflicting responsibilities. In the academic debate, states have been criticized for resorting to diplomatic assurances too easily and without enough control mechanisms. It has been claimed that many states have been willing to transfer alleged terrorists whatever the consequences and that the assurance has not been constructed as a proper protection, but rather a formal justification.⁹⁴ On the contrary, it has also been argued that diplomatic assurances “may establish the efficient monitoring and enforcement mechanisms that are currently missing in the multilateral system of human rights”⁹⁵.

Most attention has been focused on how to construct an assurance that ensures that none of the involved states violates their obligations and that the returnee's rights are

⁹⁴ Noll, 2006, section VI.

⁹⁵ Larsaeus, 2006, p. 27.

properly respected. However, equally important is the risk that the use of diplomatic assurances undermines the international absolute prohibition on torture. Both these issues have to be considered when the consequences of the assurances are analysed.

5.5.1 Promoting the use

Yet again, and not very surprisingly, it is especially governments that endorse the use of diplomatic assurances. They are the ones responsible for state security and are therefore most eager to reduce the threat from terrorism. The former Prime Minister of UK, Tony Blair, has been one of the most engaged proponents for the method. Firstly, he has declared that “the rules of the game are changing”⁹⁶. Secondly, in the case of *Youssef v. Home Office*⁹⁷, concerning four Egyptian men, Blair intervened a number of times, for example demanding that the Home Office should “get them back”⁹⁸. He also inquired, next to the assurances the Home Office had requested from the Egyptian government: “This is a bit much. Why do we need all these things?”⁹⁹.

The Swedish government has, too, defended its use of diplomatic assurances. It has on a number of occasions declared that the two Egyptians, Agiza and El Zari, should not be granted permission to return to Sweden¹⁰⁰, and that Sweden has no responsibility for the treatment of the two men after the expulsion.¹⁰¹ Sweden was also one of the states initiating an inquiry, after the affects of the assurances from Egypt had been known to them, to the Council of Europe Steering Committee for Human Rights, asking it to work out guidelines for the use of diplomatic assurances. The Committee, however, declined the request, since it was afraid that “such an instrument could be seen as weakening the absolute nature of the prohibition on torture or as a Council of Europe legitimisation of the use of diplomatic assurances”¹⁰² and that “it could also be seen as an inducement to resort to diplomatic

⁹⁶ In Metcalfe, 2009, p. 63.

⁹⁷ *Youssef v. The Home Office*, Case No. HQ03X03053, 2004, EWHC 1884.

⁹⁸ In Metcalfe, 2009, p. 69.

⁹⁹ In Metcalfe, p. 2009, 69.

¹⁰⁰ “Egyptierna är inte välkomna till Sverige”, Svenska Dagbladet, January 28, 2005, http://www.svd.se/opinion/brannpunkt/artikel_390313.svd (visited 281009).

¹⁰¹ “Inget besked om uppehållstillstånd”, Sveriges Radio, October 26, 2009, <http://www.sr.se/cgi-bin/ekot/artikel.asp?artikel=3189353> (visited 281009).

¹⁰² Extract from 62nd CDDH Report , 4-7 April 2006, CDDH(2006)007, para. 17(iii), http://www.coe.int/t/e/human_rights/cddh/3_committees/01.%20steering%20committee%20for%20hu

assurances”¹⁰³.

An underlying assumption in the governments reasoning is the fact that the threat is supposed to diminish by the removal of the alleged terrorist. However, why the state security is increased by putting the person in the hands of another government is usually not explained. One could assume that it would be harder to keep the person’s activities under surveillance outside the state’s border. But the government is perhaps fully aware that the person will be taken care of in ways not allowed in the sending state. “The efficiency of the measure rests on the presumption that removed persons will be apprehended upon return – in other words that another country assumes the role that the judicial system in [the sending state] would not have permitted”¹⁰⁴.

Or, as Noll puts it:

[A]ccording to US intelligence officials, captured terrorists were rendered over to coalition partners for interrogation, not so much for their coercive techniques as for the cultural affinities that enable them to reach out and induce, or goad, the captives into talking. Taking this argument at face value (and leaving aside the reduction of judicial monitoring for a moment), it would imply that rendition is about moving the captives to an ‘appropriate’ cultural context, where a ‘proper’ interrogation may take place. It would further confirm that the coalition’s security services lack the capability to conduct such interrogations in a satisfactory manner, for whatever reasons. Alternatively, an essentialist edge can be added, pushing the limits of the argument: multicultural societies have failed when captives need to be rendered to an ‘originary’ setting in Egypt or Syria.¹⁰⁵

The governments’ endorsement of diplomatic assurances has in some situations been accepted by the courts. In the *Abu Qatada* case in SIAC¹⁰⁶, discussed above, the court obviously considered the assurances to be enough. This is a view that SIAC has adopted in general regarding the British MOUs.

5.5.2 Concerns

As aforementioned, the human rights advocates and NGOs which argue that diplomatic assurances are not legally binding are also doubtful to the use of it. Concerns about the effectiveness of the assurances have been articulated by quite a number of scholars, whereof Goodwin-Gill, Noll, Larsaeus, Matcalfe and Borg have

[man%20rights%20%28cddh%29/06.%20interim%20and%20activity%20reports/2006_TER_en.asp](#) (281009).

¹⁰³ Extract from 62nd CDDH Report , 4-7 April 2006, CDDH(2006)007, para. 17(iv).

¹⁰⁴ Larsaeus, 2006, p. 7.

¹⁰⁵ Noll, 2006, section VI.

¹⁰⁶ n85.

already been mentioned. Except for the discussion about the assurances' legal status, the concerns expressed have mainly focused on the problems of: (1) trust, (2) denial, (3) monitoring, (4) enforcement, (5) remedies and (6) incentives to reveal a violation.

1. *Trust*. The Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, has declared that: "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture"¹⁰⁷. This is also what most NGOs and human rights advocates argue: diplomatic assurances are based on trust where there are no reasons for such trust. A state that previously has been violating the non-derogable prohibition on torture is not likely to start respecting it because of yet another document reiterating its obligations. "The factual backdrop for assessing assurances is, therefore, not simply the fact that Algeria et al have used torture, but that they have continued to do so for many years in breach of their international obligations, and in the face of international opprobrium for having done so".¹⁰⁸

With respect to the absence of a trustworthy history, this is why the content of the assurance is of such weight. Creating a diplomatic assurance that truly removes the risk of torture upon removal is most definitely a complicated matter. Nonetheless, I agree with Larsaeus in that it would be premature to reject assurances as such, based solely on this difficulty.¹⁰⁹ If constructed as legally binding agreements, including enough safeguards to prevent a real risk of torture, diplomatic assurances *could* offer sufficient protection. This is also the view of most courts and committees. However, there are many issues that need to be solved.

2. *Denial*. Closely related to the problems of trusting the state party, is the incentive to deny the practice of torture. Since torture is strictly forbidden there are no states that ever admit the use of it. The claims of torture in the cases of *Agiza* and *El Zari* were for example denied immediately by Egypt. SIAC, in case of *BB*, described the Jordanian authorities as "men of

¹⁰⁷ Report by CoE Commissioner for Human Rights, CommDH (2004)13, July 8, 2004, para. 19.

¹⁰⁸ Metcalfe, 2009, p. 83.

¹⁰⁹ Larsaeus, 2006, p.8.

honour”¹¹⁰, implying that they are to be trusted and that this therefore would be sufficient. A similar argument was proposed by Sweden before CAT: “failure to honour the guarantees would impact strongly on other similar European cases in future”¹¹¹. Contrary to SIAC, CAT did not accept this as sufficient. ECtHR has also made clear that even if the risk of torture is not denied, the sending state cannot accept an assurance on the bases of “good faith”. It does not matter whether the receiving state is in good faith or not regarding its ability to provide sufficient protection if the risk in fact is real anyhow.¹¹²

3. *Monitoring*. Because of the lack of trust and the probability that a breach of the agreement would be denied, monitoring the treatment of the transferred person is of great importance. A proper protection depends to a high degree on how well-functioning the mechanism for monitoring is. Most states are reluctant to let other state’s officials interfere with their internal affairs and letting external personnel monitor the treatment of the returnee can thus be complicated.

However, there are also many problems with how to detect torture. Firstly, physical signs of torture are not always easy to see. Therefore, it is not sufficient to let just any diplomat meet the returnee; he or she has to be examined by a person with enough knowledge of what to look for. Secondly, the meetings have to be confidential and not be monitored by the receiving state. Thirdly, torture is not necessarily officially sanctioned. Therefore, all stages and people involved in the transfer have to be monitored. Fourthly, there is a risk that the returnee and/or his or her family are threatened. For this reason, he or she may be reluctant to tell of any torture for the fear of reprisals.¹¹³

The example of *Agiza* illustrates all of these issues well. The assurance did include a right for the Swedish ambassador to visit Agiza in prison. However, it took five weeks before the first meeting. Sweden claimed the reason for this

¹¹⁰ *BB v. Secretary of the State for the Home Department*, SC/39/2005, December 5, 2006, para. 285.

¹¹¹ n64, para. 4.24.

¹¹² *Chahal v. United Kingdom*, n53.

¹¹³ *Still at Risk*, pp. 24ff.

long period to be that they wanted to show Egypt that there was a mutual trust. As just mentioned, whether Egypt should be trusted in that kind of situation is questionable. The ambassador did not get to meet Agiza alone; there were always Egyptian officials present. Finally, Sweden was apparently not able to detect any traces of torture, even though Agiza later witnessed that he had been subjected to it.¹¹⁴ Whether the reason for this was improper monitoring or a lack of interest to reveal any suspicion that torture had occurred (which will be discussed more below), is hard to tell. But one conclusion that could be drawn is that the monitoring process has to be conducted by a third, impartial, actor. This is, nevertheless, something that has to be regulated by the two states.

4. *Enforcement.* Another problem with the assurances that have been resorted to is the absence of any kind of enforcement. How to deal with a violation of the agreement cannot be left out. As aforementioned, SIAC did not find this to be a necessary requirement in the British MOUs.¹¹⁵ However, since the receiving state cannot be trusted, and the consequences for the returnee are so grave if the agreement is breached, the agreement has to include a clause for how it can be enforced. This was just as clear in the *Agiza* case, where Sweden have not shown any interest in trying to enforce the agreement. The Swedish answer has, instead, been that they do no longer have any responsibilities for Agiza.¹¹⁶
5. *Remedies.* Closely connected to the need of a possibility to enforce the agreement, is the issue of remedies. The parties to the agreement are two states. However, the one suffering from a violation is the returnee. Therefore, he or she must be offered some kind of measure for how to impeach both states in case of an infringement. The returnee should also have the right to some kind of remedies in such a situation. This has not been subject to discussion in any of the assurances used in practice. Quite the contrary, the returnee has not been regarded a subject in the agreement.¹¹⁷

¹¹⁴ Joseph, Sarah, "Rendering Terrorists and the Convention Against Torture", in *Human Rights Law Review*, 2005, Vol. 5 No. 2.

¹¹⁵ n85.

¹¹⁶ n97.

¹¹⁷ This is, indeed, a problem for the nature of human rights in general. The traditional subjects in

6. *Disclosure.* A major problem is the absence of an incentive to disclose a breach of the agreement. The receiving state will, for natural reasons, not expose any practice that not only violates the agreement, but legal obligations in general. And the sending state would cast a light upon its own disrespect of the principle of *non-refoulement* by unveiling the receiving state's practice of torture. As mentioned under "monitoring", the issue of disclosure, too, shows the necessity of an impartial actor's involvement.

A brief look at the situations where diplomatic assurances have been resorted to clearly shows that even the ones that have included provisions regarding most of these issues have failed to offer good enough protection. Therefore, the practice of diplomatic assurances has not been sufficient for avoiding torture and, consequently, the sending state has been violating its obligation not to *refoule*.

