RIGA GRADUATE SCHOOL OF LAW

The Principle of Non-Refoulement vs National Security in the Post 9/11 Era

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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ABSTRACT

The terrorist attack on September 11, 2001, had largely raised the problem of terrorism in international society. Governments launched campaigns against terrorism, one of them being the War on Terror, which as a result, raised controversial issues. One of the challenges is the fundamental human rights protection, namely the protection granted under the principle of non-refoulement. In the post-9/11 era, states started to be more concerned about their national security, and thus of individuals who enter their territories or already reside there. The main research question of this thesis is to analyze the impact of 9/11 on striking balance between the principle of non-refoulement and national security. During the research, the aim is to identify whether the balance has been recalibrated in favor of national security by examining the change in the perception of international terrorism, the attitude of governments, and the decisions of the ECtHR before to and after 9/11 attack. In result, the research shows that the perception of the society and states' motivation to defend their national security has changed, however, the justifications and approach of the ECtHR in the analyses cases have not changed. However, the *Abu Qatada* judgment demonstrates another perspective.

Key words: principle of non-refoulement, human rights, ECHR, 9/11, War on Terror.

SUMMARY

The principle of non-refoulement is a well-recognized principle enshrined in international and regional law. The principle guarantees protection for transferred individuals against torture or other degrading or inadequate treatment, which they may face in the receiving state after the transfer. Thus states are obliged to protect persons from such a risk, however, after the 9/11 events governments become to be more aware of their national security, and thus of individuals entering their territories and already residing there foreigners. The terrorist attack has caused huge distress in society worldwide and raised the problem of international terrorism globally. In the wake of the introduction of a new threat, the perception of terrorism has changed. The policy against terrorism, the War on Terror, raised controversial issues regarding the transfer and treatment of non-nationals. Thus, this thesis is aimed to analyze the impact of 9/11 on striking balance between the principle of non-refoulement and national security.

In Chapter One, the author analyzes the history and development of the principle of non-refoulement. Further, the thesis analyses the applicable legislation regarding the principle in regional and international law. The analysis includes the Refugee Convention 1951, ICCPR, CAT, and ECHR. It demonstrates that the states have a positive obligation not to transfer individuals if a substantial risk of torture or other inadequate treatment can take place. Even if under the refugee law a person falls under the exclusion clause, human rights law guarantees absolute protection against the refoulement.

In Chapter Two, human rights challenges in the context of counter-terrorism are examined. This chapter analyses the changes in the international form of terrorism after 9/11. It is seen that the tactics, organizational structure, motivations, and operational range of terrorist organizations have become more dangerous and wide- reaching, thus it has contributed to the more substantial response from the states. Next, this part analyses the WOT impact on human rights and demonstrates that this policy has produced an exceptional framework that displaced prior human rights-based regimes. Lastly, the chapter evaluates the role of diplomatic assurances, by analyzing states' justifications and challenges for the use of this instrument. Diplomatic assurances have become more often implemented by states after 9/11 since formally states fulfill their obligation under the principle of non-refoulement, however the effectiveness of this tool is another challenge. It is more wishful thinking that these ensure protection because these agreements have operation difficulties and do not have legal effects and sanctions.

After having ascertained that the threat posed by a new form of terrorism has become more dangerous and severe, that the WOT rhetoric contributes to the degradation of prior

established human rights regime, and that the use of diplomatic assurances is not as efficient and trustful as it might be, Chapter 3 examines the decisions of the ECtHR regarding the principle of non-refoulement prior and post-9/11 events to see, whether these changes have influenced the justifications of the Court. The analysis shows that the major part of the states has not used any derogation under Article 15 in terrorism- related cases. Furthermore, the Court has not changed its justifications and approach to Article 3 even after 9/11. The Court continues to implement the approach established in landmark cases e.g. *Chahal v. the UK* and *Soering v. the UK*. However, the *Abu Qatada* case shows another perspective, where the Court had justified the use of diplomatic assurances, but this is related to the research on the use of diplomatic assurances.

LIST OF ABBREVIATIONS

CAT- the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

DA- diplomatic assurances

ECHR, the Convention- the Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR, the Court- European Court of Human Rights

ICCPR- United Nations International Covenant on Civil and Political Rights

MoU- Memoranda of Understandings

NGO- non-governmental organization

POW- prisoners of war

UK- the United Kingdom

UN SC- United Nations Security Council

UN- the United Nations

US- the United States of America

WOT- the War on Terror

WW II- World War II

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INTRODUCTION

On the 11th of September 2001, the devastating terrorist attacks took place in the US, which had a destructionist effect on the economy of the state, huge emotional distress on the public worldwide, but most importantly it was a new threat to the global peace and security. During the attack nearly 3000 innocent civilians were killed, buildings were destructed and new challenges for policy-decision makers occurred. The event was followed by the introduction of a new policy – the War on Terror (hereinafter" WOT) which was aimed to fight the terrorist threat in a tougher manner since a new threat possessed a greater danger to international and national security. The major part of the states all around the world started to be more aware of the security of their borders, namely of individuals who enter their territory.[1] According to international law states poses absolute sovereignty over their territories, meaning that they can determine who can or cannot enter their state, except as otherwise stated by customary international law or treaties.

In the aftermath of 9/11, cases where states deport, expel, or otherwise transfer individuals to be dangerous to the public good and national security, have dramatically increased. After the adoption of the War on Terror rhetoric, governments started to rely upon the use of diplomatic assurances or otherwise bypass their obligations under international and regional law for the sake of security. According to international law, the principle of non-refoulement is aimed to guarantee protection against torture, inhuman or degrading treatment for individuals, who are sent back.[2] The principle has been institutionalized in the numerous international and regional legal instruments. The principle of non-refoulement is a core international protection element for refugees, but it is also very meaningful in the wider sense of the protection of fundamental human rights.[3] Consequently, states must comply with this positive obligation not put transferred individuals at such a risk. However, in practice, this is not always the case.

Even though 9/11 is already considered an old event, it has consequences which had changed the world, and which can be seen today. This event has changed the perception of terrorism threats, which in turn has strengthened security. For instance, airport security has

[1] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.124.
[2]Article 33.1 of the Convention Relating to the Status of Refugees. Available on: https://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf. Accessed April 26, 2022
[3] M. Alvi Syahrin, "The principle of non-refoulement as jus cogens: history, application, and exception in international refugee law" *Journal of Indonesian Legal Studies* Vol. 6 (2021): p.56.

changed and data collection and surveillance mechanisms have enhanced.[4] Personal data now is crucial information for governments to control the movements and sphere of activity of individuals worldwide, which in turn raises challenges with data privacy. Another area influenced by 9/11 is the human rights protection regime. This thesis is focused on the WOT consequences on the human rights regime, namely the principle of non-refoulement. The research question of this paper is: *what was the impact of 9/11 on striking the balance between the principle of non-refoulement and national security?*

The aim of the thesis is to derive the conclusion whether in the post 9/11 era the principle of non-refoulement has become implemented differently, prioritizing national security, comparing to the pre-9/11 period. One of the goals of the thesis is to examine whether human rights violations regarding non-refoulement principle has become more frequent in the analyzed states, as well as whether the European Court of Human Rights has changed its approach regarding the non-refoulement principle after the 9/11 events.

