



UNHCR Note on
Diplomatic Assurances and International Refugee Protection

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Geneva, August 2006

I. BACKGROUND AND CONTEXT

1. The term “diplomatic assurances”, as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.

2. Reliance on diplomatic assurances has been a longstanding practice in extradition relations between States,¹ where they serve the purpose of enabling the requested State to extradite without thereby acting in breach of its obligations under applicable human rights treaties,² national – including constitutional – law, and/or provisions in extradition law which would otherwise preclude the surrender of the individual concerned.³ Their use is common in death penalty cases, but assurances are also sought if the requested State has concerns about the fairness of judicial proceedings in the requesting State, or if there are fears that extradition may expose the wanted person to a risk of being subjected to torture or other forms of ill-treatment.

3. However, the use of diplomatic assurances is not confined to the area of extradition. Increasingly, assurances that the person who is to be removed will not be subjected to torture or other forms of ill-treatment are resorted to in the context of removal procedures such as expulsion or deportation,⁴ and also where individuals are transferred to other countries through informal measures which do not offer any procedural safeguards. This practice, which is sometimes referred to as “rendition” or “extraordinary rendition”, is resorted to with increasing frequency to remove persons whom the sending State suspects of involvement in terrorist activities and/or considers a danger to national security, including to countries which are reported to practice or condone torture.⁵

¹ Extradition is a formal process involving the surrender of a person by one State to the authorities of another for the purpose of criminal prosecution or the enforcement of a sentence. In the context of extradition proceedings, the two States involved are usually referred to, respectively, as the “requesting” and the “requested” State.

² See below at paragraphs 16–26.

³ Extradition agreements (whether bilateral or multilateral) and national legislation related to extradition typically provide for refusal grounds – that is, conditions under which the requested State may, or must, refuse the extradition of an individual. These include: the political offence exemption; discrimination (or non-persecution) clauses; non-extradition for reasons related to the requested State’s own notions of justice and fairness; non-extradition of nationals; bars to extradition based on international/regional human rights and/or refugee law, which have been incorporated into applicable national legislation. For more details, see S. Kapferer, *The Interface between Extradition and Asylum*, UNHCR, Legal and Protection Policy Research Series, PPLA/2003/05, November 2003, at paragraphs 69–112.

⁴ Unlike extradition, which requires formal acts of two States, expulsion and deportation are unilateral procedures of the sending State. They are, however, subject to safeguards and guarantees, including, in particular, the requirement that they have a basis in national law which must conform to international standards, and that individuals concerned be given an opportunity to challenge the lawfulness of such procedures.

⁵ See, for example, High Commissioner for Human Rights, Human Rights Day Statement: *On Terrorists and Torturers*, 7 December 2005; Report of the High Commissioner for Human Rights on Protection of human rights and fundamental freedoms while countering terrorism to the UN Commission on Human Rights, UN document E/CN.4/2006/94, 16 February 2006, at

4. Diplomatic assurances are usually sought on an individual basis, with regard to particular persons whom the host State intends to extradite or otherwise remove from its territory. More recently, however, diplomatic assurances in the form of general clauses concerning the treatment of deportees have been included in agreements governing the deportation of persons from one State to another.⁶

5. Diplomatic assurances given by the receiving State do not normally constitute legally binding undertakings. They generally provide no mechanism for their enforcement nor is there any legal remedy for the sending State or the individual concerned in case of non-compliance, once the person has been transferred to the receiving State. Given that diplomatic assurances are sought only when the sending State perceives a need for guarantees with regard to the treatment of the person concerned in the receiving State, questions arise as to the conditions under which the sending State may rely on such assurances as a basis for removing a person from its territory in keeping with its obligations under applicable international as well as national standards.

6. This note examines the use of diplomatic assurances from the point of view of international refugee protection. Two areas are of particular interest. First, it is necessary to clarify the significance of diplomatic assurances where the host State intends to transfer a refugee or asylum-seeker to another country in circumstances which may expose him or her to a risk of persecution. This is addressed in Part II of the note, which provides an overview of the host State's obligations stemming from the prohibition of *refoulement* under international refugee and human rights law as well as customary international law, and analyzes their implications for the use of diplomatic assurances.⁷ Second, where diplomatic assurances are given with regard to an asylum-seeker, this raises questions as to the impact they may have on the determination of his or her eligibility for refugee status. Part III of this note deals with relevant procedural and substantive issues.

paragraphs 9–10 and 18–20; Special Rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, *Report submitted pursuant to General Assembly resolution 58/164*, UN document A/59/324, 1 September 2004 (hereafter: “Special Rapporteur on Torture, Report of 1 September 2004”), at paragraphs 29–30; Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism to the UN Commission on Human Rights, U.N. Doc. E/CN.4/2005/103, 7 February 2005, at paragraphs 54–56. See also Human Rights Committee, *Concluding Observations* on Yemen (U.N. Doc. CCPR/CO/84/YEM, 9 August 2005, at paragraph 13); Canada (U.N. Doc. CCPR/C/CAN/CO/5, 2 November 2005); Committee Against Torture, *Concluding Observations/Comments* on Canada (U.N. Doc. CAT/C/CR/34/CAN, 7 July 2005, at paragraph 4(b)); United Kingdom (U.N. Doc. CAT/C/CR/33/3, 10 December 2004, at paragraph 4(d).

⁶ See the Memorandum of Understanding regulating the provision of undertakings in respect of specified persons prior to deportation concluded between the United Kingdom and Jordan on 10 August 2005. A similar agreement was concluded between the United Kingdom and Libya on 18 October 2005.

⁷ This note does not address questions related to the principle of *non-refoulement* in international humanitarian law.