Nevertheless, the shortfall of the assurances used this far, cannot rule out their practice as such. A reason why assurances, perhaps, could be resorted to, is the possibility of an inclusion of mechanisms for monitoring and enforcement. This is usually a problem in international law in general, and particularly in HRL; many are the rights and obligations, but the example of torture explicitly demonstrates its deficiencies. Consequently, a diplomatic assurance could actually offer better protection for the returnee than ordinary HRL. However, this can only be true if all the above-mentioned issues are properly dealt with, and with an actual intent to be upheld. Important to stress, is, thus, that the assurances must include other provisions than solely reiterating the receiving state's obligations stemming from its own legal system or international conventions. Since the state concerned is already breaching the ban on torture, which it is bound by not only internationally, but usually also in domestic law, a diplomatic assurance must provide additional protection.

5.5.3 Case Law

This is has also been the courts' and committees' perspective. No court or committee have yet declared that diplomatic assurances cannot be used because of their violation

international law have been the states. Individuals have rather been described as objects, being granted some rights but seldom the measures for demanding them. The states' obligations have, on the contrary, been directed toward other states. However, the ECtHR and UN committees, such as CAT and HRC, have provided individuals with instruments for enforcing their rights.

of *non-refoulement*. Rather, the assurances have been viewed as one fact out of many, affecting the risk assessment for the person concerned. To be able to judge whether the assurance constitutes sufficient protection or not, one has to look at the content of it, but also at the subject offering the assurance. The aforementioned criteria are what most courts and committees have found necessary to ensure, for the assurance to be of any use.

The Egyptian assurance to Sweden regarding Agiza and El Zari were criticised on a number of points, and Sweden were therefore considered to have violated its obligation not to *refoule* by both CAT and HRC. In the *Agiza* case, CAT emphasised that “[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk”¹¹⁸. This seems to imply that diplomatic assurances *could* offer sufficient protection, if they include a credible mechanism for enforcement. In the *El Zari* case, HRC concluded that a provision for enforcement was lacking and that Sweden had not monitored the treatment of El Zari properly. HRC also added that “the state party has not shown that the assurances were sufficient ‘*in the present case*’, to mitigate sufficiently the risk of torture”¹¹⁹. This makes it rather clear that diplomatic assurances are not declared ineffective as such by HRC.

ECtHR, as well, has pointed out the necessity to judge the assurance in its proper context. In *Chahal*, the first case before the court concerning diplomatic assurances against torture, the court was not persuaded that the assurance provided sufficient protection. The main reasons were that torture in India was endemic and that the government could not sufficiently control the non-state actors that constituted the threat. The removal was therefore rejected and the assurances declared not sufficient. The next judgement by ECtHR, regarding diplomatic assurances, *Matmakulov and Askarov v. Turkey*¹²⁰, has been described as an acceptance of the method. However, as the court clearly stated, the judgement was based on the absence of enough information. The applicants were not able to convince the court that they faced a real risk of torture. Thus, an assessment of the assurances was not necessary.

¹¹⁸ n64, para. 13.4.

¹¹⁹ Skoglund, Lena, “Diplomatic Assurances against Torture – An Effective Strategy?”, in *Nordic Journal of International Law*, 2008, Vol 77, No. 4, p. 344.

¹²⁰ *Matmakulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, February 4, 2005.

The most illustrating case regarding ECtHR's view on diplomatic assurances is probably *Saadi v. Italy*, decided by the Grand Chamber of the court. As described by Fiona de Londras:

Although the ECtHR accepted the right of contracting states to control the entry, residence and expulsion of aliens from the state and confirmed that there is no Convention right to political asylum, it reasserted its longstanding position that state action relating to expulsion is restrained by the absolute nature of Article 3 and the implied positive obligation not to send individuals to a state where they are at real risk of prohibited treatment.¹²¹

The court also recognized the states' problem with protecting their citizens from terrorism as a major issue, and stressed that it could not underestimate the threat that terrorism presents today. Nevertheless, the court reaffirmed that the principle of *non-refoulement* is absolute, meaning that no matter what kind of threat the person concerned poses, he or she cannot be returned if there is a real risk of torture. Thus, the court rejected Italy's and UK's – who made a third party intervention – claim that a balancing act between state security and protection for the individual is necessary.

Neither did the court accept UK's argument that the requirement of a “real risk” should be changed to the higher standard that it would be “more likely than not” that the person concerned would be subjected to torture. In its judgement, the court reaffirmed that the sending state violates the principle of *non-refoulement* if the person is transferred when there is a *real risk* of torture.¹²² Once again, ECtHR recalled that this assessment necessarily is speculative and that the court will consider all relevant information.¹²³ The domestic law is one component, but if reliable sources tell of systematic practice of torture, a legal ban of it is not sufficient. Another such component is diplomatic assurances, which the court implied might offer sufficient protection in some cases. However, in this particular case, the assurances consisted of nothing more than references to Tunisian law. This was, according to the court, not enough.¹²⁴ Human Rights Watch has, furthermore, pointed to the fact that even though ECtHR has not rejected diplomatic assurances, there are still no cases where

¹²¹ de Londras, Fiona, “*Saadi v Italy*: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases”, in *The American Society of International Law Insights*, 2008, Vol. 12, Issue 9. At: <http://www.asil.org/insights080513.cfm> (visited 031109).

¹²² *Saadi v. Italy*, Application No. 37201/06, February 28, 2008, para. 129.

¹²³ *Saadi v. Italy*, para. 133.

¹²⁴ *Saadi v. Italy*, para. 147.

the court has found them to offer sufficient protection.¹²⁵

The *Saadi* case seems to not only have confirmed the absolute nature of *non-refoulement*, it has also affected British courts in domestic judgements. In the case of *AS & DD*, mentioned above, SIAC had questioned ECtHR's decision in *Chahal*, arguing that the threat from terrorism necessitates a balancing act. When SIAC's decision was appealed, the Court of Appeal agreed with SIAC that it would be in the interest of the Libyan government to respect the MOU with UK. However, the court did not find this reasoning sufficient, based on the reality "on the ground". Thus, because of the lacking trustworthiness, the MOU did not contain enough safeguards to reduce the risk of torture.¹²⁶

5.5.4 Undermining the prohibition

It seems like most courts and committees have not given proper consideration to the risk that a systematic use of diplomatic assurances could undermine the principle of *non-refoulement*. There are but a few examples. In the *Agiza* case, CAT claimed that:

[I]f the Committee were to accept guarantees such as those offered in the present case as sufficient protection against torture, one could not discount that large scale deportations could take place after some standard form of assurance provided by States with poor human rights records.¹²⁷

The committee clearly demonstrates awareness about the problem. However, it also limits its concerns to the particular assurance in "the present case", implying that this is not necessarily the situation for all diplomatic assurances.

If this has not yet been scrutinised by the courts, NGOs and human rights advocates have highlighted it as a major issue. Human Rights Watch writes:

The phenomenon of one state requesting that another make an exception to its general policy of employing torture with respect to one individual has deeply disturbing implications. Asking for the creation of such an island of protection come dangerously close to accepting to ocean of abuse that surrounds it.¹²⁸

And moreover: "Reliance upon diplomatic assurances signals an erosion of the absolute obligation not to return or transfer a person to a place where he or she is at

¹²⁵ "European Court of Human Rights Reaffirms the Absolute Prohibition on Return to Torture", Human Rights Watch. At: <http://www.hrw.org/en/news/2008/02/27/european-court-human-rights-reaffirms-absolute-prohibition-return-torture>, (visited 031109).

¹²⁶ *AS & DD v. Secretary of State for the Home Department*, [2008] EWCA Civ 289, April 9, 2008.

¹²⁷ CAT/C/34/D/233/2003, para. 5.8.

¹²⁸ *Still at Risk*, p. 23.

risk of torture or ill-treatment”¹²⁹ Thus, resorting to diplomatic assurances does not only put the returnee in danger of being tortured, it also undermines the absolute ban on both torture and *refoulement*. Torture is therefore legitimised in two ways: firstly by requiring that only the returnee should not be tortured; and secondly, by returning a person to a country that does not fulfil its international law obligations.

These double standards have also been acknowledged by Goodwin-Gill and Husain:

Indeed, the practice of states [...] shows up many of the contradictions inherent in the very idea of seeking assurances that this or that candidate for removal will not be tortured. This process admits that torture takes place in the prospective receiving country, and is likely systematic; even as the sending State seeks protection for one, so it acquiesces in the torture of others.¹³⁰

This is, perhaps, where the most interesting critique is focused. 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 that there is one system of international law protecting people from torture and the return to a country where they might face it, and another set of rules for alleged terrorists. Theo van Boven, UN’s Special Rapporteur on Torture, has asked “whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement”¹³¹.

The structural problems with diplomatic assurances could also be analysed from a judicial perspective. If the diplomatic assurances are to be seen as treaties, they are not just unlawful, but considered void, if they could be regarded as conflicting with the *jus cogens* norm against torture.¹³² Even if they are not considered to be directly conflicting with a *jus cogens* norm, but perhaps only indirectly with the prohibition to *refouler*, diplomatic assurances could be considered unlawful. As Larsaeus points out, this is because the assurance might be incompatible with the object and purpose of the treaties containing the principle of *non-refoulement*.¹³³ Larsaeus argues that a systematic use of diplomatic assurances could undermine the protection offered by

¹²⁹ *Still at Risk*, p. 27.

¹³⁰ Goodwin-Gill and Husain, 2006, Annex 1, section 5.

¹³¹ Report of the Special Rapporteur on Torture Theo van Boven to the UN General Assembly, August 23, 2004, para. 31.

¹³² VCLT, article 53.

¹³³ Larsaeus, 2006, p. 20. Referring to VCLT, article 41.1(b)(ii).

non-refoulement, and thereby be incompatible with the object and purpose of these treaties:

[E]stablishing bilateral agreements that *certain* individuals (i.e. individuals of special interest to the State) shall not be mistreated can be interpreted as an acceptance of such treatment in other cases. If the practice of requesting diplomatic assurances continues to grow, thereby creating two parallel systems, one multilateral, which States can violate without sanctions, and one bilateral which demands detailed compliance, the practice of assurances could possibly be found to defy the object and purpose of the convention.¹³⁴

The use of diplomatic assurances may, consequently, be considered unlawful if they are to be seen as undermining the protection offered by treaties such as ICCPR, the Convention against Torture and the Refugee Convention. But it is important to stress once more, that no court or committee has yet taken this into serious consideration.

However, this creation of a parallel system and acceptance of double standards could also be discussed from a more political perspective. Not only is this necessary because of the political nature of terrorism and counter terrorism as such. But to understand where this acceptance for the mistreatment comes from, and what further consequences it can result in, I will hereon discuss this phenomenon in a theoretical and political context.

Section II - Theory¹³⁵

The theories I have chosen all have in common that they focus on how conflicts are dealt with in politics and what the consequences could be if conflicts are not acknowledged politically. The reason why I use these theories is that they are all relevant for understanding the connection between law and politics. Especially Noll,

¹³⁴ Larsaeus, 2006, p. 21.