In this thesis, doctrinal legal research, comparative legal research case study methods are applied. Firstly, as the topic of the thesis combines law and diplomacy aspects it is significant to analyze existing laws in relation to the principle of non-refoulement in order to identify states' international and regional obligations, and how the implementation of those obligations, if so, was changed due to politically important event 9/11. In this thesis the main legal basis is the European Convention on Human Rights. Secondly, the author uses case study method for the analyses of pre and post 9/11 cases of the ECtHR to examine the Court's decisions in relation to non-refoulement principle. Lastly, comparative legal research is used in order to contrast pre and post ECtHR decisions in relation to Article 3 and Article 15 of the Convention, and the difference in the states' attitude regarding non-refoulement principle.

The limitations of this thesis are that the analysis is limited to the states, which have ratified the European Convention on Human Rights, because the main legal basis is the ECHR. The thesis touches upon the US, because the WOT rhetoric was initiated by the American government, however the research does not include the American case law. Another limitation is that the thesis does not include the analyses of the non-refoulement principle in the framework of humanitarian law, only refugee law and human rights law are applied. Lastly, the thesis does not include extensive analyses of the use of diplomatic assurances.

[4] "Five ways 9/11 changed the world", available on: https://www.history.co.uk/articles/5-ways-911-changed-the-world. Accessed April 25, 2022.

The structure of the thesis is divided into three chapters. In the first chapter, the author presents the history and development of the non-refoulement principle and examines the relevant legislation on both – international and regional levels. The analyses include The Refugee Convention (1951), International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention on Human Rights. This part contrasts the refugee and human rights law by analyzing the scope and limitations of certain legal provisions. The second chapter outlines human rights challenges in the context of counter-terrorism by analyzing changes in international terrorism after 9/11 and the general impact of the WOT rhetoric on human rights regime. Lastly, this chapter presents the role of diplomatic assurances, which are aimed to protect individuals from the possibility to be tortured or inadequately treated. This part analyses the justifications for the use of diplomatic assurances, as well as the challenges this tool possesses. Chapter three provides the outlook of the non-refoulement principle and national security in the ECtHR case law. This is aimed to determine the role of Article 15 ECHR as a derogation clause for terrorism cases. Next, the author contrasts judgments of the ECtHR regarding Article 3 ECHR prior to and post 9/11. Lastly, the chapter touches upon the case law related to the use of diplomatic assurances.

1. DEFINING THE PRINCIPLE OF NON-REFOULEMENT

Transfer of people during civil wars, persecution, economic despair, political, or armed conflicts or any other problematic event, which can cause difficulties and challenges to civilians, has always been a long-standing concern all around the world. It is evident, that if there is a threat to life or the possibility to become a subject to inadequate treatment, it is incorrect and today illegal to return people home however, it was not always the case.

The absolute sovereignty of states over their territories is recognized by international law, meaning that states are able to determine who can or cannot enter their territory, unless it is otherwise stated by conventions or customary international law. Due to this, states have the ability to control and combat threats posed to national security. During World War II, concerns about inadequate post-transfer mistreatment did not play a huge role with respect to coming aliens. Before the war, only a few states in Europe concluded agreements, which restricted the expulsion of German and Russian refugees who faced inadequate treatment at home if they had the right to reside in the receiving state. However, these agreements had few supporters, and it was allowed to remove coming aliens when it was required due to national security or public order concerns.[5] Eventually, countries retained plenary control over the expulsion and admission of refugees.

Due to the fact, that states retained preliminary control over expulsion and admission, a huge number of innocent deaths occurred trough out Europe. For instance, Switzerland refused 20,000 Jews from France to enter after the Nazi takeover, which resulted in thousands of deaths. Another example is the return of Germans in 1939, which were refused to enter the US due to invalid visas. As a result, hundreds of them ended up dead.[6] Not only states refused the admission of refugees to their territories, but also the expulsion of aliens was an ordinary thing to do. More than two million returned Soviet Union citizens were sent to labor camps or executed. Such practices emphasized the need for treaty- based regimes that would protect persons from transfers, which can end up with mistreatment. Even though there were a lot of displaced and stateless people throughout in Europe after the World War, states continued to refuse to grant refugees safe heaven, and thus refused non-refoulement protection[7] because it again did not prioritize security concerns.

[5]Vijay M. Padmanabhan, "To transfer or not to transfer: identifying and protecting relevant human rights interests in non-refoulement," *Fordham Law Review* (2011): p.81.
[6]M. Alvi Syahrin, "The principle of non-refoulement as jus cogens: history, application, and exception in international refugee law," *Journal of Indonesian Legal Studies* Vol. 6 (2021): pp.56-58.
[7]Padmanabhan, *supra* note 5, p.83.

During the negotiations of the Third Geneva Convention, which regulated the treatment of prisoners of war (POWs) and captured soldiers in armed conflicts, states rejected the possibility for POWs to be transferred to another state to avoid a risk of being inadequately treated. Contrary, the Third Geneva Convention included a clause of an absolute obligation to repatriate prisoners of the war after the end of conflicts.[8] It demonstrates that states were still concerned about their own national security, even though millions of people were suffering during WW II. It does not mean that every applicant was at the risk to be subjected to torture or degrading or inhuman treatment, however even when the risk was present, states were not concerned of it.

However, since 1949 state practice demonstrates a common unwillingness, mostly in the West, to repatriate prisoners where they face mistreatment. And with this idea, the Fourth Geneva Convention went further and restricted states to transfer civilians in occupied territories or in territories of a state party to a conflict to face persecution. But the Convention still allowed the expulsion of individuals due to national security concerns. Finally, the Convention Relating to the Status of Refugees (Refugee Convention) adopted in 1951 became the first document providing extensive rights for refugees in regard to the non-refoulement principle.[9] The principle was officially enshrined in this Convention. Under the principle, it is precluded to send individuals from one country to another state if there is a risk of facing harsh abuse of certain fundamental rights[10], namely prohibition against torture and other inhuman or degrading treatment.

When looking into the topic of the principle of non-refoulement, it should be started with the analysis of applicable legislation on both- international and regional levels. Regarding the regional level, this thesis is focusing on the case- law of the European Court of Human rights (hereinafter the ECtHR), which will be analyzed further, and its core document European Convention of Human Rights. On the international level, analyses of the Refugee Convention (1951) and the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment will be demonstrated.

[8]*Ibid.*
[9]J.Hossain Bhuiyan, *Protection of Refugees through the Principle of Non-Refoulement* (Brill/Nijhoff, 2013), pp. 99-100, accessed March 2, 2022, https://brill.com/view/book/edcoll/9789004226166/B9789004226166-s006.xml.
[10]C. Droege, "Transfers of detainees: legal framework, non-refoulement and contemporary challenges," *International Review of the Red Cross* (2008): p.670.