II. DIPLOMATIC ASSURANCES AND THE PRINCIPLE OF NON-REFOULEMENT

A. Protection against *refoulement* under international refugee law

7. International refugee law specifically provides for the protection of refugees against removal to a country where they would be at risk of persecution. This is known as the principle of *non-refoulement*. Often referred to as the cornerstone of international refugee protection, it is enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees (hereafter: “1951 Convention”).⁸ Article 33(1) provides:

“No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

8. The principle of *non-refoulement* applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the inclusion criteria of Article 1A(2) of the 1951 Convention⁹ and does not come within the scope of one of its exclusion provisions.¹⁰ It applies not only in respect of return to the country of origin but also with regard to forcible removal to any other country where a person has reason to fear persecution related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to his or her country of origin.¹¹

9. Given the declaratory nature of refugee status, the principle of *non-refoulement* equally applies to those who meet the criteria of Article 1 of the 1951 Convention but have not had their status formally recognized. Asylum-seekers are also protected against *refoulement*. As such persons may be refugees, it is an established principle of

⁸ For a detailed analysis see E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of *non-refoulement*: *Opinion*”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003). Regional refugee instruments also contain *non-refoulement* provisions, notably Article II(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and Section III(5) of the 1984 Cartagena Declaration on Refugees.

⁹ Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee” shall apply to any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it”.

¹⁰ These are: the first paragraph of Article 1D (which applies to persons who are receiving protection or assistance from a UN agency other than UNHCR), Article 1E (which applies to those recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality), and Article 1F (which applies to those for whom there are serious reasons for considering that they have committed certain serious crimes or acts).

¹¹ See UNHCR, Note on *Non-Refoulement* (EC/SCP/2), 1977, at paragraph 4. See also Paul Weis, *The Refugee Convention, 1951*, at p. 341, quoted in E. Lauterpacht and D. Bethlehem, above footnote 8, at paragraph 124.

international refugee law that they should not be returned or expelled pending a final determination of their status.¹²

10. The prohibition of return to a danger of persecution under international refugee law is applicable to any form of forcible removal, including extradition, deportation, informal transfer or “renditions”. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return “in any manner whatsoever”.

11. Exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates that

“The benefit of [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 [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

12. The application of this provision requires an individualized determination by the country of asylum that the person concerned constitutes a present or future danger to the security or the community of the host country.¹³

- (i) For the “security of the country” exception to the principle of *non-refoulement* to apply, there must be an individualized finding that the refugee poses a current or future danger to the host country. The danger must be very serious, rather than of a lesser order, and it must be a threat to the national security of the host country.¹⁴
- (ii) For the danger to the community exception to apply, not only must the refugee in question have been convicted of a crime of a very grave nature, but it must also be established that the refugee, in light of the crime and conviction, constitutes a very serious present or future danger to the community of the host country. The fact that a person has been convicted of a particularly serious crime does not of itself mean that he or she also meets the “danger to the community” requirement. Whether or not this is the case

¹² See also below at paragraphs 35–37.

¹³ Article 33(2) of the 1951 Convention will not apply, however, if the removal of a refugee results in a substantial risk of torture or other cruel, inhuman or degrading treatment or punishment. See “*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*” (hereafter: “UNHCR, *Suresh Factum*”), in 19:1 *International Journal of Refugee Law* (2002), pp. 141–157; E. Lauterpacht and D. Bethlehem, above footnote 8, at paragraph 159(ii), 166 and 179.

¹⁴ See UNHCR, *Suresh Factum*, above footnote 13, at paragraphs 68–73. See also E. Lauterpacht and D. Bethlehem, above footnote 8, at paragraphs 164–166. See also A. Grahl-Madsen, *Commentary on the Refugee Convention, Articles 2–11, 13–37*, published by UNHCR (1997), commentary to Article 33, at (8), where the discussions of the drafters of the 1951 Convention on this point are summarized as follows: “Generally speaking, the ‘security of the country’ exception may be invoked against acts of a rather serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.”

will depend on the nature and circumstances of the particular crime and other relevant factors (e.g. evidence or likelihood of recidivism).¹⁵

13. In either case, the removal of a refugee in application of one of the exceptions provided for in Article 33(2) of the 1951 Convention is lawful only if it is necessary and proportionate. This means that there must be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security or community of the host country; *refoulement* must be the last possible resort for eliminating the danger to the security or community of the host country¹⁶; and the danger for the host country must outweigh the risk of harm to the wanted person as a result of *refoulement*.¹⁷

14. Moreover, the determination of whether or not one of the exceptions provided for in Article 33(2) is applicable must be made in a procedure which offers adequate safeguards.¹⁸

15. The principle of *non-refoulement* as enshrined in Article 33 of the 1951 Convention is part of customary international law.¹⁹ As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.²⁰

B. Protection against *refoulement* under human rights law

1. General considerations

16. Under international human rights treaties and customary international law, States are under an obligation not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life²¹ or torture.²² An explicit *non-refoulement* provision is contained in

¹⁵ *Ibid.*, at paragraphs 190–192.

¹⁶ If less serious measures would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2) of the 1951 Convention.

¹⁷ See UNHCR, *Suresh Factum*, above footnote 13, at paragraphs 74–84; see also E. Lauterpacht and D. Bethlehem, above footnote 8, at paragraphs 177–179.

¹⁸ At a minimum, these should be the same as the procedural safeguards required for expulsion under Article 32 of the 1951 Convention. Article 32(1) permits the expulsion of a refugee to a country other than that where he or she fears persecution on national security and public order grounds. Article 32(2) and (3) provide for minimum safeguards, including, in particular, the right to be heard and the right to appeal, as well as the right to be allowed a reasonable time within which to seek legal admission to another country.

¹⁹ See, for example, the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, at preambular paragraph 4; see also E. Lauterpacht and D. Bethlehem, above footnote 8, at paragraphs 193–219.