¹³⁵ One interesting aspect about the theories I use, not only to analyse, but to criticise the use of diplomatic assurances, is that they all somehow derive from Carl Schmitt. Schmitt's thinking has otherwise mainly been associated with the neo-realistic position, which, probably, bears the primal responsibility for politicising the law and the mystification of politics. It is both its ideological proponents as well as practical advocates, i.e. the American administration, that most effectively have engined the securitisation process of terrorism. It is, thus, this ideology that has at once paved the way for, and been the most devoted user of, methods such as diplomatic assurances, rather than the liberalism that perhaps more passively and unintentionally has enabled this development. This clearly shows how a person's ideas and models can be used and interpreted differently, depending on one's perspective and intentions. Whereas Mouffe, Behnke, Noll and Agamben argues that Schmitt's idea about the conflict is an inevitable starting-point if a vital democratic system is to be taken serious, the neo-realists have chosen to focus on his assumption that politics should always prevail before the law and that the democracy is unable to handle the political conflicts.

who shows that changes in the judicial sphere are closely connected to changes in the political. The two processes he describes are simultaneous and influence each other. This also goes for the theory of securitisation, which explains the underlying process of how a conflict is considered so detrimental that exceptional measures are necessary. Mouffe and Behnke, on the other hand, describe how a similar process can occur if a conflict is deemed non-political. Lastly Agamben shows that the exceptional measures that the GWoT has justified, risk becoming permanent and eventually undermine the democratic system. In my view, these theories are highly relevant when analysing diplomatic assurances and the undermining of *non-refoulement* since they portray how this is part of a structural problem, and not an isolated phenomenon. The theories highlight different aspects and should be seen as complimenting each other, but they all share a common essence: terrorism has to be acknowledged politically. They also stress that to understand the interplay between the parties to the conflicts described, the power relations have to be the focal point. The undermining of *non-refoulement* as a result of the GWoT has to be addressed politically, and politics is always a question of power.

To understand what role the principle of *non-refoulement* play in contemporary international law and why states in so many situations have used methods that seem to undermine it, it is necessary to elaborate on the concept of security. A big number of states consider terrorism to be a major threat to their security. Whether this is actually true or not is not what I focus this paper on, the importance lay in how states perceive and articulate this rather recent terrorist threat. One key consequence of this increased focus on terrorism is the rise of maintaining and promoting security as the main task for the state. This security-oriented perspective has, in turn, affected what methods many states consider to be necessary to prevent terrorism. From this perspective, the principle of *non-refoulment* poses an obstacle for the state when a person is considered a security threat, needed to be eliminated.

But before I go any deeper into this discussion about security, it is crucial to analyse where this focus stems from. Why is it, that terrorism is talked about in this way and described in these terms? Furthermore, how can it be that some people, i.e. alleged terrorists, are deprived of basic legal and human rights in the name of security? What, thus, is the politics behind these changes in international law? To try to answer those

questions, I start out with turning to Chantal Mouffe and her theory about agonism.

6 Mouffe

Mouffe's book *On the political*¹³⁶ is written as a criticism of the contemporary widespread understanding of politics. She argues that the dominating view today is the consensus-oriented liberalism and that this ideology is the foundation of both most academic theories, as well as how most states have chosen to construct their political system. For Mouffe, this is very problematic, since she considers this consensus democracy to be the root of many of the challenges the states are faced with today. One challenge in particular, is the increased threat from terrorism.

First and foremost, one should not forget that liberalism has played a fundamental part in the development of democracy and the history of human rights. This is important to stress since Mouffe's, and my, critique of it could be perceived as quite harsh. Liberalism *is* still important and *can* still have a substantial positive affect for democracy and human rights. However, there are significant deficits that have to be analysed and discussed.

According to Mouffe, the liberal consensus theory has two main weaknesses: (1) It is based on an incorrect assumption about the political, and (2) this assumption may lead to dangerous consequences. The liberals postulate that the goal for politics in general is to achieve a harmony where all individuals can be satisfied. For this to be possible, all conflicts should be solved by agreements. Mouffe's criticism centres on the idea that all conflicts can be solved with the result that all involved will be satisfied. This is, according to Mouffe, not how conflicts could, nor should, be dealt with in a democratic society. Conflicts are not a problem in politics, but just what constitute it. The society cannot be structured around supposedly impartial institutions trying to settle for solutions that could be liked by everyone; democracy requires proper options. Dialog and democracy are nothing but empty phrases if no proper alternatives exist. Mouffe's conclusion is that conflicts need to be acknowledged politically, or they will intensify and transform into other shapes and forms.¹³⁷

This is the reason why I begin this section with an overview of Mouffe and then use

¹³⁶ Mouffe Chantal, 2005, *On the political*, New York: Routledge.

¹³⁷ Mouffe, 2005, pp. 13f.

her theory to analyse terrorism and the responses to it. She offers a primary discussion about conflicts in general, whereof terrorism could be seen as one of many others. In my view, the GWoT is best understood and analysed if one tries to understand the importance of conflicts in a democratic system. A basic theory about conflicts in general is thus a good starting-point for later analysing the conflict behind the GWoT in particular.

6.1 The liberal misunderstanding of the political

To describe this ontological misconception, Mouffe turns to Carl Schmitt and his theory about the political. Mouffe explicitly distance herself from Schmitt's conclusions of his theories, but argues that we need to take his criticism of liberalism, and his idea that antagonism is inseparable from politics, under serious consideration. Mouffe argues that the common view on antagonism today is that it should be avoided by all means, particularly within the political sphere. For Schmitt, however, antagonism and conflicts are the essence of politics. They should not, and could not, be avoided, but rather should they be acknowledged. This, though, does not mean that conflicts are the only way to solve political problems or that they should be reinforced, but that antagonism as a fundament for the political cannot be ignored.¹³⁸

Since conflicts are unavoidable, consensus is nothing more than a mere veil hiding the deeper disagreements in society. Or, in Mouffe's words: "A key point of Schmitt's approach is that, by showing that every consensus is based on acts of exclusion, it reveals the impossibility of a fully inclusive 'rational' consensus".¹³⁹ Thus, for the idea of a fully inclusive consensus to be applicable, conflicts must be perceived as minor variations of opposing ideas about how to reach a mutually agreed upon goal. The consensus perspective describes democracy in terms of competition where different actors, by debating rationally, will see the advantages of the competitor's arguments and eventually come up with a solution fit for everyone.

As aforementioned, both Schmitt and Mouffe heavily oppose this simplification of what part conflicts play in the political system. This idea about the political is blind to the concept of power. For Schmitt and Mouffe, power is an essential part of almost

¹³⁸ Mouffe, 2005, p. 11.

¹³⁹ Mouffe, 2005, p. 11.

every conflict and the reason why conflicts do not have one single solution. When a solution to a conflict is proposed, it is necessary to understand that this is the result of different power relations between the actors involved. The result is not a consensus agreed upon by everyone, but the hegemonic definition of a consensus. The perceived consensus is a reflection of the hegemony, which, in turn, is based on power.¹⁴⁰

6.2 The problems with individualism

One reason, according to Schmitt, why liberalism cannot grasp the political is its focus on the individual. Politics cannot be based on an imagined picture of an atomic and isolated individual, since this is not an accurate description of the human being. The individual can never be differentiated from its social relations; social relations with other individuals are what constitute the society. Since politics always take part in a specific society, and structuring this particular society is the objective of politics, the political system will be shaped by the social relations in that society.

The consequence of all these different social relations is a creation of an imagined community, or, put differently, a collective defining the society. Politics, thus, requires collectives and collective identification processes – the creation of a “we”. This “we” is always produced, and reproduced, in relation to a “they”, the other that defines the limits of the “we”. The construction of these groups has nothing to do with essential commonalities. The collectives are historically and socially constructed, but nonetheless existing facts. This is why the collective cannot be ignored when discussing politics. And this is why liberalism, with its constant focus on the individual, is not equipped with a functioning tool to handle the political.¹⁴¹

6.3 Agonism instead of antagonism

Unlike Schmitt, Mouffe argues that the conflict-oriented perspective of the political is possible to reconcile with a democratic system. According to Mouffe, conflicts do not necessarily result in antagonism; the point is that conflicts *may* do that. This is what one has to be aware of when conflicts are lifted up as the centre of politics. Politics should be about avoiding that conflicts end up in antagonism by offering them space within the political system. It is when conflicts are de-legitimised as being non-

¹⁴⁰ Mouffe, 2005, pp. 17f.

¹⁴¹ Mouffe, 2005, pp. 14f.

political they face the risk of intensifying into antagonism. When conflicts can be articulated in political terms, no collective needs to face the risk of apprehending its existence as being threatened. What Mouffe proposes is a middle ground between Schmitt's antagonism-perspective and the liberal idea about the consensus, namely agonism. By this, she aims to avoid the violent potential of antagonism, as well as the political exclusion resulting from the desire to always reach a consensus.

In contrast to antagonistic conflicts, agonism does not threaten the political system or society in itself. Agonism means that conflicts are admitted within the political sphere, which, thus, disarms their violent potential. Political opponents and their arguments are perceived as legitimate, even though all involved might never agree upon the best political solutions. By this, Mouffe illuminates how, in an agonistic democracy, the actors accept the political framework in itself, but what is always disputed is its content. Democracy should, according to her, be about transforming antagonistic conflicts into agonistic by offering legitimate political channels where opposing views and arguments can be expressed. Unlike the liberal consensus, however, agonism presupposes a fundamental questioning of the power structures in society. Agonism, thus, gives room for a reflexion and debate about the hegemony. What Mouffe proposes is a much wider definition of the political than what is common today and that conflicts, as far as possible, have to be addressed politically.¹⁴²

6.4 The dangers of consensus

It is this process, when conflicts are de-legitimised as non-political, that Mouffe points out as the danger of liberalism. Ignoring conflicts will not make them disappear, but rather intensify them. If conflicts are not given a political shape, they will take some other form; a non-political conflict is usually described in terms of moral. By articulating a dispute in moral terms it is given the impression of being a question of right or wrong. For the actor within the hegemonic perspective, the opposing view is therefore unacceptable. For the de-legitimised one, on the other hand, this exclusion comes to show how closed and unreachable the political arena is. For this reason, arguing politically does not seem to be an alternative.

¹⁴² Mouffe, 2005, p. 20.

6.5 A broader concept of the political

To include conflicts within the realm of politics is, consequently, not a threat to democracy, but a precondition to its existence. Conflicts should neither be suppressed, nor should they be allowed to escalate into violence. Agonism offers a political perspective where conflicts do not have to be mediated and admits space to fundamental questionings of contemporary hegemony. A widening of the political is, as a result, a necessity to avoid increased antagonism.

Liberalism's inability to handle conflicts is thus very problematic. To de-legitimise alternative and conflicting opinions and ideas as non-political, does not mean that they disappear, but rather that they radicalise. And when conflicts are described as being about moral values instead of different political opinions, the gap between the collectives widens. The result from defining the political as an aim to reach consensus is, eventually, an intensification of the conflicts. Excluding conflicts do not lead to a peaceful settlement, but to increased antagonism. Or, as Mouffe puts it:

There is some irony in the fact that the approach which claims that the friend/enemy model of politics has been superseded ends up creating the conditions for the revitalization of the antagonistic model of politics that it has declared obsolete. However, there is no denying that the post-political perspective, by hindering the creation of a vibrant agonistic public sphere, leads to envisaging the 'they' as 'moral', i.e. 'absolute enemies', thereby fostering the emergence of antagonism, which can jeopardize democratic institutions.¹⁴³

6.6 Influencing politics

The liberal consensus theory has had a major impact on the political systems in many states. Instead of increased reflexion and a wish to engage in political discussions there is a tendency to de-legitimise conflicts and opponents as non-political. Differences and disagreements are essentialised and described in terms of "us and them", "right or wrong", "with us or against us" etc. Politicians more and more refer to the affectionate dimension of politics and "we" as a collective is increasingly kept at a distance in relation to other collectives, "they". By distancing the collectives, there is less potential to accept the other's opinions as legitimate.

¹⁴³ Mouffe, 2005, p. 76.

6.7 Critique against Mouffe

6.7.1 *Mouffe and human rights*

One might argue that it is a paradox to use Mouffe's thinking to criticize diplomatic assurances for undermining human rights, since Mouffe herself is criticising the human rights regime for being a part of the universalistic consensus claims. However, this paper does not set out to analyse the human rights regime as such, i.e. the nature of human rights, or if the concept of human rights are being used for political purposes.¹⁴⁴ Even though I consider the ban on torture to be a fundamental right that *should* be seen as an absolute universal standard, and thus not be subject to any form of relativisation, this is my own subjective belief. What Mouffe helps us to understand is that diplomatic assurances are a part of a policy that divides humanity in two separate categories: those with rights, and those without. The importance is not whether these right should be called human rights, or what their nature are, but that states are constructing a system where some people are completely excluded from the principles of the *Rechtsstaat*.