1.1. Non-Refoulement in the Refugee Convention 1951

The legal starting point of the non-refoulement principle begins with the Refugee Convention of 1951, and the term *non-refoulement* is mostly associated with the refugee law because it is codified in Article 33 (1). The document entered into force in 1954, as stated above after World War II to protect persons fleeing the war in Europe.[11] The Convention is a commonly ratified global human rights instrument that protects the rights of refugees.[12]

It is essential to determine the key terminology used in the Refugee Convention. Article 1A (2) defines "a refugee" as someone who has "a well-founded fear of persecution for reasons of religion, nationality, race, member of a certain social group or political opinion"; who is "outside his state of nationality"; who "cannot or does not want to avail him of countries protection" and "having this fear cannot or does not want to return to his state of origin". Contrary, "asylum claimant" or "asylum seeker" is a person being in a process of seeking asylum and is not officially determined as a refugee yet.[13] Furthermore, Article 1A (2) does not define *a refugee* as an individual that has been formally recognized as such, it just indicates that any person who satisfies the conditions set up in this provision is entitled to protection under the principle of non-refoulement.[14] In other words, asylum claimants, asylum seekers, and refugees are equally protected under the principle of non-refoulement.

1.1.1. Article 1F and Article 33. 2

However, the definition of "refugee" from the Article 1A is not applicable to persons who have any charges with committing crimes against peace or humanity, war crimes, any other non-political crime in the state of origin, or an act contrary to the UN principles as defined in the Article 1F.[15] Furthermore, individuals who fall under Articles 1 C, E, and D are also not entitled to the protection under the principle of non-refoulement. However, the focus is on Article 1F. It is seen that the Refugee Convention's scope of application has limitations and it is not applicable for any individual, meaning that if a person does not fall under the category of Article 1A, he or she is not entitled to the protection under Article 33 (1). In this case, individuals can

[11] L. Skoglund, "Diplomatic Assurances against Torture- an Effective Strategy," *Nordic Journal of International Law* Vol.77 (2008): p.323.
[12]Jenny Hiu Kwan Poon, "Safeguarding the Principle of Non-Refoulement in Europe: Counteracting Containment Policies in the Common European Asylum System". Doctoral thesis of the University of Western Ontario (2020): pp. 7-8.
[13]*Ibid.,* p.11.
[14] Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection,* ed. E. Feller, V. Turk and F. Nicholson (Cambridge University Press, 2003), p.116.
[15] Convention Relating to the Status of Refugees. Available on: https://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf. Accessed March 3, 2022.

invoke protection from the international human rights instruments e.g. Convention against Torture or International Covenant on Civil and Political Rights, but this will be discussed in the next section of the thesis.

The idea of Article 1F was introduced: firstly, to limit the benefits granted to the status of refugee to people who underserve it due to their actions, and secondly, to hold these people accountable for committed acts. This article is created to ensure the integrity of the institution of asylum, and it must be applied very cautiously.[16] Since this research paper is focused on the striking balance between national security, namely the threat of terrorism and the principle of non-refoulement, it is essential to discuss *terrorism* in the context of this article. When analyzing exclusion from international refugee protection with regard to terrorism actions, it must be noticed that the Article 1F requires that committed acts are assessed against the exclusion grounds paying attention to the nature and context of the act. In other words, just qualifying an act as *terrorism* does not automatically mean that it will lead to exclusion, because it must fall within the scope of the Article 1F, namely under its sub-clauses. Even though terrorist acts are likely to fall under this exclusion provision, this article is not being equal to anti-terrorism provisions, e.g. EU Directive 2017/541 on combating terrorism or United Nations Security Council Resolution 1373 (2001). It is important to emphasize, that an asylum application, like any other application, must be examined with the inclusion clauses first.[17] Meaning that, firstly, it is to define the criteria that an individual must fulfil in order to be admitted as a refugee.

Previous paragraph emphasizes, that Article 1A of the Refugee Convention defines who is *a refugee*, while Article 1F is an exclusion clause for the determination of the refugee status. In turn, Article 33 (2) determines who is excluded from the protection under the non-refoulement principle as a specific limitation of protection from refoulement, even if he was recognized as a refugee. Limitations under this article have been applied in numerous cases for individuals suspected in terrorist activities, e.g. *Agiza v. Sweden a*nd *Alzery v. Sweden.* In these cases Sweden decided to exempt the abovementioned persons from protection, calling them "security threats" because of their possible connection with terrorist groups.[18] Despite these provisions being closely connected to each other, these must be distinguished. These provisions are distinct and both serve different purposes. Firstly, Article 1F is a part of the definition of *a*

[16]UNHCR Statement on Article 1F of the 1951 Convention (2009): p.6. Available on: https://www.unhcr.org/protection/operations/4a5edac09/unhcr-statement-article-1f-1951-convention.html. Accessed March 6, 2022.
[17]*Ibid*., pp.7-8.
[18]L. Skoglund, "Diplomatic Assurances against Torture- an Effective Strategy," *Nordic Journal of International Law* Vol.77 (2008): p.324.

refugee, and it lists exclusion grounds for the refugee status, but Article 33 (2) does not determine status of *a refugee*. Secondly, Article 1F aims to ensure integrity of the refugee protection regime, however Article 33 (2) is aimed at the protection of national security of the receiving state. Lastly, the way the Article 33 (2) is applied, affects the treatment of refugees, meaning that under certain and exceptional circumstances individuals, who were recognized as refugees but now threaten security of the host state, are excluded from the protection under the non-refoulement principle.[19]

To sum up, from the Refugee Convention it is clear, firstly, that asylum seekers, asylum claimants and refugees fall under the Article 1A and are defined as *refugee.* There is no need for official recognition of a *refugee* in order to fall under this category. Secondly, Article 1F provides exceptional clauses, which determine who is not entitled for definition of a *refugee*, e.g. an individual committing a crime against humanity. Thirdly, Article 33 (1) determines that *a refugee* is entitled to the protection under the non-refoulement principle; accordingly, people under Article 1F are not entitled to it. Furthermore, Article 33 (2) is created to provide national security of the receiving state and the Article 1F provides for the determination of who is entitled and who is not. It is important to mention, that persons committing terrorist acts do not automatically fall under the exclusionary provisions. Next, Article 1F and Article 33 (2) of the Convention should be distinguished, because both serve different purposes.

To conclude, the Refugee Convention provides for the protection against refoulement, and the principle when there exists the risk of torture is considered absolute. However, the non-refoulement principle is also codified under international human rights law, and it is essential to analyze international human rights conventions.

1.2. Non-Refoulement in the International Human Rights Law

Prohibition of torture is considered one of the most well- established international norms of human rights law and is a norm of *jus cogens,* i.e. it is a certain and overriding principle. Prohibition against torture is expressed in numerous international and regional conventions on human rights. The right is of an absolute nature and is complemented or contains in itself a ban on transferring individuals to states where exists a substantial risk of torture. Under the international human rights law there is no difference in the nature of the transfer of an individual, meaning that the terms *expel, return, extradition* or *transfer* are all having the same meaning- a person is moved from one state to another. The underlying idea is that effective

[19]UNHCR statement, *supra* note 16, p. 8.

control over an individual during his transfer must take place according to the international human rights regime.