²⁰ The prohibition of *refoulement* of refugees under customary international law also applies, with regard to non-European refugees, in States which are party to the 1951 Convention, but which maintain the geographical limitation provided for Article 1B(1) of the Convention.

²¹ The right to life is guaranteed under Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and, for example, Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 4 of the 1969

Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.²³ The prohibition of *refoulement* to a risk of torture is also part of customary international law and has attained the rank of a peremptory norm of international law, or *jus cogens*.²⁴ It imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments.²⁵

17. Obligations under the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, and under regional human rights treaties, also encompass a prohibition of return to other forms or cruel, inhuman or degrading treatment or punishment, as part of the absolute and non-derogable proscription of such treatment under the relevant provisions.²⁶

18. The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including

American Convention on Human Rights (ACHR), Article 4 of the African (Banjul) Charter on Human and People's Rights, Article 5 of the 1981 Arab Charter on Human Rights.

²² The right to be free from torture is guaranteed under Article 1 of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Article 7 ICCPR, and, for example, Article 3 ECHR, Article 5(2) ACHR, Article 5 of the African (Banjul) Charter on Human and People's Rights, and Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture.

²³ See also Article 22(8) ACHR, which provides that "[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

²⁴ See, for example, International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija*, Trial Chamber, Judgement of 10 December 1998, at paragraphs 134–164. See also the judgement of the House of Lords in *Pinochet Ugarte, re.* [1999] 2 All ER 97, at paragraphs 108–109.

²⁵ Pursuant to Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, *jus cogens* norms prevail over treaty provisions. They also rank higher than general customary rules not endowed with the same force.

²⁶ With regard to the scope of the obligations under Article 7 ICCPR, which guarantees the right to be free from torture and other cruel, inhuman or degrading treatment or punishment, see Human Rights Committee in its *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 April 2004, at paragraph 12; see also Special Rapporteur on Torture, *Report of 1 September 2004*, above footnote 5, at paragraph 28. The prohibition of *refoulement* to a risk of serious human rights violations, particularly torture and other forms of ill-treatment, is also firmly established under regional human rights treaties. See, for example, the jurisprudence of the European Court of Human Rights on the scope of protection under Article 3 ECHR, in particular, the decisions in *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1998, and *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996. Other provisions in international and regional human rights instruments which prohibit torture as well as other cruel, inhuman or degrading treatment or punishment include Article 16 UNCAT, Article 5(2) ACHR, Article 5 of the African (Banjul) Charter on Human and People's Rights, and Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture.

asylum seekers and refugees,²⁷ and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed.²⁸ It is non-derogable and applies in all circumstances, regardless of the nature of activities the person concerned may have been engaged in.²⁹

19. Under the above-mentioned obligations, the sending State has a duty to establish, prior to implementing any removal measure, that the person whom it intends to remove from its territory or jurisdiction would not be exposed to a danger of serious human rights violations such as those mentioned above.³⁰ Where the receiving State has given diplomatic assurances with regard to a particular individual, or where there are assurances in the form of clauses concerning the treatment of persons transferred under a general agreement on deportations or other forms of removal, these form part of the elements to be assessed in making this determination. Such assurances do not, however, affect the sending State's obligations under customary international law as well as international and regional human rights treaties to which it is party.³¹

²⁷ For States Party to the ICCPR, this has been made explicit by the Human Rights Committee in its *General Comment No. 31*, above footnote 26, at paragraph 10. Similarly, in its *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 3 June 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child “[...] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention.”

²⁸ See Human Rights Committee, *General Comment No. 31*, above footnote 26, at paragraph 12.

²⁹ See, for example, Human Rights Committee, *General Comment No. 29 on States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, at paragraph 11; Human Rights Committee, *Concluding Observations/Comments on Canada*, U.N. Doc. CCPR/C/CAN/CO/5, 2 November 2005, at paragraph 15; Committee Against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, U.N. Doc. CAT/C/18/D/39/1996, 28 April 1997, at paragraph 14.5. The absolute nature of the prohibition of *refoulement* to a risk of torture and other forms of ill-treatment under Article 3 ECHR has been affirmed by the European Court of Human Rights in *Chahal v. United Kingdom*, above footnote 26. See also Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System*, 28 February 2000, at paragraph 154. This also fully applies in the context of measures to combat terrorism. See, for example, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005, in which the Human Rights Committee acknowledged that “measures taken to fight terrorism, including denial of safe haven, deriving from binding Security Council Resolutions are both legitimate and important. Their execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the Convention [Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], as affirmed repeatedly by the Security Council.” (at paragraph 13.1, with references to Security Council resolutions 1566 (2004) of 8 October 2004, 1456 (2003) of 20 January 2003 and 1373 (2001) of 28 September 2001). See also Security Council resolution 1624 (2004) of 14 September 2005.

³⁰ Also relevant, particularly in the context of extradition, is the prohibition of return to serious violations of fair trial rights, as guaranteed under Article 14 ICCPR, Article 6 ECHR, Article 8 ACHR, Article 7 of the African (Banjul) Charter on Human and People's Rights, and Articles 6, 7, 14 and 16 of the Arab Charter on Human Rights.

³¹ As noted by the Special Rapporteur on Torture, general statements in deportation agreements according to which those returned to a State party to the agreement will be treated in accordance

2. Removal on the basis of diplomatic assurances

20. The conditions under which the sending State is permitted to remove a person to another country on the basis of diplomatic assurances have been examined by international, regional and national courts in cases involving extradition to a risk of capital punishment or serious violations of fair trial as well as expulsion or deportation to a danger of torture or other forms of ill-treatment. The issue has also been addressed by human rights treaty bodies and experts mandated by the United Nations Commission on Human Rights, among others. This has led to the development of clear criteria, and it is now well established that the sending State acts in keeping with its human rights obligations only if such assurances effectively remove the risk that the individual concerned will be subjected to violations of the rights guaranteed therein. Thus, diplomatic assurances may be relied upon only if they are

- (i) a *suitable* means to eliminate the danger to the individual concerned, and
- (ii) if the sending State may, in good faith, consider them *reliable*.³²

Whether or not this is the case must be established in each individual case, in light of all relevant information.