Thus, I am using Mouffe's theories the same way she is using Schmitt's: by taking her concerns seriously, but not necessarily have the same opinion about the solutions. Whether one agrees with the conclusions of Mouffe or Schmitt is not what matters, but that they raise alarming questions and problematise issues that are necessary to take in to consideration.¹⁴⁵

6.7.2 *What conflicts are legitimate?*

One major problem with the theory of agonism is that, while it argues that conflicts have to be embraced, it still limits the scope to particular conflicts. According to Mouffe, the actors have to accept the democratic rules and preconditions for the system to function. But who is to decide which those rules should be? And how should a fundamental questioning of the power structures in society be differentiated

¹⁴⁴ Or, as Slavoj Žižek puts it: "'human rights' are, as such, a false ideological universality, which masks and legitimizes a concrete politics of Western imperialism, military interventions and neo-colonialism", Žižek, *Against Human Rights*, "New Left Review", 2005, 34, July-August.

¹⁴⁵ For a further discussion about how HR *could* be maintained without becoming neither relativised nor forms a part of an imperialistic hegemony, see for instance, Baaz, Michael "Human Rights or Human Wrongs? Towards a 'thin' universal code of international human rights for the twenty-first century", in *Juridisk Tidskrift*, 2008-09, Vol. 2.

from a de-legitimation of the same? There are some important issues that need to be solved if Mouffe's theories are to be seen as something more than a mere description of the contemporary political system.

One could, however, argue that Mouffe is not offering a new understanding of politics, but rather a discussion about the risks with the dominating view of democracy. She describes the danger of some tendencies and tries to solve them by arguing that the democratic system needs to be re-vitalized to survive. As for the critique about relying on new limitations for the content of the political, I would argue that this stance is of course problematic, but perhaps inevitable. A political system has to be limited to some extent, and the problem is not the limits themselves, but how they are addressed. As discussed below by Behnke, in a democratic society these decisions have to be acknowledged as political rather than moral.

6.7.3 The political as something more than promoting one's self-interest

Another critical argument is that the purpose of consensus is not necessarily to always agree, but should be seen as a theoretical objective for a debate. The idea about consensus presupposes an ideal speech situation, where everyone has the same ability to argue. However, this is just an ideal situation and not an empirical fact. The thought about this equality is that it *should* be the arguments that contribute to democratic solutions, not depending on the person arguing or other facts. This does, though, not mean that the proponents of consensus are not aware that power relations exist in reality.

Furthermore, the wish for consensus is to some extent also included in Mouffe's thinking. She, too, argues that there has to be some kind of mutual acceptance of the basic rules in a democratic system. This is, perhaps, what the consensus liberals mean when they argue that the aim should be an agreement. And is it necessarily bad to strive for consensus when it comes to matters of fundamental importance for society? Being able to review an argument from a position outside one's own is perhaps what makes people able to accept other people's opinions, and therefore necessary in a democracy. But this can only be achieved if the actors are not always lead by their self-interest. Mouffe argues that groups in a society should not be understood from an essentialist point of view. Nevertheless, she claims that the source of the conflicts

derives from this kind of group thinking and that this should not only be acknowledged, but enhanced.

This seems, to me, like a rather deterministic apprehension of how people are always guided by their self-interest and group identification, without a possibility of development or change. In my view, this is probably the least developed, and most problematic, part of the theory of agonism; even though group identities and collectives are fundamental for understanding the political, it is not very fruitful to regard them as socially given entities with no possibility to be influenced. However, despite a few problematic parts of the theory, Mouffe still has a lot to offer when trying to grasp how the perception of conflicts affects the political outcomes as a response to terrorism.

6.8 Consensus and terrorism

The theory of agonism can, despite its flaws, be helpful when it comes to analysing terrorism. International terrorism is usually described as a non-political issue. It is talked about in terms of security and moral, and the division into clearly separated collectives has created a wide gap between what is defined as “we” and “they”. The tendency to articulate terrorism as an enemy to “humanity” is used by Mouffe as an example to demonstrate how this process is functioning. In the Western world, the party in the conflict with the hegemonic power, the struggle against terrorism is justified with arguments that monopolise terms such as “democracy”, “civilisation” and “humanity”. This description of the conflict is used as an ideological weapon, which de-legitimises the opponent’s political claims. According to Schmitt, the liberals’ use of a humanitarian ethic is nothing but a cover for imperialistic expansion. The moralised rhetoric unmistakably transforms the opponent into an enemy with which no settlements whatsoever could be made. To also wage a war in the name of humanity means that no peace is possible before the enemy is annihilated. This kind of war is “particularly inhuman since all means [are] justified once the enemy [has] been presented as an outlaw of humanity”¹⁴⁶.

Schmitt wrote about an “international civil war”¹⁴⁷ where the rules of war no longer

¹⁴⁶ Mouffe, 2005, p. 78.

¹⁴⁷ This would, probably, correspond to the expression “internationalised internal armed conflict”,

are applicable. In my view, this term responds well to how the war on terrorism is being waged. The alleged terrorists are not seen as legitimate parties to the conflict, and therefore deprived of the rights – but not the responsibilities – that should come with being a combatant.¹⁴⁸ To this, Schmitt adds the resurrection of the expression the “just war” and the tendency to define the enemy as a criminal. This justifies the use of more or less any methods, as long as the enemy will be defeated. All claims from the enemy about either rights or political causes are completely de-legitimised. A very alarming result is, thus, the rise of an ethic where all means are justified by the cause. This is, however, something that Mouffe does not discuss at all, but which I see as one of the most dangerous result of this politic.¹⁴⁹

The principle of *non-refoulement* is, consequently, not particularly heavy weighting, when a balance is sought to be struck between security and rights for alleged terrorists. Methods such as diplomatic assurances are, as I see it, rather natural results of a politic that de-humanises and de-legitimises all opponents that question the hegemonic power.

Terrorism should, according to Mouffe, be seen as an effect of the unipolar world we live in today. It is the consequence of the lack of any legitimate political channel where opposing views and ideologies can be expressed. When conflicts no longer are accepted within the political, they will take other forms and shapes. The American hegemony has, through its excluding consensus, let go of the ability to respond to conflicts with other means than violence, since all kind of resistance is seen as total enmity. The solution is, I would argue, not universalism, but an acceptance of conflicts as a constituting nature for the political. Only then can the antagonism be transformed into agonism and conflicts dealt with politically. But this requires of broader definition of the political than what is offered by liberalism today.

which aims to describe how the traditional theoretical division between internal and international armed conflicts often falls short of being applicable to contemporary conflicts. See Droege, 2008, p. 7.

¹⁴⁸ The use of the term “illegal combatants” deprives the opponents of all their rights they are provided with as combatants by the Geneva conventions. Schmitt’s expression “international civil war” is thus very illustrating since the Geneva conventions only (with a few exceptions) regulate armed conflicts *between states*.

¹⁴⁹ The idea that the cause justifies the means can be found in almost every attempt to defend all major military interventions today, such as the wars in Iraq and Afghanistan and in the reasoning behind humanitarian interventions. Thus, this shows that the reactions to the terrorist threat are a part of a bigger political and moral understanding.

7 Behnke - The Partisan model

The danger of defining terrorism as a non-political concept *per se*, is elaborated further by Andreas Behnke.¹⁵⁰ He starts his analysis with the question: how can we understand the event of September 11? He later widens this discussion to also involve the reactions to the terrorist attack and terrorism as a concept in general. According to Behnke, the main difference is between those who choose to describe it as a political act and those who think that it was not political. The aim of his discussion is to show the underlying reasoning behind and what the consequences are of either standpoint. For the purpose of this article, Al Qaeda represents international terrorism.

7.1 Defining the political

In contrast to Michael Ignatieff¹⁵¹ – but in line with Mouffe –, Behnke wishes to keep the scope of what is defined as political rather wide. He turns against what he calls Ignatieff’s formulation of “a typical Liberal position in which politics appears as the reasoned deliberation of rational actors about mutually acceptable strategies to attain collective goals”¹⁵², or “the juxtapositioning of politics and metaphysics as two irreconcilable domains”¹⁵³. In Behnkes view, shared by Mouffe, the liberal consensus democracy’s understanding of politics necessarily excludes everything that is not rational. The liberals, thus, construct an artificial division between politics and what is defined as nihilism, since what is seen as the political only includes a mutual understanding about both the means and the goals. The only kinds of difference of opinions that are allowed in that sphere are minor variations of how these goals best can be achieved.

Behnke, on the other hand, tries to show how this is not only a problematic ontological assumption, but, which is his main point, this narrow view of politics is a dangerous method to handle conflicts.¹⁵⁴ Both arguments are important to consider since they both questions how terrorism, and especially states responses to it, affects

¹⁵⁰ Behnke, Andreas, “Terrorising the Political: 9/11 Within the Context of the Globalisation of Violence”, in *Millennium - Journal of International Studies*, 2004, Vol. 33, No. 2.

¹⁵¹ Behnkes article is a response to Ignatieff, “It’s War – But it Doesn’t Have to be Dirty”, in *The Guardian*, October 1, 2001.

¹⁵² Behnke, 2004, p. 280.

¹⁵³ Behnke, 2004, p. 280.

¹⁵⁴ Behnke, 2004, p. 282.

our basic understandings of what society should look like.

7.2 A political decision

As for the construction of the division, Behnke concludes that this decision in itself is what the liberals would describe as metaphysical. Constructing these boundaries is exactly what the liberals describes as non-political; namely what is right or wrong, good or evil and the idea that there is one single solution. Thus, the liberal idea of the political is based on what they argue to be metaphysical. The inside – the political – is, and will always be, understood in contrast to the outside, the excluded metaphysics.

Behnke, however, regards this decision as *political*. Trying to establish artificial borders and hiding behind a strict terminology is a political attempt to de-legitimise other political opinions. Referring to Mouffe, Behnke considers this to be a sign of deeper conceptual problems within liberalism as such: “Focusing on the de-politicised basic entity of the Individual as a universal and general reference, it remains blind or even hostile to the argument that political processes, among them liberal democratic deliberations, can only take place within politically defined, historically situated communities”¹⁵⁵.

7.3 The problems of exclusion

The idea of a universal political model in combination with the constitutive exclusion of everything that cannot be narrowed down to compromises, might, according to Behnke, lead to dangerous results. When de-legitimising acts and ideas as being non-political, there can be no political solutions in sight and it leaves us with only two alternatives: right or wrong. Arguing that terrorism *as such* should not be excluded from the political sphere, Behnke then, too, turns to Carl Schmitt.¹⁵⁶

For Schmitt, politics was about handling the relation between friend and enemy. Behnke describes this as the art of enduring conflicts. Since conflicts are, and always will be, a fundamental part of society, Behnke and Mouffe, following Schmitt’s train of thought, claim that politics have to acknowledge conflicts rather than trying to

¹⁵⁵ Behnke, 2004, p. 282.

¹⁵⁶ Behnke, 2004, p. 285.

ignore them. To ensure that the political system is enduring, conflicts have to be enduring. Conflicts, therefore, must be channelled through political institutions.

7.4 The partisan

Violence from non-state actors constitutes a big risk of undermining the political structure. Not only does it often force its state counterpart to reply with even more violence, but it also challenges the state as an institution where conflicts are managed. Whereas violence between states can be characterised with the relation friend-enemy and is limited by the mutual understanding of state sovereignty, violence between a state and a non-state actor can be defined with the relation friend-*foe*. For this kind of conflict the only solution is total annihilation, no peace or settlement can ever be found. Terrorism is in this sense nothing new, and to understand the phenomenon, Behnke makes use of Schmitt's discussion about the partisan.¹⁵⁷

The partisan, in Schmitt's view, stands for the contrast to the regular soldier. Violence from partisans, and being at war with them, should be understood as the opposite of the violence and war regulated by internationally accepted norms.