The principle of non-refoulement is recognized by several human rights documents, e.g. Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 7 of the International Convention on Civil and Political Rights and ECHR. The European Court of Human Rights (hereinafter ECtHR) has also stated that the principle of non-refoulement should flow directly from the abolition of torture and inhuman or cruel treatment in Article 3 of the ECHR.[20] Under the jurisprudence of different regional human rights bodies, the principle can extend to other risks of abuse of human rights. This part of the thesis is focused on the provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights, and the ECHR regarding the non-refoulement principle.

1.2.1. CAT and ICCPR

Under Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT), parties should not return (*refoul)* individuals to another state, if there is a substantial ground of a risk for torture, and competent state authorities must assess these risks before the transfer. The Convention however is focused only on the abolition of torture, rather than inhuman and degrading treatment together with torture. The Committee against Torture has stated that the abolition of torture is a human right that cannot be taken away or otherwise compromised. Furthermore, it has indicated that the principle of non-refoulement is a fundamental concept of the refugee law, and under the human rights law, there could not be any derogation from such a right.[21] It means that under Article 3 the principle of non-refoulement is guaranteed in absolute terms. The judgment of the case *Tapia Paez v. Sweden* demonstrates the supremacy of the principle of non-refoulement over security concerns. The Committee against Torture argued that Article 3 of the CAT is absolute and the nature of actions of an individual cannot be a material consideration to violate obligations under this article.[22]

[20]C. Droege, "Transfers of detainees: legal framework, non-refoulement and contemporary challenges," *International Review of the Red Cross* (2008): pp.670-671.
[21]Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Available on: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx. Accessed March 11, 2022.
[22]*Paez v. Sweden,* application no.29482/95 (1996), ECtHR.

According to Article 7 of the International Covenant on Civil and Political Rights, no one shall be subjected to torture or inadequate treatment[23] however it does not put an express ban on transferring persons to face such treatment. But the Human Rights Committee argued that such a ban on transferring is contained in the ban on torture in this article.[24] This was expressly demonstrated in the case *Alzery v. Sweden,* where the Committee had found a violation of article 7 of the ICCPR due to the fact Sweden failed to show diplomatic assurances, which would guarantee sufficient protection for the person concerned during the transfer from Sweden to Egypt.[25]

1.2.2. Article 3 of the European Convention on Human Rights

The ECHR does not provide for specific provision which grants protection under the principle of non-refoulement however, Article 3 indicates that no one should be subject to torture or degrading and inhuman treatment and punishment. Under this provision, the ECtHR and the Commission have established case law,[26] which now is working as a safeguard against the forced removal of individuals who may fear the risk of being tortured or ill-treated at home states.

The first case, which concerned the principle of non-refoulement and was considered in detail, was *Soering v. the UK*. A German national was detained in the United Kingdom pending extradition to the US to face charges of killing a person. The applicant alleged that if he will be sent back, he will be subject to the death penalty and consequently the UK will breach Article 3 of the ECHR. As a result, the Court stated that, if the UK extradites the applicant to the US, the responsibility under Article 3 will be raised; because it was proved that there are substantial grounds to believe that inadequate treatment of the applicant will take place, which is incompatible with the values of the Convention.[27] The next important case regarding the applicability of the ECHR to asylum cases was *Cruz Varas v. Sweden,* which concerned a refused asylum claimant for the first time. In this judgment the Court established that the decision from *Soering v. UK* can be also applied to the decision to expel, meaning that expulsion

[23]Article 7 of the International Covenant on Civil and Political Rights. Available on: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. Accessed April 12, 2022.
[24]L. Skoglund, "Diplomatic Assurances against Torture - An Effective Strategy," *Nordic Journal of International Law* 77, no. 4 (2008): p.325.
[25] *Alzery v. Sweden*, communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005.
[26] J. Ristik, "The Right to Asylum and the principle of Non-Refoulement under the European Convention on Human Rights," *European Scientific Journal* (2017): p. 109.
[27]D. Weissbrodt and I. Hortreiter, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties," *Buffalo Human Rights Law Review* (1991): pp.15-30.

cases like extradition cases are covered by Article 3. The same decision was taken in the case *Vilvarajah and Others v. the UK*. The Court mostly considers asylum cases under the Article 3, however other provisions of the Convention can also be applied: Article 4, Article 2, Article 9-10, and others.[28] Lastly, the *Chahal* case is a crucial case, under which the principle of non-refoulement was accepted as an absolute.[29]

It can be concluded, that the ECHR does not include explicit provision for the protection under the principle of non-refoulement, however, the Court has interpreted Article 3 of the Convention in a sense to establish prohibition to transfer individuals if there are substantial grounds to believe that sufferings due to torture, inhuman or degrading treatment or punishment may occur. This article provides complementary protection to refugees from transfers and puts a barrier to such removal.[30]

This chapter has sought to outline the legal framework governing the transfer of individuals under the Refugee Convention, CAT, ICCPR, and ECHR. While the legal obligations of the parties to these core documents may vary, the idea is that persons must not be transferred in any manner if there are substantial grounds for believing that these people can be subjects to any form of inadequate treatment or torture. However, there are substantial differences between these two legal regimes. While human rights law defines that everyone is covered by the protection against any such treatment, refugee law applies only to asylum seekers, asylum claimants, and refugees. Furthermore, refugee law includes exceptional clauses, meaning that certain groups of individuals can be rejected the protection under the principle, however, under human rights law it is not the case.[31] While the scope of application and limitations of these two regimes differ, contracting parties to these conventions must comply with their obligations. However, after 9/11 international community has become more concerned about the national security aspect and consequently of individuals, who are entering states' borders and staying in their territories.

[28] J. Ristik, "The Right to Asylum and the principle of Non-Refoulement under the European Convention on Human Rights," *European Scientific Journal* (2017): pp. 112-113.
[29] N. Burduli, "Are Diplomatic Assurances Effective Guarantee against Torture?," *Journal of Law* (2014): p.286.
[30] Ristik, *supra* note, p. 116.
[31] Jenny Hiu Kwan Poon, "Safeguarding the Principle of Non-Refoulement in Europe: Counteracting Containment Policies in the Common European Asylum System". Doctoral thesis of the University of Western Ontario (2020): p.60.

2. HUMAN RIGHTS CHALLENGES IN THE CONTEXT OF COUNTER-TERRORISM

It is evident that terrorist acts are always violating human rights of a great number of innocent people. These rights are varying from the most fundamental as the right to life, the right to be protected from torture or other inadequate treatment to the right to enjoy one's own life. Despite human rights violations of civilians, terrorist attacks have the potential to destabilize states' inner political processes, economic aspects, undermine peace and security. Under the international, regional and domestic legislation states have obligations to secure their territories and especially their civilians from such a threat and abuse of human rights. As a result governments adopt anti-terrorism laws, sign international conventions on counter-terrorism measures, control their borders, use various kinds of policy-making tools e.g. diplomatic assurances and etc.,[32] because terrorism must never be permitted to threaten the safety of civilians and destroy the democratic way of living.[33] However, most of the part of such adopted measures and policies do violate and put under the threat international human rights regime, as well as the rule of law and principles of democracy themselves, because such policies are in fact counterproductive while combating terrorism threats. In essence the relationship between the fight against international terrorism and protection of human rights of possible terrorists themselves is especially complex and multifaceted.[34]