21. In determining the weight which may be attached to diplomatic assurances, the sending State must consider a number of factors, including the degree and nature of the risk to the individual concerned, the source of the danger for the individual, and whether or not the assurances will be effectively implemented. This will depend, *inter alia*, on whether the undertaking provided is binding on those State organs which are responsible for implementing certain measures or providing protection, and whether the authorities of the receiving State are in a position to ensure compliance with the assurances given.³³ The assessment must be made in light of the general human rights situation in the receiving State at the relevant time, and in particular, any practice with regard to diplomatic assurances or similar undertakings.³⁴

with international standards do not offer safeguards beyond the obligations of the States concerned under the treaties they are party to. See “*Diplomatic Assurances*” *not an adequate safeguard for deportees, UN Special Rapporteur against Torture warns*, United Nations Press Release, 23 August 2005. In its resolution on Torture and other cruel, inhuman or degrading treatment or punishment of 16 November 2005 (U.N. Doc. A/C.3/60/L.25/Rev.1), the General Assembly “[...] recognize[d] that diplomatic assurances, where used, do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*.”

³² See, for example, Committee Against Torture, *Agiza v. Sweden*, above footnote 29, at paragraphs 13.4 and 13.5; various decisions of the European Court of Human Rights, in particular the leading decision on extradition and human rights, *Soering v. United Kingdom*, above footnote 26, and, with regard to expulsion, *Chahal v. United Kingdom*, above footnote 26.

³³ This would not be the case, for example, where the authorities of the receiving country, even if they have given assurances in good faith, may not be able to prevent human rights violations by certain members of the security forces. See European Court of Human Rights, *Chahal vs. United Kingdom*, above footnote 26, at paragraph 105.

³⁴ See, for example, Committee Against Torture, *Agiza v. Sweden*, above footnote 29, at paragraphs 13.4 and 13.5.

22. In general, assessing the suitability of diplomatic assurances is relatively straightforward where they are intended to ensure that the individual concerned will not be subjected to capital punishment or certain violations of fair trial rights as a consequence of extradition.³⁵ In such cases, the wanted person is transferred to a formal process, and the requesting State's compliance with the assurances can be monitored. While there is no effective remedy for the requested State or the surrendered person if the assurances are not observed, non-compliance can be readily identified and would need to be taken into account when evaluating the reliability of such assurances in any future cases.

23. The situation is different where the individual concerned risks being subjected to torture or other cruel, inhuman or degrading treatment in the receiving State upon removal. It has been noted that "unlike assurances on the use of the death penalty or trial by a military court, which are readily verifiable, assurances against torture and other abuse require constant vigilance by competent and independent personnel."³⁶ The Supreme Court of Canada addressed the issue in its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, contrasting assurances in cases of a risk of torture with those given where the person extradited may face the death penalty, and signalling

“...the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.”³⁷

24. In his report to the UN General Assembly of 1 September 2004, the Special Rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment examined the question of diplomatic assurances in light of the *non-refoulement* obligations inherent in the absolute and non-derogable prohibition of torture and other forms of ill-treatment. Noting that in determining whether there are substantial grounds for believing that a person would be

³⁵ For example, an undertaking not to seek or impose the death penalty, or to conduct a re-trial of a person in an ordinary rather than a special court, may adequately protect the individual concerned.

³⁶ Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, above footnote 5, at paragraph 56.

³⁷ See Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002, above footnote 13, at paragraph 124. On concerns with regard to the effectiveness of monitoring as a safeguard against a risk of torture, see below at paragraph 26. See also Council of Europe, Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to Sweden, 21–23 April 2004, CommDH(2004)13, 8 July 2004: “[...] When assessing the reliability of diplomatic assurances, an essential criteri[on] must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances, it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment.” (at paragraph 19).

in danger of being subjected to torture, all relevant considerations must be taken into account,³⁸ the Special Rapporteur expressed the view that:

“in circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture, the principle of *non-refoulement* must be strictly observed and diplomatic assurances should not be resorted to.”³⁹

25. The Special Rapporteur further stated that in situations where there may not be a pattern, but where there is a risk of torture or other forms of ill-treatment in the individual case,⁴⁰ the use of diplomatic assurances should not be ruled out *a priori*. It is essential, however, that “such assurances contain an unequivocal guarantee that the person concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of that person has been put into place.”⁴¹ For this to be the case, diplomatic assurances should fulfil a number of essential requirements in terms of protection from torture and other forms of ill-treatment in order to make them

³⁸ Special Rapporteur on Torture, *Report of 1 September 2004*, above footnote 5, at paragraph 35.

³⁹ *Ibid.*, at paragraph 37. The Special Rapporteur recalls the definition of the Committee Against Torture as regards the “systematic practice of torture: that is, where acts of torture have not occurred fortuitously in a particular case or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question.” He also noted that torture may be systematic even if this is not the direct intention of a Government, but rather results from factors beyond the control of the Government (at paragraph 36). Similarly, in its Resolution on the Transfer of Persons, U.N. Doc. E/CN.4/Sub.2/2005/L.12, 4 August 2005, the Sub-Commission on the Promotion of Human Rights “confirms that where torture or cruel, inhuman or degrading treatment is widespread or systematic in a particular State, especially where such practice has been determined to exist by a human rights treaty body or a special procedure of the Commission on Human Rights, there is a presumption that any person subject to transfer would face a real risk of being subjected to such treatment and recommends that, in such circumstances, the presumption shall not be displaced by any assurance, undertaking or other commitment made by the authorities of the State to which the individual is to be transferred” (at paragraph 4).