According to Schmitt, four features characterise the partisan:¹⁵⁸

1. *Irregularity*. The partisan is not a part of any regular army and does usually not wear a uniform. It is also irregular regarding the use of methods, which is why the animosity increases into extreme hostility. The irregularity gives the partisan a number of advantages, such as being able to choose where and when the fighting occurs, and this leads to increased violence by the state. To be able to fight the partisan, the state responds with same methods and tactics, which then tend to increase the violence.
2. *Public/Political cause*. The partisan is not just any criminal, but fights for what it considers to be a just cause. The motive is something bigger than a personal gain and is usually described in political terms.
3. *Increased mobility*. This is a recognition of how the partisan adapts to new technology and its ability to be up to date. This statement is even more

¹⁵⁷ Behnke, 2004, pp. 288ff.

¹⁵⁸ Behnke, 2004, pp. 44-45.

important in the present high technological warfare. Trying to defeat the partisan purely by using more efficient weapons is deemed to fail.

4. *Tellurian nature*. Traditionally, the partisan has been defending a particular territory. Most of its legitimacy has sprung from claims to a piece of land that has been occupied, so the partisan's fight has been defined as defensive. Even if the goal for the partisan has been a total victory, i.e. no compromises could be accepted, this victory has been limited geographically. Thus, the partisan has not been characterised by having any claims of universality. This fourth criterion, however, is what makes the terrorist differ from Schmitt's model of the partisan (which will be developed further below).

7.5 The global partisan

I want to emphasise that applying these four criteria on the contemporary terrorist is not an attempt to once and for all define terrorism, but rather to make an effort to grasp how, and why, terrorism affects world politics, and how, and why, changes in world politics affects states' responses to terrorism. As Behnke puts it: "understanding involves rendering the unfamiliar in the terms of the familiar"¹⁵⁹.

7.5.1 Irregularity

As is rather obvious, most of Schmitt's criteria match terrorist organisations such as Al Qaeda. It cannot be connected to any state in particular; it is rather a loosely connected network of people with the same objective. Their strategies and methods are undoubtedly irregular and there are especially two things that emphasise this: First of all, the non-existent distinction of military and civilian targets; all infidels are legitimate targets for an attack. Secondly, by using suicide bombers, they dismiss the traditional concern about casualties. Instead of fighting to stay alive, a suicide bomber uses his or her own death for a greater purpose.

Both these methods are typical of Al Qaeda's irregularity and have most definitely contributed to what the military responses have looked like. The high numbers of civilians killed and the military strategies used are but a few examples of how the American reaction more or less immediately mirrored the terrorist attacks. The

¹⁵⁹ Behnke, 2004, p. 302.

violence has clearly been radicalised and intensified and the decision not to acknowledge the opponent as a legitimate party to the conflict is a good illustration how this can be described in terms of a partisan war.¹⁶⁰

7.5.2 Public/Political cause

As for the public/political cause, Al Qaeda might not have one single goal with their struggle, but it is apparent that they do fight for something bigger than personal enrichment. Al Qaeda presents its own truth and universalism. Spreading Islam and eradicating Western influences from the Middle East stands in stark contrast to the Western led globalisation. As a result, the enemy turns to foe because of the two irreconcilable apprehensions of what the world should look like. For this reason, as I see it, there seems to be no time limit to this war. Whereas the partisan fought for freedom from its occupiers, Al Qaeda's fight has no end. Since this also goes for its counterpart, the war takes indefinite proportions.¹⁶¹

7.5.3 Increased mobility

The increased mobility criterion, as well, is a distinct characteristic of Al Qaeda. Even if they do not have access to the same kind of high-end warfare technology as their opponents, Al Qaeda has been quick to adapt to technological innovations. They use computers, satellite phones and Internet to communicate. Furthermore, they are able to transfer huge amounts of money to finance their operations.¹⁶² Schmitt's conclusion that a war against a partisan could never be won by using more powerful technology is probably one of the most important lessons to be learned in this ongoing war against terrorism. Other solutions than firepower will be needed if this war is ever to be ended.¹⁶³

7.5.4 Tellurian nature

This fourth criterion is probably where Al Qaeda differs from Schmitt's description of the partisan. Even though Al Qaeda refers to Americans on their holy land as being an

¹⁶⁰ Behnke, 2004, pp. 302ff.

¹⁶¹ Behnke, 2004, pp. 305ff.

¹⁶² Behnke, 2004, pp. 307.

¹⁶³ Which, perhaps, might be happening now: "US commander in Afghanistan proposes revamped strategy", The Guardian, August 31, 2009, <http://www.guardian.co.uk/world/2009/aug/31/afghanistan-mcchrystal-strategy> (visited 030909).

insult to the whole Muslim community, and especially the fact that American soldiers are positioned in Saudi-Arabia, this should rather be seen as an attempt to legitimate its struggle, than the true reason for it. Al Qaeda's fight is not a defensive one. Additionally, the loose structure of the network and its many subdivisions located throughout the world is also a reason to why Al Qaeda does not fulfil the fourth criterion. However, Behnke argues that this should not be a reason to dismiss Schmitt's model as such. Al Qaeda might not be exactly what Schmitt described as a partisan group, but this should not stop us from using Schmitt's reasoning and conclusions. The consequences of waging a war against a global partisan might not be so different from one against the traditional one.¹⁶⁴

7.6 De-politicisation and de-humanisation

This idea that the terrorist is a new version of the traditional partisan, steams from the development in world politics. A more globalised politics enhances globalisation of conflicts. But this relation is also converse: The less bound the partisan is to a specific territory and cause, the more its violence affects the state's response into getting less political and more antagonistic.

The consensus liberal universalism is what, according to Behnke, characterises the so-called globalisation. What we see is the emergence of Western, and particularly American, values and understandings of politics, culture and economics. The changes in world politics, the Western dominance and hegemony, have brought with them a universalism and a de-legitimisation of opposing opinions. Consequently, what we see is a moralisation, i.e. a de-politicisation, of world politics. This is underscored by the reactions to September 11. Expressions like "defending humanity", "good and evil", "right and wrong" etc, has been the most common reactions from American representatives, and which party of the conflict that belongs to humanity, good and right has not really been a question.¹⁶⁵

In Behnke's words, world politics has been both de-territorialised and de-politicised.¹⁶⁶ The result is a move towards a Pax Americana¹⁶⁷, where resistance is a

¹⁶⁴ Behnke, 2004, pp. 308ff.

¹⁶⁵ Behnke, 2004, p. 294.

¹⁶⁶ Behnke, 2004, p. 312.

¹⁶⁷ Hettne, Björn, 2005, *Från Pax Romana till Pax Americana: Europa och världsordningen*,

sign of enmity. Conflicts, in this context, do no longer take place between states and could never be settled peacefully. The antagonism increases and the enemy turns to foe; or in other words:

By making humankind the definition of its political identity, or the Friend, the question of who the Enemy is takes on a particular significance. Traditional decisions about Friend and Enemy have taken place within the horizon of humanity. That is, humanity per se is not part of the distinction, but is that which makes the distinction possible. Within the American imperial sovereignty, however, humanity becomes the positive pole in a universalist structure. And if the horizon is now also the positive part of the distinction, the Enemy can only be something that lies beyond that horizon, can only be something antithetical to horizon and positive pole alike – can only, in other words, be *inhuman*.¹⁶⁸

What, then, are the consequences of defining the enemy as inhuman?

7.7 The partisan and the principle of non-*refoulement*

By de-humanising the enemies, refusing them basic human rights is the logical next step. This is not only true for the ones caught in battle and denied the status of POW (as mentioned above), but for everyone associated with the foe. Thus, all alleged terrorists could easily be deprived of fundamental rights, such as non-*refoulement*, and this is why I find Behnke's analysis of terrorism to be clarifying when discussing the use of methods that seem to violate human rights. This kind of argumentation also clears the way for making pure membership of an organisation illegal, without having to prove any particular illegal activities from the person concerned.¹⁶⁹

From this perspective, the use of diplomatic assurances is not the least problematic. The rights that are, or might be, violated as a consequence of using these methods are already taken from the alleged terrorists. I am, of course, aware that in reality it is not that simple. Even a person proven to be responsible for a severe terrorist act is not practically deprived of all his or her human rights. If this was to be true, diplomatic assurances would not be necessary at all, since the terrorist easily could be sent anywhere with no concern at all about his or her faith. States do still acknowledge that some fundamental rights should be respected, and if any derogation is considered it has to be motivated. What Behnke's analysis offers is a description of a tendency in the world to justify grave human rights violations by labelling a person "terrorist",

Stockholm: Santérus Förlag.

¹⁶⁸ Behnke, 2004, p. 297.

¹⁶⁹ For a further discussion about this, see Bruin and Wouters, 2001.

and the kind of politics that has caused this antagonism. He also explains how the GWOt is affecting how all alleged terrorists are treated; dealing with terrorism necessitates unconventional measures.

8 Noll

Schmitt's definition of the partisan has also been used by Gregor Noll to understand the responses to contemporary terrorism.¹⁷⁰ In Noll's view, this could help us to understand how, and why, the GWOt might lead to permanent state of emergency. Noll's theory is important because it describes the close interrelation between law and politics and tries to explain how changes in one sphere affect the other. For him, world politics should be seen as the context to where new ideas of the judicial have to be placed to be fully understood. At the same time, new comprehensions of international law could be the reason for transformations of world politics.

8.1 Politicisation and mystification

To understand the connection between changes in law and politics, Noll postulates two parallel processes that he claims are taking place today: (1) the re-politicisation of the law and (2) the re-mystification of politics.¹⁷¹

- Noll's starts out with what he calls the dissolvment of the dual ban of force in international law. Within a state, this means the prohibition for the state to use arbitrary force against an individual. According to Noll, the emergence of terrorism as a threat to state security has undermined this prohibition. The law is no longer applicable, since terrorism enables the use of exceptional measures. He sees Guantanamo, diplomatic assurances and the use of indefinite detention as three examples of how politics has enabled exception from the law. Some persons, i.e. alleged terrorists, are no longer protected by the same legal rights as others.¹⁷²
- The derogations from law take place in a context where the political has been

¹⁷⁰ Noll Gregor, "Rätt, myt och politik: folkrättens våldsförbud i undantagets gränsland", in Amnéus, Diana and Gunner, Göran (eds.), 2003, *Human Rights – from the frontiers of research*, Uppsala: Iustus förlag.

¹⁷¹ Noll, 2003, p. 188.

¹⁷² Noll carries on analysing how this can be connected to the diluted prohibition on military force at the inter-state level. However interesting, this is outside the scope of this thesis.

re-mystified. This is how the securitisation process (which will be elaborated further below) works – the issue is no longer discussed in political terms, but rather in moral and military ditto. Phrases such as “war on terrorism”, “a crusade”, having to be “with us, or with the terrorists”, and rather talking about justice than law clearly shows how terrorism is associated with moral and military force and no longer with politics. Or what Behnke describes as being de-legitimised from the political and put into the sphere of metaphysics.

As abovementioned, these two processes are connected. Discussions about the development, and perhaps amendments, of international law are situated in a context of right and wrong. Hence, there is not a rational, but a moral, debate about how terrorism should be dealt with.