International community has been always aware of the threat possessed by terrorist organizations. International, regional and domestic laws in this regards were organized in such a way that it was possible to counter this threat. However since 11 September 2001 terrorist acts have changed the political, societal and legal view on this type of danger. The whole world started to be more scared for the peace and security of everyday life. The rhetoric "war on terror" launched by the president of the US turned out to be a game changer in the context of balancing aspects of national security of the states and human rights regime, which actually is under potential to be undermined and weakened due to this "new" type of threat.[35] This part of the thesis will firstly deal with the change in the form of terrorism, answering the question whether there are substantial differences between "old" and "new" terrorism. Secondly, it will

[32]Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 32 "Human Rights, Terrorism and Counter-terrorism" (2008): pp. 2-5. Available on: https://www.refworld.org/docid/48733ebc2.html. Accessed March 10, 2022.
[33] M. Arden, "Balancing Human Rights and National Security" in *Human Rights and European Law: Building New Legal Orders*, (Oxford: Oxford Scholarship Online, 2015), p.171.
[34]J. Stepockina, "Human Rights Challenges in the Context of Counter-Terrorism". Research paper in Interdisciplinary Research: Law and Politics (2022): p. 2.
[35] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.124.

discuss the launched policy "war on terror" (hereinafter WOT) and its influence on the international human rights regime. Next, the ECtHR case law prior the 9/11 events and under the WOT rhetoric will be analyzed, in order to see, whether the Court has changed its justification in relation to a "new" threat.

2.1. Changes in the International Terrorism after 9/11

On the 11 September 2011 the US has become a victim of one of the biggest terrorist attacks in the history. The attack was organized by one of the main terrorist organizations- al-Qaeda, which targeted New York and Washington D.C. causing extensive deaths and enormous destructions in the state. Nearly 3000 innocent people were killed.[36] This event has caused a huge emotional distress worldwide and the start of new era of the perception of terrorism. Despite the fact that a term "new terrorism" already appeared in the academic writings in 1990s, the 9/11 attack has enshrined such definition and radically changed form of terrorist threat, which gained widespread purchase out of academia and spread over to policy- making circles. The event had provoked an extreme perception of terrorism, due to its "new" form which has become transnational, targeted at innocent civilians, aimed at causing maximalist destruction and motivated by new motives rather than localized and motivated by political ideology, comparing to "old" form of terrorism in 1960s-1980s. Some scholars believe that there was a need for a new legal framework, which would be able to combat such a "new" form of a threat, while others believed that there is no need for a change and this would not possess any new forms of a danger.[37] This notion will be demonstrated in the next chapter of the thesis, by analyzing the ECtHR pre 9/11 and post 9/11 cases.

In order to evaluate, whether the "new" form of terrorism in fact possesses a bigger danger to the international community, it is essential to briefly analyze the differences between "old" and "new" concepts of terrorism. The analyses will include five variables, which will help to contrast these two forms by taking the ideal type of each of them. Firstly, the organizational structure demonstrates that the "new" form is using the international network, meaning that a network is freely connected worldwide, rather than the old hierarchical command based in a one region. Secondly, the operational range of the "new" terrorism has reached transnational orientation, rather than the focus on the home region due to nationalist and separatist movement aimed to change the political situation in certain region. Thirdly, as mentioned, different motives rule the "old" and "new" terrorism. Previously terrorist attacks

[36]"September 11 attacks", available on: https://www.britannica.com/event/September-11-attacks. Accessed March 12, 2022.
[37]A. Gofas, ""Old" vs. "New" Terrorism: What's in a Name?" *International Relations* Vol.80 (2012): pp.20-21.

were stemmed by political ideology, national aspirations, rational political concerns or ethnical conflicts however today it is influenced by transformational beliefs, which emphasizes different morality concepts. Lastly, one of the most important aspects is tactics used during the attack. "Old" notion of terrorism was focused on the idea to catch the attention of people, to make them "watch" rather to kill people, characterizing this tactic as specific in targeting and restrained. In contrary "new" one demonstrate a will to utilize excessive violence and severe destruction. [38]

It is essential to indicate, that the comparison was based on the ideal type of each format of terrorism, and it does not mean that these two are completely distinct forms. Of course, there are similarities, and it should be understood that a change was of a degree rather than of the kind of danger. It is evident that the notion of "new" terrorism possesses greater threat to the international community, since the analysed five variables demonstrate that tactics, organizational structure, operational range and motivation have changed and have become more powerful.[39] Consequently, such change produces implications and new perception for policy level decisions. The most significant change was the introduction of the new policy "War on Terror", the discourse of which is found on recalibrated balance approach, where the risk to national security prioritize human rights of an individual.

2.2. The "War on Terror" as a Danger to Human Rights Regime

WOT is the international counterterrorism campaign launched by US president G. Bush and his administration, as a result of the 9/11 attack. The campaign represents a new era in international political relations and has huge and essential consequences for the global human rights regime, security aspects, international law, and cooperation. The war on terrorism is multidimensional including wars in Iraq and Afghanistan, military assistance programs for fighting terrorism, an increase in the funding of intelligence capabilities and extension of cooperation of such services globally and etc.[40] This section is focused on the effect of the WOT on the international human rights regime.

The WOT has become a steadfast means to describe the fight against international terrorism and has given states the authority to apply measures that would be too harsh to apply before the 9/11.[41] As the danger after 9/11 was considered "new", the reaction of the states had to be different as well. This new attitude has produced complicity with the torture regime. In

[38]A. Gofas, ""Old" vs. "New" Terrorism: What's in a Name?" *International Relations* Vol.80 (2012): pp.22-30.
[39]*Ibid*., p.24.
[40]"War on terrorism", available on: https://www.britannica.com/topic/arms-race/Prisoners-dilemma-models. Accessed March 16, 2022.
[41] M.Mullard, Bankole A. Cole, *Globalization, Citizenship and the War on Terror* (Cheltenham: E. Elgar, 2007), pp. 3-6. Available on: Google Books. Accessed March 17, 2022.

certain situations, it has become to be seen as legitimate and legal. The UN SC Resolution 1373 calls states to take appropriate measures in the fight against terrorism and to ensure that individuals, who are involved in terrorism related acts, do not receive refugee status.[42] In the wake of such policies and concerns of national security, it has become easier and safer for states to accuse all suspected individuals as being part of terrorist organizations. Thus these individuals would not receive the non-refoulement protection under the refugee law. Under the WOT policy, it has become permissible to abuse human rights in order to protect national security. The claim to legitimacy and legality has framed a debate over the effect and legacy of the WOT and fundamental human rights granted to every single individual. Some scholars argue that fundamental human rights were put into crisis in the aftermath of the 9/11 attacks precisely due to the fact that it has become impossible to neglect an existence of a two-tier standard of legitimacy which has been entrenched in international society.[43] Since the WOT was launched by the US, such a two-tier standard of legitimacy was exactly centered on the American belief of its exceptional standing on the attempt to reclassify torture as permissible. The counterterrorism measures had become driven by spatial exceptionalism, rather than blanket exceptionalism. Meaning that after the 9/11, justifications for taking exceptional measures were present not only in a case when a terrorist threat was imminent but also it was used on the territories not covered by the protection of human rights, and it is known that there are states with a poor experience on the protection of fundamental human rights. Consequently, the US has become an illiberal norm entrepreneur by promoting such practices.[44] It is essential for the thesis because the global antiterrorism war was initiated by the US and it has influenced the rest of the world to enact similar measures and practices. Furthermore, it is not the main problem that the US had legitimized abuse of human rights[45], but the essence is that it has legitimated thoughts that such inadequate treatment and torture can be in fact a reasonable policy to fight against terrorism.[46] The exceptionalism and the WOT rhetoric has put human rights in an unstable position.