⁴⁰ In determining whether or not this is the case, the sending State must examine both the prevailing situation in the receiving State and the individual circumstances and vulnerability of the individual whose removal is at stake, including experiences of torture or other forms of ill-treatment in the past, and the possibility that he or she may be at risk of persecution or systematic discrimination amounting to torture or other cruel, inhuman or degrading treatment or punishment on account of his or her belonging to any identifiable group. See Special Rapporteur on Torture, *Report of 1 September 2004*, above footnote 5, at paragraphs 34 and 38–39.

⁴¹ *Ibid.*, at paragraph 40, with reference to the report of the Special Rapporteur on Torture to the General Assembly during its 57th Session, U.N. Doc. A/57/173, 2 July 2002, at paragraph 35.

solid, meaningful and verifiable.⁴² There should also be a system of effective monitoring which is prompt, regular and includes private interviews.⁴³

26. However, in a more recent report which addressed *inter alia* examples of State practice in cases involving diplomatic assurances, the Special Rapporteur on Torture has expressed the view that post-return mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.⁴⁴ In a similar vein, the High Commissioner for Human Rights has expressed concern about the effectiveness of monitoring where the individual concerned faces a risk of torture and cruel, inhuman or degrading treatment.⁴⁵

C. Diplomatic assurances and the forcible removal of refugees or asylum-seekers

27. Whether or not the host State may rely on diplomatic assurances with regard to the treatment of refugees or asylum-seekers in the receiving State must be assessed in light of its obligations under international and regional refugee and human rights law as well as customary international law, as outlined in its main elements in the preceding sections.

1. Refugees

28. The host State's obligation to respect the principle of *non-refoulement* as guaranteed under Article 33 of the 1951 Convention applies with regard to persons who have been recognized as refugees by its own asylum authorities, but also if the person concerned has been determined to be a refugee by UNHCR⁴⁶ or by a country which is different from the State that intends to remove him or her.⁴⁷

⁴² The conditions listed by the Special Rapporteur include, as a minimum: provisions with respect to prompt access to a lawyer; (video) recording of all interrogation sessions and recording of the identity of all persons present; prompt and independent medical examination; forbidding incommunicado detention or detention at undisclosed places. See Special Rapporteur on Torture, *Report of 1 September 2004*, above footnote 5, at paragraph 41, with reference to the Special Rapporteur's report to the Commission on Human Rights of 23 December 2003, U.N. Doc. E/CN.4/2004/56, at paragraphs 27–49.

⁴³ See Special Rapporteur on Torture, *Report of 1 September 2004*, above footnote 5, at paragraph 42.

⁴⁴ See Special Rapporteur on Torture, *Report submitted in accordance with General Assembly resolution 59/182*, U.N. Doc. A/60/316, 30 August 2005, at paragraph 46.

⁴⁵ See High Commissioner for Human Rights, *Human Rights Day Statement, On Terrorists and Torturers*, 7 December 2005, where it is noted that “[s]hort of very intrusive and sophisticated monitoring measures, such as around-the-clock video surveillance of the deportee, there is little oversight that could guarantee that the risk of torture will be obliterated in any particular case. While detainees as a group may denounce their torturers if interviewed privately and anonymously, a single individual is unlikely to reveal his ill-treatment if he is to remain under the control of his tormentors after the departure of the ‘monitors’”.

⁴⁶ Under its international protection mandate, UNHCR may conduct refugee status determination where this is required for protection reasons. UNHCR's authority to do so derives from the Office's 1950 Statute (annexed to General Assembly resolution 428 (V) of 14 December 1950), as developed and refined in subsequent resolutions of the General Assembly and the Economic and Social Council.

⁴⁷ A determination by a State that a person is a refugee under the 1951 Convention has an extraterritorial effect, at the very least with respect to other States Parties to the 1951

Removal to the country of origin or former habitual residence

29. In determining the significance, if any, of diplomatic assurances in situations involving the removal of a refugee to the country which he or she fled, it is necessary to distinguish between cases where the person concerned is protected against *refoulement* under Article 33(1) of the 1951 Convention and those in which one of the exceptions provided for in Article 33(2) of the 1951 Convention is applicable.⁴⁸

30. Diplomatic assurances should be given no weight when a refugee who enjoys the protection of Article 33(1) of the 1951 Convention is being *refouled*, directly or indirectly, to the country of origin or former habitual residence.⁴⁹ The reason for this is that the country of refuge has already made a determination in the individual case and has recognized the refugee to have a well-founded fear of being persecuted in the country of origin. Once the country of refuge has made this finding, it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for assurance that the refugee will be well-treated upon *refoulement*.⁵⁰

31. If the competent authorities of the host State have determined that a refugee comes within the scope of one of the exceptions of Article 33(2) of the 1951 Convention, he or she does not benefit from protection against *refoulement* under international refugee law. However, this does not affect the sending State's obligations under human rights law. In assessing whether the person's removal on the basis of diplomatic assurances would be in keeping with applicable human rights standards, the sending State would need to conduct an assessment along the lines set out above at paragraphs 20–26.

Removal to a country other than the country of origin or former habitual residence

32. Under Article 32 of the 1951 Convention, the host State may expel a refugee who is lawfully in the territory to a country other than the country in relation to which a well-founded fear of persecution has been established. However, this may be undertaken only on grounds of national security or public order,⁵¹ and only in pursuance of a decision reached in accordance with due process of law.⁵²

Convention. Refugee status as determined in one State Party should only be called into question by another State Party in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the 1951 Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned comes within the terms of an exclusion provision of the 1951 Convention. See Executive Committee, Conclusion No. 12 (XXIX) – 1978 on the Extraterritorial Effect of the Determination of Refugee Status, at paragraph (g). See also UNHCR, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, EC/SCP/9, 24 August 1978.

