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Senate Standing Committee on Legal and Constitutional Affairs
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Dear Committee Secretary

Re: Answer to Question on Notice – Australian Refugee Law Academics

I write to answer a question on notice asked by Senator Cash during my appearance (with Professor Jane McAdam) before the Committee on 23 September. The question requested a list and summary of cases concerning the legality of diplomatic assurances which seek to prevent the ill-treatment of a person upon return to another country.

I **attach** to this letter the following leading cases, and summarise their relevant findings:

- ***Alzery v Sweden*, UN Human Rights Committee, Communication No. 1416/2005, 25 October 2006** (concerning article 7 of the *International Covenant on Civil and Political Rights*)
- ***Agiza v Sweden*, UN Committee against Torture, Communication No. 233/2003, 20 May 2005** (concerning article 3 of the *Convention against Torture*)
- ***Saadi v Italy*, Application No. 37201/06, Judgment of the Grand Chamber of the European Court of Human Rights, 28 February 2008** (concerning article 3 of the *European Convention on Human Rights*, equivalent to article 7 of the *International Covenant on Civil and Political Rights*).

I also extract below the ‘best practice’ recommendations of an independent UN expert, Professor Robert Goldman, and UN Special Rapporteur Professor Martin Scheinin, concerning diplomatic assurances. Finally, I **attach** a comparative study of diplomatic assurances by Human Rights Watch.

I hope that this may be of assistance.

Yours sincerely

SUMMARY OF KEY CASES

***Alzery v Sweden*, UN Human Rights Committee, Communication No. 1416/2005, 25 October 2006**

The case concerned the return of an Egyptian national to Egypt by Sweden, where the person feared ill-treatment prohibited under international law (specifically, article 7 of the International Covenant on Civil and Political Rights). The UN Human Rights Committee found as follows concerning Sweden's attempted reliance upon diplomatic assurances from Egypt that the person would not be ill-treated upon his return:

11.3. ... The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.

11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion of the author consistent with its international human rights obligations (see *supra*, at para 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.

11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

***Agiza v Sweden*, UN Committee against Torture, Communication No. 233/2003, 20 May 2005**

The case involved the removal of an Egyptian national to Egypt by Sweden, in circumstances where it was found that there was a risk of ill-treatment upon return, contrary to article 3 of the UN Convention against Torture. The UN Committee against Torture found as follows concerning Sweden's attempted reliance upon diplomatic assurances from Egypt that the person would not be ill-treated:

13.4. ... The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

***Saadi v Italy*, Application No. 37201/06, Judgment of the Grand Chamber of the European Court of Human Rights, 28 February 2008**

The case concerned the attempted return of a person from Italy to Tunisia. Italy requested the Tunisian Government for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the European Convention on Human Rights (equivalent to article 7 of the International Covenant on Civil and Political Rights). The Tunisian Government confirmed in writing to the Italian Government that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions". The European Court of Human Rights found as follows:

147. ... the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.

149. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

OTHER RELEVANT STANDARDS

The UN Human Rights Committee has stated as follows (CCPR/C/SWE, para. 12):

... when a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion.

Report of the independent expert (Robert K. Goldman), assisting the Office of the UN High Commissioner for Human Rights, on the protection of human rights and fundamental freedoms while countering terrorism, 7 February 2005, E/CN.4/2005/103, paras. 56-61:



M. Diplomatic assurances

56. Also troubling is the increased reliance on diplomatic assurances sought by the sending State from the receiving State that transferred terrorist suspects will not face torture or other ill-treatment following their arrival. Such transfers are only sometimes accompanied by a rudimentary monitoring mechanism, most often in the form of sporadic visits to the person from the sending State's diplomatic representatives. Some States have argued that by securing such assurances they are complying with the principle of non-refoulement, but critics have taken issue with this assertion. 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. Moreover, the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated.

57. The Special Rapporteur on the question of torture, in his report to the General Assembly, mentioned "a number of instances where there were strong indications that diplomatic assurances were not respected" and questioned whether States' resort to assurances is not becoming a politically inspired substitute for the principle of non-refoulement (A/59/324, para. 31). His concern is buttressed by the fact that diplomatic assurances are not legally binding and thus have no sanctions for their violation. Even when post-return monitoring accompanies assurances, States that reportedly practise torture have generally restricted access to outside persons, particularly independent doctors and lawyers who are often best able to determine whether abuse has taken place. Moreover, such monitoring is further frustrated by the fact that persons subjected to torture are often reluctant to speak about the abuse out of fear of further torture as retribution for complaining.

58. The Human Rights Committee has expressed concern about the expulsion of asylum-seekers suspected of terrorism to their countries of origin on the basis of such assurances. In recent concluding observations, it stated: "when a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion" (CCPR/C/SWE, para. 12).

59. In his report (A/59/324), the Special Rapporteur on the question of torture suggested some factors to consider in determining whether a risk of torture or ill-treatment exists. The factors can generally be described as the prevailing political conditions in the receiving State and the personal circumstances of the individual that render him/her particularly vulnerable to this risk in the receiving State. These factors alone or, in combination, would determine whether the principle of non-refoulement precludes reliance on assurances. However, the Special Rapporteur has indicated that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to" (ibid., para. 37).

60. The Special Rapporteur on the question of torture has also elaborated minimum safeguards that should be included in any assurance. These include provisions granting prompt access to a lawyer; recording of interrogations and of the identities of those persons present; allowing independent and timely medical examinations; prohibiting incommunicado detention or detention in undisclosed locations; and monitoring by independent persons or groups conducting prompt, regular visits that include private interviews. Those conducting such visits should be qualified in identifying possible signs of torture or ill-treatment (ibid., paras. 41, 42).



61. Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that non-refoulement obligation.

Report to the General Assembly of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 15 August 2007, A/62/263, paras. 57-58:

57. The Special Rapporteur further underlines that diplomatic assurances sought from a receiving State to the effect that a person will not be subjected to torture or any other form of cruel, inhuman or degrading treatment or punishment do not absolve the duty of the sending State to assess individually the existence of a “real risk” of such treatment. The same obligation to conduct an individual assessment exists also in relation to the risk of persecution or the risk of capital punishment in contradiction with article 6 (right to life) or article 14 (right to a fair trial) of the International Covenant on Civil and Political Rights, or for countries that themselves have abolished capital punishment.

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

[Underlining added]