As it is seen, the continued fight against international terrorism produces an exceptional framework, which has become a norm that displaces prior human rights- based regime. Measures, adopted after 9/11, are not created just to meet the immediate crisis, but are intended

[42]UN SC Resolution 1371 (2001). Available on: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement. Accessed May 6, 2022.
[43] A. Jillions, "When a gamekeeper turns poacher: torture, diplomatic assurances and the politics of trust" *The Royal Institute of International Affairs,* Vol. 91, No.3 (2015): p.498.
[44] J. Stepockina, "Diplomatic Assurances: a Tool to Help or Damage?" Research paper in Interdisciplinary Research: Law and Politics (2022): p. 5.
[45] See transfer of Djamel Saiidi Ali Ameziane and Bensayah Belkecem from Guantanamo to Algeria, 2010.
[46] Jillions, *supra* note 43.

to operate for the long term[47], consequently, the erosion of the human rights regime is not temporary, but rather permanent. After the beginning of the WOT policy, when human rights advocates started to be concerned about the human rights regime's erosion, states have become concerned about their undermining ability to protect security against terrorist activity. As a result, calls for the balance between human rights and national security started to be on the agenda. On this background, another essentially controversial area has been utilized- the use of diplomatic assurances against torture. This policy-making tool has caused a controversial international reaction- some are for its utilization, while others are sceptically against it. The next section will analyse the effects of diplomatic assurances on the international human rights regime, and whether diplomatic assurances are effective protection against torture and a safeguard for the non-refoulement principle.

2.3. Diplomatic Assurances- a Tool to Help or to Damage?

The use of diplomatic assurances, in the cases of transfer of individuals to torture, has upraised significant questions about the legality of such practice in international law. The main reason for this awareness is that the use of diplomatic assurances is causing mitigation of the non-refoulement principle. This practice has caught the attention of the international community exactly after the 9/11 events and consequently after the WOT policy adoption when the use of diplomatic assurances had significantly increased. According to the principle of non-refoulement, states should not send anyone to places, where a substantial risk of being subject to torture or degrading or inhuman treatment exists.[48] In order for states to transfer individuals deemed "security threats" without breaching their obligations under regional and international law, states are actively accepting the use of diplomatic assurances. Despite the fact, that diplomatic assurances do not have a uniform definition in international law, in general meaning these are agreements concluded between countries for human rights protection of transferred individuals, where the receiving state provides assurances that torture and degrading or inhuman treatment will not be carried out.[49] There are three different types of diplomatic assurances: exchange of letters, diplomatic notes and Memoranda of Understandings (hereinafter: MoUs). Diplomatic assurances can be classified as "hard" and "soft" ones[50],

[47]R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.143.
[48]Article 33 (1) of the Convention Relating to the Status of Refugees. Available on: https://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf. Accessed March 3, 2022.
[49] M. Farzamfar, "Diplomatic Assurances in Cases of Expulsion to Torture: A Critical Analysis," in *Finnish Yearbook of International Law 24* (2014): 52-55.
[50]Dr. Bibi van Ginkel and F. Rojas, "Use of Diplomatic Assurances in Terrorism- related Cases in Search of a Balance Between Security Concerns and Human Rights Obligations", Expert Meeting Paper of International Centre for Counter-Terrorism- The Hague (2011): p. 2.

meaning that "hard" ones provide for greater enforcement mechanisms and monitoring, while "soft" ones on the contrary are lacking such mechanisms. However, the aspect of strength and effectiveness of monitoring and enforcement mechanisms of diplomatic assurances is still a challenge in general. In this thesis, the term "diplomatic assurances" will cover all the above-mentioned types of diplomatic assurances. Since diplomatic assurances do not have a uniform definition, these are not mentioned in international human rights conventions or other related treaties, consequently diplomatic assurances remain a "grey area" because these are unregulated. However, case law contributed to the formation of legislation for the application of diplomatic assurances.[51]

Some international organizations have called states to stop using such promises because diplomatic assurances are considered to be insufficient as safeguards,[52] while states contrary are for the use of diplomatic assurances because formally states are acting under the scope of their obligations.

2.3.1. States' Justifications for the Use of Diplomatic Assurances

Diplomatic assurances emerged as an ideal resolution for states' issues regarding the individuals deemed "security threats", namely terrorist suspects, where their transfer may be at risk of torture, according to the principle of non-refoulement.[53] Consequently, governments are mostly supporting the use of diplomatic assurances, rather opposing them. In the post- 9/11 era, as was mentioned, states became especially concerned about their national security, and it seems clear, that this policy-making tool is a useful instrument for governments.

The United Kingdom and the US are ones of the most active supporters in receiving diplomatic assurances. Amnesty International in its public statement in 2011 has called the UK Europe's most influential and aggressive supporter of diplomatic assurances, which cannot be called reliable and safe. The UK has deported non-nationals suspected and accused of terrorism activity to the states with poor human rights records, namely Jordan[54], Lebanon, Libya, etc.[55] The United Kingdom has tried to deal with suspects in terrorism in many possible ways, and one of them being the conclusion of MoU. The authorities of the state argue that protection

[51] L. Skoglund, "Diplomatic Assurances against Torture - An Effective Strategy," *Nordic Journal of International Law* 77, no. 4 (2008): 333.
[52] S. Isman, "Diplomatic Assurances- Safeguard against Torture or Undermining the Prohibition of Refoulement?" Master Thesis of Lund University (2005): p.26.
[53] A. Jillions, "When a gamekeeper turns poacher: torture, diplomatic assurances and the politics of trust" *The Royal Institute of International Affairs,* Vol. 91, No.3 (2015): p.498.
[54] *Abu Qatada v. the United Kingdom,* application no.8139/09 (2012) ECtHR.
[55]Amnesty International public statement, "The United Kingdom fails on diplomatic assurances: Amnesty International's preliminary response to the UK counter-terrorism review" (2011). Available on: https://www.amnesty.org/fr/wp-content/uploads/2021/07/eur450012011en.pdf. Accessed April 5, 2022.

against torture and inadequate treatment is guaranteed under such diplomatic assurances. As a result, such kind of practice against inadequate treatment and torture has led to the increase of transfers relying on diplomatic assurances.[56] The United Kingdom, as an active supporter of diplomatic assurances, has participated in the key legal precedents regarding diplomatic assurances. A landmark case for Article 3 ECHR, *Chahal v. the UK*, is the example, where the Court ruled that assurances from the Indian government, stating that a person concerned will not be mistreated, are insufficient to provide effective protection and any guarantees. Consequently, the UK would violate Article 3, if such transfer did take place.[57] After the judgment the *Chahal Principle* was established as a reinforcement of the non-refoulement principle. Furthermore, the UK acted as an intervenor party in *Saadi v. Italy*, where it argued to weaken the *Chahal Principle* for the sake of national security.[58].