⁴⁸ See above at paragraphs 11–14.

⁴⁹ See UNHCR, *Suresh Factum*, above footnote 13, at paragraph 51.

⁵⁰ See UNHCR, *Suresh Factum*, above footnote 13, at paragraph 52.

⁵¹ Article 32(1) of the 1951 Convention.

⁵² Article 32(2) of the 1951 Convention. Articles 32(2) and (3) of the 1951 Convention also provide for minimum procedural safeguards which must be observed. See also above footnote 18.

33. Prior to expelling a refugee on the basis of Article 32 of the 1951 Convention, the host State would need to ascertain that the person concerned would not face a risk of persecution for reasons of his or her race, religion, nationality, membership of a particular social group or political opinion in the receiving country, or of being sent onward to another country where he or she has a fear of persecution related to one or more of the aforementioned grounds. If the receiving State has provided diplomatic assurances, they would constitute one of the elements to be considered as part of this determination. In examining whether, in light of all available information, such assurances could be considered a suitable and reliable means to eliminate any risk of the individual concerned being exposed to persecution, the host State should take into account the different ways in which persecution may manifest itself.⁵³

34. If the assurances provided do not meet the requirements of suitability and reliability and cannot, therefore, effectively eliminate a risk of persecution which may result from the refugee's transfer to the country concerned, forcible removal to that country would not be covered by Article 32. In such cases, expulsion of a refugee would be in keeping with the host State's obligations under international refugee law only if the individual comes within one of the exceptions to the principle of *non-refoulement* provided for in Article 33(2) of the 1951 Convention.⁵⁴

2. Asylum-seekers

35. As noted above at paragraph 9, asylum-seekers are protected under Article 33(1) of the 1951 Convention against *refoulement* pending a final determination of the asylum claim.⁵⁵

Removal to the country of origin or former habitual residence

36. Thus, an asylum-seeker may not be returned to the country of origin or former habitual residence while his or her asylum claim is being considered. This applies regardless of the manner of removal, including, in particular, where an asylum-seeker is the subject of an extradition request. In such cases, the asylum application should, in principle, be determined in a final decision prior to any decision on the extradition request, and in any event, a decision to extradite should not be implemented while it has not yet been determined whether the wanted person is indeed a refugee.⁵⁶ Diplomatic assurances regarding the treatment of the asylum-seeker in case of return do not affect

⁵³ See also below at paragraph 50.

⁵⁴ See above at paragraphs 11–14.

⁵⁵ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva (hereafter: “UNHCR, *Handbook*”), 1979, re-edited 1992, at paragraph 28; see also E. Lauterpacht and D. Bethlehem, above footnote 8, at paragraphs 87–99.

⁵⁶ As noted below at paragraph 47, the determination on the asylum claim submitted by the person whose extradition is being sought should be made by the requested State's asylum authority. See also UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (hereafter: “UNHCR, *Background Note on Exclusion*”), 4 September 2003, at paragraph 102.

the host State's obligation under international refugee law to respect the principle of *non-refoulement*.⁵⁷

Removal to a country other than the country of origin or former habitual residence

37. The question of removal may arise with respect to a country other than the asylum-seeker's country of origin or former habitual residence. In such cases, the host State would be required under international refugee, human rights and customary international law to evaluate the risks resulting from the person's transfer to that country. Any diplomatic assurances provided by the receiving State would need to be assessed in light of the criteria described above at paragraphs 20–26, with a view to determining whether they would constitute a suitable and reliable tool to eliminate a risk of persecution and/or any other form of harm facing the asylum-seeker upon removal.⁵⁸ If a risk of persecution or onward transfer to such a risk exists, the host State's obligations under Article 33(1) of the 1951 Convention and customary international law would preclude the removal of the asylum-seeker. If there is no such risk, the asylum-seeker may be transferred, provided that the States involved ensure that he or she has access to an asylum procedure.⁵⁹

⁵⁷ However, in such cases, diplomatic assurances would be an element to be considered in determining whether the person concerned has a well-founded fear of persecution. See below at paragraphs 44–55.

⁵⁸ See below at paragraphs 44–55.

⁵⁹ Where the asylum-seeker is transferred on the basis of an extradition request, the asylum procedure in the requested State should be suspended. Consideration of the asylum procedure should be resumed and brought to its final conclusion after the resolution of the prosecution, whether by conviction and sentence or by acquittal. This could be done either in the State where the asylum application was initially pending, or through transfer of responsibility for examining the asylum application to the State to which he or she was extradited. In any event, the removal of an asylum-seeker will be consistent with the sending State's obligations under the 1951 Convention only if the receiving State can be considered a "safe third country" (see below at footnote 65). See UNHCR, *Recommendations on the European Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States* COM(2001)522 final 2001/0215 (CNS)), October 2001; see also UNHCR, *Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Asile 64, of 9 November 2004) (hereafter: "UNHCR, Provisional Comments"), comment on Article 6.

III. DIPLOMATIC ASSURANCES AND REFUGEE STATUS DETERMINATION

A. General considerations

38. The right to seek and enjoy asylum, as enshrined in Article 14 of the Universal Declaration of Human Rights and inherent in the proper functioning of the 1951 Convention/1967 Protocol, encompasses the obligation of States to examine applications for international refugee protection in fair and efficient procedures.⁶⁰ While States may put into place different kinds of procedures for the examination of asylum claim, certain core elements are necessary for decision-making in keeping with international protection standards.⁶¹ From an international protection perspective, it is necessary to ensure that the use of diplomatic assurances in the context of asylum procedures does not result in restrictions of essential procedural safeguards and/or jeopardize the substantive examination of asylum claims.