Noll asks himself why international law has not been able to oppose its relativisation and relates this to the nexus between norm and exception. According to Noll, in line with Schmitt and Agamben (see below), in extreme situations, the legal system can accept actions that would otherwise be deemed as illegal. But the exception could lead to either a new norm, or, as described by Agamben, a state of normlessness.¹⁷³

8.2 Relativisation of international law

One possible answer, according to Noll, is that international law was not constructed to handle the kind of conflicts we see emerging today. The terrorists, such as Al Qaeda, do not fit in any definition of parties to a conflict, according to traditional international law (*jus ad bellum* or *jus in bello*). These kinds of conflicts can be described as asymmetrical, and since the conflicts are said to have a new character, many actors argue that so should also the rules regulating them (for instance Tony Blair¹⁷⁴, Philip Bobbit¹⁷⁵ and Ruth Wedgwood¹⁷⁶). They claim that international law has not kept up with the changing patterns of international conflicts.

On the other hand, international law has always been highly political. Parties to a conflict usually argue that this particular conflict has a “new quality” or is different

¹⁷³ Noll, 2003, p. 189.

¹⁷⁴ “The rules of the game are changing”, Blair, Press conference 5 August 2005.

¹⁷⁵ Bobbitt, Philip, 2008, *Terror and Consent: The Wars for the Twenty-First Century*, London: Penguin Books.

¹⁷⁶ Wedgwood Ruth, 2002, ‘Al-Qaida, Military Commissions, and American Self-Defence’, in *Political Science Quarterly*, Vol. 117, No. 3.

from the ones regulated by international law. According to Noll, these kinds of claims are rather the rule than the exception.¹⁷⁷ This is why it is so important to always ask oneself what the consequences are if derogations from the norms are accepted.

8.3 Applying the partisan model

To easier understand how this war on terrorism affects both international law and what methods that are accepted as legitimate to use to combat it, Noll, too, compares the terrorist – using Al Qaeda as the representative of contemporary international terrorism – to Carl Schmitt’s definition of the partisan and comes to the same conclusions as Behnke. Making use of Schmitt’s terminology, Noll defines the terrorist as a dislocated partisan.¹⁷⁸

In a partisan war, peace is not an option – for neither part. The conflict is about right or wrong and therefore usually leads to more and more extreme violence. Both parts tend to legitimise their attacks outside their own territory as defence; not just defending its territory but especially its moral values and way of living. Furthermore, the war is thus usually described in mythological terms.

Neither the partisan nor the terrorist is seen as a legitimate party to the conflict. In Noll’s view, the use of the phrase “GWoT” is very deceitful, but thus strategic. By applying the term “war” it is implied that military force is needed and that exceptions from normal regulations might be necessary. But by emphasising that the war is waged against terrorism, the opponent is de-legitimised as an equal party to the conflict. By disqualifying the enemy they are de-humanised and as a consequence they lose their human rights.¹⁷⁹

When international law is no longer respected, and exceptions are more common than applying the rules, the question is whether we have any system of norms at all? Or are we facing what Agamben has described as a permanent state of emergency?

¹⁷⁷ Noll, 2003, p. 190.

¹⁷⁸ Noll, 2003, pp. 194ff.

¹⁷⁹ Noll, 2003, p. 197.

9 Securitisation

The starting-point for the theory of securitisation is to lay bare how, and why, a particular subject is articulated as a question of security. Securitisation is a discourse theory, focusing on how security as a concept is talked about and understood; the argument is that security is a *speech act*.¹⁸⁰ The basic assumption is that there is no indispensable connection between what is articulated as a threat to security and an actual threat. According to this theory, the term security is referring only to itself. Something is considered to be a threat just because it is perceived that way.¹⁸¹ The aim for the theory of securitisation is to describe this process: How is a subject securitised? By whom? And what are the consequences?

An important reason why to use the securitisation theory to analyse how, and why, the principle of *non-refoulement* has become a problem for many states is that it resolves the problem of international law of treating states as “black boxes”. When states are discussed as subjects in international law, they are usually taken for granted, and seen as one singular subject contrasted to other such subjects. But in reality, the state is an arena in itself with many different, and most often conflicting, groups and interests. Just as Mouffe does, the securitisation theory questions this simplification and blindness to the importance of power relations *in* states, not only between them.

9.1 The securitisation process

According to the theory of securitisation, security is what is publicly agreed to lie within that concept, and this has to be seen as an ongoing process. There is no definite definition of the expression, so what is considered to be a matter of security changes and is constantly under threat of being challenged by other views. This is a basic assumption for all social constructivist and discourse theories.

The ability to define security is, thus, the starting-point for this theory and this is a question of power. Theoretically, anyone could be the securitising subject. But in practice, this process is mainly lead by the executive power within the state. However, this is usually done in conjunction with other powerful institutions in society, such as

¹⁸⁰ Taureck, Rita, “Securitisation Theory and Securitisation Studies”, in *Journal of International Relations and Development*, 2006, 9 (1), p. 3.

¹⁸¹ Buzan B, Wæver O and de Wilde J, *Security. A New Framework For Analysis*, 1998, London: Lynne Rienner Publishers, p. 24.

the military, media, courts, researchers etc. Nevertheless, these groups are mainly focused on as being the audience that has to be convinced, rather than the subject.

What happens once an issue has been securitised is that it is no longer discussed in political terms. It leaves the political sphere in favour of “high politics”. The securitised issue has to be dealt with in forms other than the traditional political and judicial. It, thus, legitimises the use of exceptional measures, or, in other words, “it requires emergency actions beyond the state’s standard procedures”¹⁸². These emergency actions are usually what under normal circumstances would be considered illegal or at least in some kind of grey area. Securitisation, therefore, describes a process, which results in a sort of state of emergency (which will be elaborated further below).

Since the motive for the securitisation process is to legitimate emergency actions, i.e. the executive power’s right to make decisions without, or with less, interference from the legislative and judicial powers, this could be seen one explanation why it usually is the state that is the engine in this process. It is the state, and in particular the executive, that gains control and power to handle the issue once it has been securitised.

But to successfully securitize an issue, it is not enough that the securitising subject articulates the matter as being a threat to the security of the state.¹⁸³ The relevant audience has to be convinced for this understanding to be mutually accepted. Who this is differs, but the more extreme measures the executive wants to have access to, the wider and more diverse this audience normally is. Other than the general public, the audience usually consists of institutions in society related to the particular matter.

9.2 Making it work

The securitisation theory uses a rather traditional realistic terminology for the analysis of the reference object and the threat. The reference object is usually the state, whereas the threat is anything that is described as an existential threat to the state:

¹⁸² Emmers, Ralph, “Securitization”, in Alan Collins (ed.), 2007, *Contemporary Security Studies*, Oxford: Oxford University Press, p. 111.

¹⁸³ Buzan et al, 1998, p. 25.

“security is about survival”¹⁸⁴. Nevertheless, the state as the reference object is problematised to some extent. What is interesting about the theory is the way it relates the reference object to the threat and the questioning of how this threat is created as a security threat. It is a deconstruction of the process, rather than the objects.

The extraordinary measures have to be legitimised. This is an ongoing process, where different actors will try to articulate the threat in different ways. Hence, which discourse that will be dominating is primarily a question of power.¹⁸⁵ But equally important, this articulation of a problem is not something stable or eternal and the securitising actor has to defend this definition of the threat continuously in all of those steps mentioned above.

The securitisation theory mainly focuses on the process within a state, since this is usually the arena where the executive can exercise its power. But this process can just as well be applied to the international stage. The major difference is what audience that needs to be convinced. Whereas the audience within a state tends to be quite diverse, it is first and foremost other states that have to be convinced at the inter-state level. Nevertheless, other actors, such as international courts, IGOs, NGOs, media etc, could still play a most important part in promoting or rejecting the securitisation.

9.3 Limitations

The theory of securitisation does not set out to give an explanation *why* an issue is securitised. It tries to describe and analyse the process, but why the securitising subject in each and every case wants to securitize the issue is beyond the scope of the theory. Securitisation looks on this process from a discourse perspective, which is to say, it focuses on how the actor articulates the problem. As Ole Wæver puts it: “[S]ecurity thinking does not mean how actors *think*, which would be rather difficult to uncover – and not all that interesting. What is up for discussion here is how and what they think aloud”¹⁸⁶.

¹⁸⁴ Buzan et al, 1998, p. 21.

¹⁸⁵ Buzan et al, 1998, p. 31.

¹⁸⁶ Wæver, 1997, *Concepts of Security*, Copenhagen: Institute of Political Science, University of Copenhagen, p. 116.

9.4 Securitisation and the dissolution of the political

The process of securitisation could be seen as a model for understanding Mouffe and Behnke's description of the liberal consensus democracy's inability to handle conflicts and what Noll calls the re-mystification of the political. What all these theories have in common is the aim to explain how some actors can de-politicise a particular issue and why this is incredibly problematic. Whereas Mouffe, Behnke and Noll analyse the connection between law, politics and moral, the securitisation theory could be used as a tool to deconstruct this division between the political and the metaphysics.

One important feature in securitisation is the spectrum the theory is based on:

In theory, any public issue can be located on the spectrum ranging from nonpoliticized (meaning the state does not deal with it and it is not in any other way made an issue of public debate and decision) through politicized (meaning the issue is part of public policy, requiring government decision and resource allocation or, more rarely, some other form of communal governance) to securitized (meaning the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure.¹⁸⁷

What Mouffe and Behnke do is showing that in whatever way the issue is defined as outside the realm of politics, it always ends with an intensification of conflicts. Whereas securitisation describes the step when the issue is made "high politics", Mouffe and Behnke demonstrate that the exact same effect emerges when the issue is deemed non-political. Furthermore, they emphasise that these divisions between the non-political and the political, and between a political issue and a securitised ditto, are in themselves political decisions.

Another common denominator is the reference to discourse theory. They all focus on the question of power and show that what it all comes down to is the ability to define the political and its borders. In Mouffe and Behnke's view, liberalism has tried to delegitimise conflicting opinions by articulating them as non-political. From their perspective, the problem is that the strive for consensus inevitably leads to an exclusion of conflicts within the political, which then tends to lead to an intensification of just those conflicts. To avoid the process of securitisation and the

¹⁸⁷ Buzan et al, 1998, pp. 23-24.

de-legitimisation of conflicts, the borders of the political should not be too strict.

Important to bear in mind when discussing the philosophical reasoning behind these theories is that securitisation should be seen as a post-structural *realism*. As such, it first and foremost accepts some entities in society as given. This does not mean that they are essentially objective, but that they exist as social and historical facts. Just as Mouffe bases her theory of agonism on conflicts between collectives as social facts, so does the theory of securitisation. It is thereafter the social constructivist analysis of how security is created as a speech act that takes place. Thus, securitisation is a social constructivist theory, but not what is commonly described as post-structuralist; it does not aim to deconstruct everything.¹⁸⁸

9.5 Critique against the theory of securitisation¹⁸⁹

An analytically focused critique against the theory is that while securitisation aims at deconstructing security threats, the definition of security is taken for granted. By arguing that security is always about surviving and countering existential threats, the theory accepts the traditional realistic notion of security, and has, consequently, a rather limited de-constructivist pursuit. There is somewhat of a gap between arguing that it is the actors that make up security by a speech act, but not taking into consideration how they perceive what security is.¹⁹⁰ This singular definition of security does not manage to make enough allowance for the empirical context. The meaning of security has to, as is the securitisation process, be more flexible and allow for contextual variations.¹⁹¹

Moreover, securitisation has, to some extent, become a buzzword. It is rather easy to dismiss the executive's attempt to handle an issue, by arguing that it has become securitised. However, these claims are not always proven to be true in terms of empirical facts. For example, Christina Boswell has criticised the statement that migration in Europe has been securitised for being a simplification of the matter. According to Boswell, what the theory of securitisation lacks, is a credible description

¹⁸⁸ Taureck, 2006, p. 26.

¹⁸⁹ For a more comprehensive critical analysis of the securitisation theory, see for instance, Stritzel, Holger, "Towards a Theory of Securitization: Copenhagen and Beyond", in *European Journal of International Relations*, 2007, Vol. 13, No. 3.