It is evident that states, as the example of the UK, are deemed to use diplomatic assurances as a valuable instrument in countering terrorism from a national security perspective. Diplomatic assurances seem to be the best choice for them, because formally diplomatic assurances are in compliance with states' legal international obligations, namely in compliance of the non-refoulement principle, because relying on diplomatic assurances, the sending country claim to be able to transfer persons without breaching its obligations under applicable laws, namely international and regional human rights law and refugee law.[59] States are not willing to release persons suspected in terrorism in their territory, they cannot send them back to the home states according to the principle of non-refoulement, and they are unable to detain them indefinitely,[60] consequently states go for diplomatic assurances. However, the effectiveness of this tool is another issue, because reliance on diplomatic assurances is not always performed conscientiously. The next section will consider challenges posed by the use of diplomatic assurances on the international anti-torture regime, and consequently on the principle of non-refoulement.

2.3.2. Challenges with the Use of Diplomatic Assurances

It is evident that the states, e.g. the UK are arguing for the use of diplomatic assurances for the sake of national security however there also exist some challenges and the opposite opinion for

[56] N. Burduli, "Are Diplomatic Assurances Effective Guarantee against Torture?" *Journal of Law* (2014): pp. 284-285.
[57] *Chahal v. the United Kingdom*, application no. 22414/93 (1996), ECtHR
[58] Dr. Bibi van Ginkel and F. Rojas, "Use of Diplomatic Assurances in Terrorism- related Cases in Search of a Balance Between Security Concerns and Human Rights Obligations", Expert Meeting Paper of International Centre for Counter-Terrorism- The Hague (2011): p. 8.
[59] M. Farzamfar, "Diplomatic Assurances in Cases of Expulsion to Torture: A Critical Analysis," *Finnish Yearbook of International Law* 24 (2014): p.58.
[60] Dr. Bibi van Ginkel and F. Rojas, *supra* note 58, p. 3.

the use of this instrument. Most international human rights groups and protectors, e.g. Amnesty International and Human Rights Watch, are arguing against such policy-making tools. The reason for this is that, according to them, diplomatic assurances are unreliable as safeguards against torture,[61] and thus basic human rights have become challenging. Despite human rights groups also authoritative institutions support their position to reject the use of diplomatic assurances. In the case of *Agiza v. Sweden* the Committee against Torture argued that diplomatic assurances did not provide for effective monitoring and enforcement mechanisms and the Committee called diplomatic assurances useless.[62] As is seen from the first part of the thesis, numerous international and regional human rights protection systems recognize the value of the principle of non-refoulement, and even on the ground of terrorism, meaning that the right to be protected from torture and other inhuman or degrading treatment is absolute in its terms. However, as the practice demonstrates, diplomatic assurances are not that trustful and reliable.

To begin with, the very fact of the use of diplomatic assurances already raises the suspicion, meaning that the need for diplomatic assurances shows that states are worried about the risks that a person would face on his return.[63] According to Article 3 CAT, this could be sufficient to block the return of the individual because, under the strict reading of the article, it is precluded to transfer a person where exists a ground for being tortured or inadequately treated.[64] The Human Rights Watch argued that while governments use diplomatic assurances, they rather engage in wishful thinking that diplomatic assurances actually provide for efficient protection.[65] The reason for this being the mere fact that diplomatic assurances do not have any roots in international law, meaning DAs are not governed by international law.[66] Diplomatic assurances are more political agreements with no legal effect. These agreements are created specifically for every individual case and are just signed by diplomatic agents. Furthermore, there are no sanctions that would contribute to their enforcement.[67]

After the ECtHR judgment in the *Abu Qatada* case[68] most part of the human rights protectors regarded the challenge over the legality of diplomatic assurances as a lost battle.

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[61] N. Burduli, "Are Diplomatic Assurances Effective Guarantee against Torture?" *Journal of Law* (2014): p. 281.
[62] *Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005.
[63] A. Jillions, "When a gamekeeper turns poacher: torture, diplomatic assurances and the politics of trust" *The Royal Institute of International Affairs,* Vol. 91, No.3 (2015): p.493.
[64] Article 3 of the Convention against Torture and other Cruel, Unhuman or Degrading Treatment or Punishment. Available on: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx. Accessed April 13, 2022.
[65] Jillions, *supra* note 63, pp.492-493.
[66] L. Skoglund, "Diplomatic Assurances against Torture - An Effective Strategy," *Nordic Journal of International Law* 77, no. 4 (2008): p.334.
[67] M. Farzamfar, "Diplomatic Assurances in Cases of Expulsion to Torture: A Critical Analysis," in *Finnish Yearbook of International Law 24* (2014): p.69.
[68] See Chapter 3 .4 "Diplomatic Assurances in the Case Law".

Despite the fact that a stronger model of diplomatic assurances (enhanced diplomatic assurances) accrued, human rights groups continued to express skepticism regarding diplomatic assurances' capacity to effectively protect transferred individuals. There are four areas of concern that provide, that even if there is now a more solid jurisprudential basis for the utilization of this tool, the challenges would continue to be met unless diplomatic assurances could legitimately be used.[69] The challenges presented below are the operational difficulties of the application of diplomatic assurances.

Firstly, there is a challenge with the post-transfer monitoring, because not much has been done to strengthen it.[70] Furthermore, for the sake of additional credibility, states suggest human rights groups and the media perform public scrutiny. However, the implication is that the media or human rights organizations are unable to access responsible bodies in the states such as Egypt, Jordan, or Kazakhstan, due to the inner states' politics. Moreover, anonymity and protection against reprisals in such states are poor, consequently, detainees would not be willing to report on their treatment.[71] Effective port-transfer monitoring must have unlimited and unimpeded access to the transferred individuals in all detention facilities. Secondly, there are challenges with the objectivity of the monitoring authorities themselves. It is not always the case however it is worth mentioning, because there are many cases regarding the incompetence of such authorities. An example is the United Kingdom's MoU with the Libyan government under the Gaddafi regime. The son of Gaddafi was the chair of the monitoring body at that time[72], which means that this would cause a conflict of interests and consequently, violation of the non-refoulement principle of an individual. Thirdly, there could be a possible misalignment between the two contracting parties regarding the promises concluded in the diplomatic assurance. The point is that the major part of diplomatic assurances is not legally binding. Consequently, why the states which violate their binding international legal obligations would be trusted to comply with their non-binding obligations? The *Abu Qatada* case demonstrates that even if issued diplomatic assurances were signed by both states in a good faith, domestic authorities and courts could interpret it not always as it was intended by the author of diplomatic assurance.[73] Consequently, diplomatic assurances concluded with states with poor history and records on torture and inadequate treatment are not actually worthy and reliable. Lastly, the ability of the diplomatic assurances to manage the struggle between security and human rights

[69] Jillions, *supra note* 58, p.497.
[70] Farzamfar, *supra* note 67.
[71] M. Nowak, "Fact-Finding on Torture and Ill-Treatment and Conditions of Detention", *Journal of Human Rights Practise* (2009): pp. 104-105.
[72] A. Jillions, "When a gamekeeper turns poacher: torture, diplomatic assurances and the politics of trust" *The Royal Institute of International Affairs,* Vol. 91, No.3 (2015): p.496.
[73] *Ibid.*

stands on confidence in the existence of the stable diplomatic relationship between the states as a prerequisite for trusting as well as punishing it in the case of a failure to comply with diplomatic assurances. An example of this would serve the unexpected events of the Arab Spring, when the governments of Egypt, Tunisia, Libya, etc. were overthrown due to economic stagnation and corruption, meaning that the trustworthiness can be undermined.[74] To sum up, political regime and stability in the contracting state are of big importance because it influences the way diplomatic assurance will be implemented.