B. Diplomatic assurances with regard to asylum-seekers

39. Throughout the asylum procedure, the confidentiality of all aspects of an asylum claim should be respected.⁶² As a general rule, no information regarding an asylum application, or the fact that such an application has been made, should be shared with the country of origin or, in the case of stateless asylum-seekers, the country of former habitual residence, as this may breach the applicant's right to privacy⁶³ or even expose the applicant or persons associated with him or her to a risk of persecution. Thus, the host State should not seek diplomatic assurances with regard to an asylum-seeker from

⁶⁰ See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, at paragraphs 4–5; see also Executive Committee Conclusions No. 8 (XXVIII) – 1977 on Determination of Refugee Status; No. 15 (XXX) – 1979 on Refugees Without an Asylum Country; No. 30 (XXXIV) – 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum; No. 58 (XL) – 1989 on Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV) – 1983; No. 55 (XL) – 1989; No. 65 (XLII) – 1991; No. 68 (XLIII) – 1992; No. 71 (XLIV) – 1993; No. 74 (XLV) – 1994; No. 81 (XLVIII) – 1997; No. 82 (XLVIII) – 1997; No. 85 (XLIX) – 1998; No. 92 (LIII) – 2002. See also Goal 1, Objective 2, point 2 of the Programme of Action for the implementation of the Agenda for Protection, adopted during the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, convened in Geneva on 12 and 13 December 2001, and endorsed by the Executive Committee in its Conclusion No. 92 (LIII) – 2002, at paragraph (a).

⁶¹ For an overview of best State practices with regard to these core elements, see UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above footnote 60, at paragraph 50.

⁶² See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above footnote 60, at paragraph 50 (m).

⁶³ International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference (see, for example, Article 12 of the Universal Declaration of Human Rights; Article 17 (1) ICCPR; Article 8 ECHR; Article 11 ACHR). Effective measures need to be taken to ensure that information concerning a person's private life does not reach the hands of third parties that might use such information for purposes incompatible with human rights law. See Human Rights Committee, *General Comment No. 16 on Article 17 of the ICCPR* (32nd session, 1988), at paragraph 10, HRI/GEN/1/Rev.1 at p. 23.

his or her country of origin or former habitual residence pending a determination of the asylum claim.

40. This notwithstanding, the authorities of the country of origin or former habitual residence may be aware of, or suspect, that a particular person has sought asylum in another country and may submit diplomatic assurances to the authorities of that country of their own initiative. Alternatively, the person concerned may seek asylum after diplomatic assurances have been submitted, for example, in the context of extradition proceedings. An asylum-seeker may also come within the terms of a general deportation agreement which contains an undertaking that he or she would be treated in accordance with international standards if returned to the country of origin.

41. Where diplomatic assurances concerning an asylum-seeker exist, they are part of the factual elements to be taken into consideration when determining whether the person concerned is eligible for international protection as a refugee.⁶⁴

C. Access to asylum procedures

42. Diplomatic assurances should not result in the denial of access to asylum procedures. Only formal grounds, such as the availability of protection in a “first country of asylum” or transfer of responsibility to a “safe third country” could form the basis for declaring an asylum application inadmissible.⁶⁵ Diplomatic assurances are concerned with the treatment of the individual concerned in the receiving State, and thus affect the substance of the person’s asylum application. They could not, therefore, give rise to a declaration of inadmissibility. The significance, if any, of such assurances for the well-foundedness of an applicant’s fear of persecution needs to be assessed in the context of the examination of the merits of the claim.⁶⁶

43. For the same reasons, an asylum application should not be declared inadmissible on the grounds that the host State has concluded an agreement on deportations with the applicant’s country of origin or any other country to which the State intends to deport the individual concerned.

D. Diplomatic assurances and refugee status determination

44. Where the country of origin or former habitual residence has provided diplomatic assurances with regard to a particular individual, or where an asylum-seeker would come within the terms of a general agreement concerning the removal and subsequent treatment of certain categories of persons, such assurances are but one of the elements to be considered when examining whether the individual concerned is a refugee.

45. Diplomatic assurances cannot as such form the basis for rejecting an asylum application. They must be evaluated and assessed in light of all the circumstances of the

⁶⁴ See also below at paragraph 49.

⁶⁵ On the criteria which must be met for a country to be considered a “first country of asylum” or a “safe third country”, see UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above footnote 60, at paragraphs 10–18; see also UNHCR, *Provisional Comments*, above footnote 59, comments on Articles 26 and 27.

⁶⁶ See below at paragraphs 44–55.

case, with a view to determining an applicant's eligibility for international refugee protection.

46. If the host country has received diplomatic assurances from the country of origin or habitual residence, this does not as such provide grounds for considering a claim as manifestly unfounded. The asylum application should be examined in the regular asylum procedure, unless it is manifestly unfounded for other reasons. Depending on the circumstances, it may be appropriate, however, to prioritize the treatment of such claims.⁶⁷ Where the circumstances of the case give rise to considerations of exclusion under Article 1F of the 1951 Convention, and particularly in the case of persons who may have been involved in terrorist acts, asylum applications may be considered on a priority basis by specialized exclusion units within the institution responsible for refugee status determination.⁶⁸

47. Determinations on asylum applications should be made by a single, central specialized asylum authority, on the basis of a full factual and legal assessment of the individual case, taking into account all available information on the situation in the country of origin or, in the case of a stateless person, the country of former habitual residence.⁶⁹ This applies in all situations, including where the authorities of that country have submitted a request for the extradition of an asylum-seeker.