¹⁹⁰ Ciuta, Felix, "Security and the problem of context: a hermeneutical critique of securitisation theory", in *Review of International Studies*, 2009, Vol. 35, Issue 2.

¹⁹¹ Ciuta, 2009, pp. 318ff.

of the nexus between the levels of discourse and practice. Migration might very well have been securitised at the discourse level, but whether this has spread to the organisational level where the policies are implemented is not yet investigated enough. Boswell means that the scheme of securitisation is an adequate description of the power politics of the discourse level, but does not manage to explain how the organisational level is constructed and is functioning. The strive for power and control is, in contrast to the pursuit of the executive, not the most distinguishable feature when policies are implemented. At the administrative level there are many other, often contradictory, interests that thwart the move to a single outcome. Thus, the proponents of the securitisation theory have failed both to analytically describe this connection between policy and its implementation, and to empirically show what practical consequences securitisation at the discourse level has had.¹⁹²

This kind of critique has also emerged from advocates of the theory of embedded liberalism. They argue that thanks to the major influence of liberal values in all levels of the state, the executive's power is restricted in a number of ways. Firstly, through the constitution, providing all citizens certain rights. Secondly, the division of power ensures that other institutions, such as courts, will slow down and affect a sudden change of political mindsets. Thirdly, the obligations towards other states emanating from regional and international treaties curtail the executive's line of options. Whether this struggle should be explained in terms of embedded liberalism or as a discursive practice where all actors are trying to win the privilege of interpretation could be a matter of extensive debate. However, as I will show below, the theory of embedded liberalism does not provide a sufficient explanation, since there are a growing number of cases where the courts have accepted the executive's perspective. Thus, constitutional rights and division of power does not offer enough protection. Moreover, the problems with insufficient protection from constitutions and international HRL are discussed in the first section of this paper.

Finally, one could also criticise the theory of securitisation for being too focused on the political speech act. The reasons for the speech act, the conditions or causes that influence the securitisation process, are not deemed irrelevant, but much less

¹⁹² Boswell, Christina, "Migration Control in Europe after 9/11: Explaining the Absence of Securitization", in *Journal of Common Market Studies*, 2007, Vol. 45, Issue 09.

analysed. It seems like too little importance is attributed to what causes the process to begin with and as with all discourse theories, it might become too relativistic. On the other hand, as Barry Buzan argues: “States, like people, can be paranoid (constructing threats where none exist) or complacent (ignoring actual threats). But since it is the success (or not) of the securitization that determines whether action is taken, that side of threat analysis deserves scrutiny just as close as that given to the material side”¹⁹³.

9.6 Securitisation and terrorism

Many states have seen terrorism as a subject needed to be securitised. It has been done so by being articulated as an existential threat to the state. Because of this, the state has been given the right to use a lot of means that it usually does not. It is mainly the state itself that has acted in this securitisation process, but it has had a lot of help by many other actors in society. Especially media has played a major part in articulating terrorism as an existential threat.

What is meant by the term terrorism, however, is worth a thesis in its own right. Since there is no clear and mutually accepted definition of it – neither by states, nor by scholars – terrorism as a concept fits perfectly as a threat to be securitised. The vaguer the threat is, the wider are the margins of appreciation for the ones who are interpreting it. Because of this, states have been able to use the terrorist threat to legitimise numerous of actions that otherwise would have been hard to win acceptance for. Today, almost any group or organisation with a slightly radical agenda opposing the state, could be described in terms of terrorism. Hence, terrorism has become a powerful discursive tool for states, used to combat opposing non-state agents.¹⁹⁴

9.6.1 *The connection between the national and the international*

How the threat is defined and used in the securitisation process illustrates the connection between securitisation at the international level and at the national. This could be seen as a two way process where both levels affect each other. For instance,

¹⁹³ Buzan, Barry, “Will the 'global war on terrorism' be the new Cold War?”, in *International Affairs*, 2006, Vol. 82, Issue 6.

¹⁹⁴ This has, by some scholars, been argued to be one of the main reasons why it has been so hard to come up with a mutually accepted definition of terrorism in international law. See, for instance Ben Saul, 2005.

many states have referred to resolutions from the Security Council while arguing that exceptional measures are not only needed, but required to fulfil their international obligations.¹⁹⁵ On the other hand, states striving for international responses to be put in action to prevent terrorism usually refer to their national security. Thus, to understand how terrorism has been securitised, one has to include both national and international politics in the analysis.

9.6.2 The reference object

What is being threatened is not always clear, though. The state usually relies on secret evidence, so what the public is being told is that the state officials have to be trusted. But since most terrorism today is associated with Islamic fundamentalism and because well-known representatives, such as Bin Laden, have promoted the killing of any infidel, it has been rather easy for states to equate the threat against the state to a threat against its citizens. Thus, the idea that terrorism is a threat to the citizens of most Western states is rather accepted today.

9.6.3 The relevant audience

For the executive power to properly securitize terrorism, it's not enough to convince the military, media and the public opinion. Since the executive's options of how to handle terrorism is restricted by many legal and political restraints, it also has to convince the legislative and judicial powers that terrorism is of such an existential threat that those restraints have to be loosened.

9.6.4 Other states as audience

When it comes to international law, changing the norms is quite a complex process. Changing customary law usually takes long time, and it is seldom easy to affect the law with a new convention since most of the times there are not only just one treaty regulating the issue at stake. Regarding terrorism there are some specific conventions regulating that, but since the restraints to state action often is found in the vast amount of human rights treaties, most executives (at least the ones considering themselves bound by these treaties) find amending all of them to be a much too slow process.

¹⁹⁵ Such as UN SC res. 1373.

Nevertheless, many changes have taken place since a big number of states do acknowledge that terrorism is a threat to their security. What they have not been able to agree upon is how big this threat actually is, meaning what kind of actions it legitimises. There is still no consensus about what kind of derogations and limitations from HRL that are necessary. So, even if terrorism could be considered to have been securitised at an inter-state level, there are still controversies regarding what extraordinary measures the executive might use.

9.6.5 Convincing the courts

Like I mentioned above, convincing the lawmaking power is not enough. The judicial power also has to be convinced that the terrorism threat demands extraordinary measures. Both because the judicial power sometimes have the ability to stop or slow down legal changes and since it usually has the power to make the executive refrain from derogating from the norms it is bound by. This process, too, has been very complex. A look at case law tells us that the judicial power has at once been willing and reluctant to accept the executive's description of terrorism as being an existential threat to the state. That this process is all about the executive trying to persuade the courts was evident in the aforementioned case of *Youssef v. Home Office*¹⁹⁶.

The aforementioned case law from ECtHR and SIAC and the decisions by CAT and HRC show that there is not one single answer to how the courts and committees have reacted to the executives' attempts to securitize terrorism. But one plausible conclusion is that while they usually have agreed that terrorism constitutes a great threat to state security, and states have a responsibility to protect their citizens, most courts have not been willing to accept all extraordinary measures the executives have been proposing. In general, the case law shows that the courts have been rather critical to the executives' attempts to justify derogations from their human rights responsibilities by referring to the threat from terrorism.

9.6.6 The Suresh case

Nevertheless, there are a number of cases where courts have accepted that HRL can be derogated from in the name of state security. As mentioned above, the ECtHR has

¹⁹⁶ n97

not excluded the use of diplomatic assurances per se as incompatible with the Convention. Another illustrating example is the *Suresh* case in Canada.¹⁹⁷ Michel Coutu and Marie-Hélène Giroux's analysis of the case clearly shows how courts too are affected by political and moral changes in a society.¹⁹⁸ In comparison to earlier case law, *Suresh* sets a new precedent. Whereas the principle of *non-refoulement* earlier had hindered extraditions that would be in conflict with the Canadian constitution, the Supreme Court's judgment in *Suresh* was based on the idea that terrorism, as a threat to security must be balanced against the rights for the individual. Coutu and Giroux explain this change as a shift in the underlying reasoning by the court. They claim that the judgement is a result of a formalistic, rather than a value-based jurisprudence, which rely on the legal system and regulations as such, instead of the moral values and principles behind it. From having been a "guardian of the Canadian constitution", the Supreme Court amends its task to interpret and judge on the formal norms it has been given. According to Coutu and Giroux, "the Tribunal has put aside discourse ethics [...] to the benefit of formal legality – which is nothing else, in the circumstances, than judicial deference towards governmental and administrative decisionism"¹⁹⁹.

Thus, the *Suresh* case is important not only from a legal perspective, but perhaps even more so as an example of how courts are affected by changes in the political climate. The securitisation of terrorism is probably a major cause to the transformation of the underlying ethics and the reasoning behind the judgement. This paragraph, in particular, shows how the court has accepted the executive's description of the issue:

They [the terrorist attacks of 9/11] are a reminder of that in matters of national security, cost of failure can be high. This seems to me to underline the need for the judicial arm of the government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.²⁰⁰

¹⁹⁷ *Suresh*, n66.

¹⁹⁸ Coutu M and Giroux M-H, 2006, *The aftermath of 11 September 2001: liberty vs. Security before the supreme court of Canada*, Oxford: Oxford University Press.

¹⁹⁹ Coutu and Giroux, 2006, p. 329.

²⁰⁰ *Suresh*, para. 33.

9.7 The struggle of the definition

This clearly shows how the securitisation process works. Since it is a matter of discourse, there is no final answer to how the terrorism threat will be articulated. There are many powers in society countervailing the attempts to establish one hegemonic view on a subject. One discourse is always questioned by another and in the end a question of power. Therefore, the theory of securitisation does not only show the dangers of securitising a subject and moving it away from the fields of politics; it also explains how the opposite could happen, how a subject can be de-securitised and once again be considered to be a matter of politics. In that way, securitisation is highly political and emancipating. This, too, is what Mouffe and Behnke argue: a widening of the political to avoid antagonism. As mentioned before, to avoid getting stuck in the sphere of metaphysics where there can be no peaceful settlements, conflicts – and thus terrorism – need to be addressed politically.

10 The state of emergency

10.1 Schmitt and the theory of securitisation

Since many of the theories I am using are based on Carl Schmitt's definition of the political, turning to Schmitt could also give the theory of securitisation a deeper understanding. In Rita Taureck's analysis of the securitisation theory, she argues that Schmitt in many ways has affected the theory. Referring to Williams²⁰¹, Taureck sees a connection between the existential threat that the securitising actor points out and Schmitt's understanding of the political: "[J]ust as the nature of 'the political' is determined by the division between friend and enemy, the nature of 'security' is determined by the division between normal democratic rule and extraordinary politics beyond rules and regulations"²⁰². It is the existential threat, the enemy of the state, which justifies this exception.

Another similarity is Schmitt's division between friend and enemy and the securitisation theory's description of how a "we" and "they" is created. The securitising actor identifies itself with the reference object, the state, but distinguishes

²⁰¹ Williams M, 2003, "Words, Images, Enemies: Securitization and International Politics" in *International Studies Quarterly*, Vol. 47 No. 4.

²⁰² Taureck, 2006, p. 15.

itself from the threat. Taureck gives two reasons why this division is necessary: “[F]irst because security is always relational in the sense that one actor’s insecurity/security hinges on another actor’s insecurity/security – the classic security dilemma; and, second, it makes little sense to speak of one actor’s security (the ‘self’) without recognizing the source of the threat (the ‘other’), as in the absence of ‘the other’ there is no need for security”²⁰³. This also connects the theory to Mouffe’s description of how different collectives are driven further away from each other because of the excluding practice of the consensus.

However, Taureck recognises one important distinction between Schmitt and the securitisation theory. For Schmitt, the executive’s choice to take on exceptional measures was all about its own decision whether to do that or not. It lies within the realms of the executive’s power to take that decision. Securitisation, on the other hand, describes a much more complex process where the executive is but one actor trying to influence this process.

Lastly, there is also a normative difference. Whereas the securitisation process has been critically analysed, Schmitt considered this to be something politically necessary. Since Schmitt meant that the political precedes the law, and the political is based on the conflict between friend and enemy, it is the obligation of the executive to derogate from the law if this conflict becomes too intense. According to Schmitt, it is the decision, rather than a rational discussion, that defines the executive, and the most important decision is the one about the state of emergency. The executive’s right to declare a state of emergency is what legitimises its power. However, this state of emergency does not mean a dissolution of the law for the executive’s own sake, but should be used as a tool to once again create order. The law prerequisites order, not the other way around, and this is why law can never precede the political.

But this can only be true as long as the state of emergency is temporal. Securitisation as such is not necessarily a problem. Some issues might be of such a big threat that they do legitimate emergency actions that otherwise would be illegal. However, which Noll points out, the state of emergency has to be limited both in time and space. What we see today is the extension of the state of emergency from being a

²⁰³ Taureck, 2006, p. 16.

necessary tool to prevent a specific threat from destabilising the society, to becoming a permanent part that society. Thus, securitisation and the exclusion of conflicts from the political might result in a permanent state of emergency.²⁰⁴ This is why Schmitt's theory about the executive's right to declare a state of emergency no longer properly describes contemporary world politics.

10.2 Agamben

This is also what Agamben argues. In contrast to Schmitt, Agamben looks on the state of emergency with suspicion. He takes on where Schmitt ended: at the attempt of trying to include the state of emergency within the realms of the law.²⁰⁵ The state of emergency, in Agamben's terms, is not an abolishment of the law; the law is still in place, but without significance.²⁰⁶ Thus, there is no need for a formal derogation or limitation of the rights provided by human rights treaties. By the de-humanisation of some people, or the creation of the *homo sacer*, the outcast, they are excluded from society and thereby the realms of law.²⁰⁷ The law is in force, but has abandoned the ones with no rights.

According to Agamben, and Schmitt, the state of emergency is no anomaly to the democratic society, but rather its precondition. For Schmitt, this is what constitutes sovereignty. Agamben, however, does not view the state of emergency as a theoretical necessity, but as a historical fact. The development of democracy and the politics within democratic states, shows, according to Agamben, that the state of emergency is no longer a state of exception, but has become the norm.²⁰⁸ The exclusion from, and the undermining of, the principle of *non-refoulement*, is but one of many examples of human rights that formally persist, but without much significance to the ones in most need of its protection.

11 Discussion and conclusions

As shown in section one, from a legalistic perspective, diplomatic assurances might be very problematic, but perhaps possible to justify. Whereas the individual's legal

²⁰⁴ Noll, 2003, pp. 197f.

²⁰⁵ Agamben, Giorgio, 2005, *Undantagstillståndet*, Lund: Site edition I, pp. 43f.

²⁰⁶ Agamben, 2005, pp. 63 and 78f.

²⁰⁷ Agamben, 1998, *Homo Sacer. Sovereign Power and Bare Life*, Stanford: Stanford University Press.

²⁰⁸ Agamben, 2005, p. 22.

rights can be codified in a lot of documents, the realisation of these rights will always take place in a specific context. In this context there will necessarily be other interests to consider. Whether to provide a particular right or not in a specific situation requires a balance of those different interests. This has particularly been emphasised by governments, trying to unleash themselves from human rights restrictions such as *non-refoulement*, when countering terrorism. The necessity to assess each and every case individually and to always consider all relevant information has been acknowledged by all the courts and committees that I have looked into. For this reason, the use of diplomatic assurances has not been ruled out as incompatible with the principle of *non-refoulement*. On the other hand, no international court or committee has yet accepted an assurance as sufficient protection. Consequently, the diplomatic assurances that have been used this far has not been in accordance with international law.

Furthermore, as shown in the last part of the first section, a systematic use of diplomatic assurances might defy the purpose of the conventions wherein *non-refoulement* is expressed. Even though this claim has not yet been considered by the courts, I consider this to be the main argument why diplomatic assurances should be deemed unlawful. This is also the answer to the first question I asked myself in the beginning of this paper: the legal implications of the use of diplomatic assurances are, on an individual level, many, but could possibly be overcome; however, from a structural perspective, diplomatic assurances could probably be regarded as undermining the principle of *non-refoulement*, and therefore considered unlawful.

The problem with this legalistic view is that the legal system of norms is seen as a closed system, referring only back to itself. For this reason, a discussion about the principle of *non-refoulement* and whether the use of diplomatic assurances are violating it cannot go beyond the perspective “right or wrong”. This is the reason why I, in the second section, contextualised the problem politically and theoretically. The politics behind the GWT is a necessary background for understanding why diplomatic assurances have to be analysed as being a part of a wider anti terrorism policy, risking to undermine the human rights it is said to protect.

The purpose of the second section was to both give a background to why governments resort to methods that seem judicially problematic, and to discuss what wider political

consequences the use of diplomatic assurances might have. If this discussion is analysed from a social constructivist perspective, where the legal system is seen as a reflection of, and always in relation to, political and moral values in a society, one can easily see the limits of the legalistic view. The principle of *non-refoulement* and its importance is not worth much in a world where some people are deprived of all their rights. When the security perspective has become the hegemonic power and all opponents are de-legitimised and de-humanised, their legal rights lose substance. Diplomatic assurances could, from a legalistic perspective, be seen as an attempt to mediate between conflicting interests. But put in a wider context, with the help from Mouffe, Benhke, Noll and the securitisation theory, these methods should rather be seen as symbols of, and the result of, political changes. The decision to exclude everyone that questions the consensus hegemony as non-political, and the securitisation of terrorism, has led to increased antagonism and a widening of the gap between different parts of the world. In this narrow discourse, principles such as *non-refoulement* are nothing but empty words.

Coutu and Giroux's analysis of the *Suresh case* – which they describe as a shift of reasoning in the balance between liberty and security – and SIAC's judgements in UK, demonstrates that a division of power clearly is not enough to safeguard principles such as *non-refoulement* when politics in a society are changing. An independent judicial power might, and has proven to do so, slow down and perhaps influence these political and moral changes. But in a longer perspective, which is also confirmed by the theories I have based this paper on, what is needed is a political understanding of the problems and another political alternative to the excluding consensus democracy. However independent on a formal level, the judicial power too is affected by processes such as securitisation and the mystification of the political. This is especially important when this security perspective shapes the laws that the courts are to interpret and judge from. Once again referring to Coutu and Giroux's Canadian example, they state that “the Canadian Anti-Terrorism Act remains, in nature, an emergency legislation. The perennial dilemma of ‘liberty vs. security’ is, so to speak, in it *ab initio*”²⁰⁹. The whole legal system is thus affected by the emergency measures the state considers to be necessary.

²⁰⁹ Coutu and Giroux, 2006, p. 314.

If diplomatic assurances, and, particularly MOUs, are used systematically, they risk becoming its own structure and model for deportation: a parallel system. Thus, the absolute ban on torture and the prohibition to return a person to a country where he or she might face torture are undermined by this parallel system. The absolute rights are reserved for people not considered to be terrorists; the citizens have rights, the aliens are de-humanised. They are the partisans, with which the state is fighting a never-ending war. This is my answer to my question what the consequences might be if the use of diplomatic assurances is systemised. Diplomatic assurances are a part of the construction of this parallel system and the undermining of the principle of *non-refoulement*. The method is at the same time legitimised by the processes described by Mouffe, Behnke and Noll, while also a catalyst increasing these processes. By undermining *non-refoulement*, and accepting different standards for different people, the democratic system as such is undermined. Therefore, which has been argued many a times before, there is a risk that the GWOt destroys just what it is said to protect. Diplomatic assurances should therefore be understood as a part of this war, and its usage could not be reduced to a discussion about legal foreseeability or whether an assurance reduces the risk of torture in a particular case. The structural effects of it, and the reasoning behind it, are political, and, consequently, so must the analysis be.

SIAC in UK seems to be the best example of how the executive power has been able to convince the court that “the rules of the game have changed”. In all cases referred to above, they have fully accepted the executive's perspective, arguing that the MOUs offer sufficient protection. This does, indeed, seem to imply that terrorism has been securitised. However, other courts and committees have been reluctant to accept this reasoning, stating that the principle of *non-refoulement* is absolute and that only if the assurances reduce the risk of torture enough, can they be regarded as sufficient protection. This could be described as a struggle of how to define terrorism and the impacts of it. Until now, the courts have been powerful enough to affect the discourse, claiming that human rights should prevail. Nevertheless, as the case of *Agiza* and the Swedish government's rejection to admit any responsibility illustrates, the states are not very willing to listen to the courts. Since terrorism has been securitised, the executive considers itself to have the moral, political and judicial responsibilities to deal with it.

Finally, the construction of a parallel system could also be analysed by Agamben's theory of the state of emergency. For Schmitt, the state of emergency was a temporal suspension of the law, so that the executive would have to ability to restore the order. This ability to declare the state of emergency is what constitutes the executive's power and legitimacy. But for Agamben this can only be true if this state actually is temporal. The exception cannot legitimize the norm, when the exception becomes the norm. What we see emerging today is that the state of emergency loses its temporal feature and becomes permanent. The parallel system of diplomatic assurances becomes the norm, which undermines the previous norm. This is why diplomatic assurances cannot solely be discussed in terms of legality, but has to be analysed in their political context. The securitisation of terrorism risks becoming permanent, and therefore, the exceptions from normal legal standards this legitimises, may create a permanent state of emergency. Or, as described by Buzan:

It thus becomes clear that terrorism poses a double threat to liberal democratic societies: open direct assaults of the type that have become all too familiar, and insidious erosion as a consequence of the countermeasures taken. It is easy to see how this dilemma drives some towards seeking a solution in total victory that will eliminate both the terrorists and the contradiction. But if it is impossible to eliminate terrorists, as is probably the case, then this drive *risks the kind of permanent mobilization that inevitably corrodes liberal practices and values* (emphasis added).²¹⁰

When the political opponent has turned into an antagonistic, de-humanised enemy, based on the indefinite GWoT, diplomatic assurances are not used to ensure protection, but to disguise the weakening of human rights and democratic principles. One again, quoting Noll:

It is frequently argued that terrorism will prevail as soon as human rights are compromised in the struggle against it. The ambiguity of such statements should give us pause; apart from its common sense, it can also be understood as an imperative to protect the concept of human rights from being tainted by the violence unleashed in the 'war on terror'. With regard to diplomatic assurances, the same ambiguity is at work. Rather than assuring the captive of protection against harm, it may be that human rights as such are merely assuring themselves. Thereby, the rendering community may feel that the conception of human rights remains unharmed by the struggle that unfolds itself during the rendition process.²¹¹

An enduring answer to how the problems of the undermining of *non-refoulement* can be solved, is therefore more of a political than legal nature. This is also the answer to my final object with this paper: a discussion about *de lege ferenda*. What is needed is

²¹⁰ Buzan, 2006, p. 1117.

²¹¹ Noll, 2006, section VI.

not a legal change, but a different perspective on terrorism. The political sphere has to be widened and political opponents acknowledged rather than de-legitimised. A demystification of politics, a de-securitisation of terrorism and a re-humanisation of alleged terrorists are a few first steps required if democracy and the *Rechtsstaat* are to be restored.

Acronyms and abbreviations

CAT	Committee against Torture
CSS	Critical Security Studies
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court for Human Rights
ECJ	European Court of Justice
EU	European Union
GWoT	Global War on Terror
HRC	Human Rights Committee
HRL	Human Rights Law
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGO	Inter-governmental Organisation
IHL	International Humanitarian Law
MOU	Memorandum of Understanding
NGO	Non-governmental Organisation
POW	Prisoner of War
SIAC	Special Immigration Appeals Commission
UN	United Nations
UN GA	United Nations General Assembly
UN SC	United Nations Security Council
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

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