48. In assessing the weight which may be given to diplomatic assurances in the examination of an asylum claim, the decision-making authority should be guided by the criteria which have been developed under international and regional human rights law for the evaluation of diplomatic assurances.⁷⁰ In the refugee context, this means determining whether such assurances can be considered a suitable and reliable tool to eliminate the risk of persecution facing the applicant in the country concerned and may, therefore, justify a finding that he or she does not qualify for international protection as a refugee. In doing so, decision-makers would need to bear in mind the particular nature of an asylum claim.

49. It should be recalled, in particular, that an asylum-seeker has established a claim for refugee status if he or she has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (the

⁶⁷ On the criteria which must be met for a claim to be considered "manifestly unfounded", see Executive Committee, Conclusion No. 30 (XXXIV) – 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, at paragraph (d); see also UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above footnote 60, at paragraphs 25–32.

⁶⁸ See UNHCR, *Background Note on Exclusion*, above footnote 55, at paragraph 101. It should be noted that applications involving questions related to exclusion under Article 1F of the 1951 Convention should not be treated as "manifestly unfounded", as they may give rise to complex issues of substance and credibility which are not given appropriate consideration in accelerated procedures. See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above footnote 60, at paragraph 29.

⁶⁹ See Executive Committee, Conclusion No. 8 (XXVIII) – 1977 on Determination of Refugee Status, at paragraph (e)(iii); see also UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above footnote 60, at paragraph 50 (i) and (j).

⁷⁰ See above at paragraphs 20–26.

“1951 Convention grounds”).⁷¹ While the burden of establishing the veracity of his or her allegations and the accuracy of the facts relevant to an asylum claim (the “burden of proof”) lies, in principle, on the applicant, the duty to ascertain the pertinent facts is shared between the applicant and the decision-making authority.⁷² It is the role of the decision-maker to determine whether, based on the facts, the applicant meets the refugee definition as set out in Article 1 of the 1951 Convention. In this analysis, diplomatic assurances go to the question of the well-foundedness of the fear.⁷³

50. The analysis in cases involving diplomatic assurances should start with a careful examination of the nature of the harm facing the applicant in the event of his or her return to the country of origin or former habitual residence. It is important to recall that the notion of “persecution” in international refugee law encompasses, but is not limited to, serious human rights violations such as arbitrary deprivation of life or liberty, torture or other cruel, inhuman or degrading treatment or punishment. Persecution may manifest itself in other ways, including, for example, discriminatory measures which, either of themselves or cumulatively, result in consequences of a substantially prejudicial nature. Restrictions of a person’s social and economic rights may also amount to persecution if they result in depriving those affected of their ability provide for their livelihood.⁷⁴

51. Diplomatic assurances would meet the suitability criterion only if they could effectively eliminate all reasonably possible manifestations of persecution in the individual case. The decision-maker would need to consider whether a person who may be subjected to a particular form of persecution linked to a 1951 Convention ground may be exposed to other kinds of serious harm for those reasons, even if the assurances would effectively eliminate a specific threat. For example, an undertaking given by the country of origin to the effect that an applicant would not be subjected to torture if he or she were to be extradited would not necessarily eliminate a risk of persecution in the form of excessive or disproportionate punishment, or serious discrimination which the individual concerned is likely to face independently of the criminal proceedings against him or her.

52. Another question which is relevant both to the suitability of diplomatic assurances and their reliability is whether the risk of persecution emanates from State agents or non-State actors, and whether or not the authority which has provided the assurances has effective control over their actions.

⁷¹ As noted above at paragraph 8, eligibility for international refugee protection also requires that the applicant does not come within the scope of an exclusion provision of the 1951 Convention.

⁷² See UNHCR, *Handbook*, above footnote 55, at paragraphs 195–199; see also UNHCR, *Note on Burden and Standard of Proof*, above at footnote 57, at paragraph 6. Depending on the circumstances, the decision-maker may be required to use all the means at his or her disposal to produce the necessary evidence in support of the application. However, as noted above at paragraph 39, this should not include seeking diplomatic assurances with regard to an asylum-seeker from the authorities of the country of origin or former habitual residence.

⁷³ An asylum-seeker’s fear is well-founded if there is a “reasonable possibility” that he or she would be subjected to the treatment feared, or any other harm amounting to persecution, if returned to the country of origin or former habitual residence. See UNHCR, *Note on Burden and Standard of Proof*, 16 December 1998, at paragraph 17.

⁷⁴ See UNHCR, *Handbook*, above footnote 55, at paragraphs 51–64.

53. If it has been determined, in an individual case, that diplomatic assurances are a suitable means to obliterate the risk of persecution, this could form the basis for a rejection of the applicant's claim only if the host authorities may in good faith consider such assurances reliable. If there are doubts as to whether the assurances will be respected, the reliability criterion would not be met. The onus of establishing that diplomatic assurances would be a suitable and reliable means to eliminate all forms of persecution which the individual concerned is reasonably likely to face lies on the decision-making authority, not on the applicant.⁷⁵

54. In assessing the reliability of diplomatic assurances in the refugee context, the decision-making authority must examine the practice in the country concerned, including with regard to previous undertakings to permit monitoring by the authorities of the sending country.⁷⁶ Given the many different ways in which persecution may manifest itself, the above-described concerns about the extent to which monitoring may provide a safeguard against torture and other forms of ill-treatment are all the more pertinent where an individual is in danger of being persecuted upon removal. In such cases, effective monitoring will only be possible in those cases where the risk of persecution facing the applicant is limited to certain, precisely defined measures.⁷⁷

55. Moreover, where it is established that an asylum-seeker has already suffered persecution in the country which he or she fled, assurances by the authorities that were responsible, either directly or indirectly, for such previous persecution should not be considered reliable. In such cases, similar considerations would apply as for diplomatic assurances given with regard to recognized refugees.⁷⁸

⁷⁵ See also above at paragraph 49.

⁷⁶ See above at paragraph 21.

⁷⁷ See above at paragraph 26.

⁷⁸ See above at paragraph 30.