It demonstrates that in the reality the use of diplomatic assurances while trying to remedy the relationship between national security and human rights does not provide efficient protection for transferred individuals, and what is more, it erodes the broader anti-torture regime, regardless of how strong the case-by-case risk assessment or post-transfer monitoring mechanisms are. Under the WOT, policy the two-tiered standard of legitimacy has emerged, because after 9/11 fundamental human rights were put into crisis.[75] Human rights groups and authoritative institutions listed above are standing for a complete rejection of such practices and insist on governments' prohibition of reliance on diplomatic assurances in any situation if there is a risk of torture. Many cases such as *Ben Khemais v. Italy, Agiza and Alzery v. Sweden, Mamatkulov and Askarov v. Turkey* demonstrate even though the diplomatic assurances were exchanged between the states, returnees were subjected to torture.[76] Consequently on this background, governments argue due to the threat posed by international terrorism and the significance of safeguarding national security in the post 9/11 era there exist a necessity for reform in rules and norms in international law, as well as under certain circumstances certain exceptions shall be applied to the principle of non –refoulement to torture.[77]

3. PRINCIPLE OF NON-REFOULEMENT AND NATIONAL SECURITY AFTER 9/11 IN THE ECTHR CASE LAW

The discourse of the War on Terror claims that the current legal regimes and the rule of law established prior to the 9/11 attacks are in fact incapable to deal with the threat posed by the "new" form of international terrorism. Measures to counterterrorism, taken by the High Contracting Parties to the ECHR in the aftermath of the 9/11, mirror the threat posed to human rights regime. While countering terrorism, grave violations by the states of the Convention's

[74] Jillions, *supra note* 72, p.497.
[75] T. Dunne, ""The Rules of the Game are changing": Fundamental Human Rights in Crisis After 9/11", *International Politics* Vol. 44 (2007): pp. 270-273.
[76] M. Farzamfar, "Diplomatic Assurances in Cases of Expulsion to Torture: A Critical Analysis," *Finnish Yearbook of International Law* 24 (2014): pp. 68-69.
[77] Frazamfar, *supra note* 67, p.61.

articles are taking place. In the cases, which concern terrorism aspect, the Court has given states some degree of a margin of appreciation, which means that states are able to act without falling short the standards of protection granted under the ECHR.[78] Despite the fact that the research is focused on the case law of the ECtHR rather than domestic legislation of the states- parties, this section will also touch upon member states' view on the cases and some decisions of the domestic courts, because margin of appreciation has an important influence on the final decision of the ECtHR. This part of the chapter is going to analyse whether the WOT rhetoric has influenced the reasoning and judgements of the Court by contrasting the ECtHR's treatment of terrorism in the cases before and after the 9/11 attacks. This part of the thesis is more oriented on the case law regarding the non-refoulement principle. Firstly, this part will analyse Article 15 of the ECHR, because it is a derogation clause. The analyses will discover whether the states parties are able to rely on this article in the terrorism related cases for the sake of national security, and which place does the non-refoulement principle take regarding this article. Secondly, Article 3 of the ECHR will be examined, namely how it was dealt by the Court prior and post 9/11 events. The cases analysed in this chapter concern human rights protected under the non-refoulement principle. Since this part is focused on the case law, it will also look into the case, where diplomatic assurances were implemented, in order to see whether these were successful and effective. It does not mean that cases, which are not included in this sub-chapter, did not involve diplomatic assurances, because every sub-chapter focuses on the specific details from the case, and in certain cases diplomatic assurances did not play a significant role.

3.1. Article 15 as a Derogation for Terrorism Cases

When the Court deals with situations of high sensitivity, the margin of appreciation for the states is consistently being used. According to Article 15, the greatest area of sensitivity- is the establishment of a state of emergency.[79] During the time of emergency or war, which threatens life of nation, states are allowed to implement measures derogating from their obligations under the ECHR, but only to the extent required by the situation, and it should not be inconsistent with other duties under the international law.[80] For the first time margin of appreciation to the ECHR was introduced by the use of Article 15.1, because as the Court argues, states are placed in a better position to make an assessment whether there exists an emergency situation. The

[78] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.125.
[79]European Court of Human Rights, report by the Research Division, "National Security and European case-law" (2013):pp.37-38. Available on:
https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf. Accessed March 17, 2022.
[80]European Convention on Human Rights. Available on:
https://www.echr.coe.int/documents/convention_eng.pdf. Accessed March 18, 2022.

application of Article 15.1 has developed from utilized derogations in response to emergencies that had arisen from terrorist activity.[81] In the *Greek case* judgement of 1967 the criteria for emergency and its characteristics have been outlined. Consequently, the emergency situation is established if the threat is imminent and it affects the whole nation, if it threatens the continuity of life of the nations, and if the character of the threat is exceptional and the Convention is incapable of maintaining safety, health and order of community.[82] Hence, if all of these characteristics of a threat are present, states are able to establish the state of emergence and derogate form its Convention's obligations under Article 15.1. Furthermore, under this article states are allowed not only to establish the existence of emergency situation, but also they have the right to assess the necessity of the measures taken to prevent the dangerous situation.[83] However, even if this approach to high sensitive cases concerning emergency situations was developed against the background of cases concerning terrorism, judgments under Article 15.1 do not give exceptional treatment only due to the fact that terrorism is involved. It is rather the general attitude the Court takes when Article 15.1 is involved.

Ireland v. the United Kingdom is one of the cases, where the Court has justified derogations made by the UK under Article 15.1. In order to fight a violent terrorist campaign, the Northern Ireland authorities had exercised extrajudicial powers of detention and arrest. In turn the UK's government had submitted several derogation notices regarding these exercised powers during 1971 and 1975. The government of Ireland argued that the extrajudicial measures of deprivation of liberty were not compatible with Article 15 and thus had breached the Article 5-right to liberty and security of the ECHR.[84] The Court reaffirmed that Article 15 is applicable during the time of the war or in case of other public emergency, which threatens the life of community. As the result, the ECtHR declared that the existence of such an emergency was evident and clear according to the facts of the case. [85] This case is the example of the ECtHR judgement made prior to the 9/11 attack.

According to the ECtHR case law, the majority of parties to the ECHR have not used any derogation from the Convention in response to 9/11. This explicitly demonstrates that contrary to the rhetoric of WOT, which promotes for exceptional and new nature of

[81] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?", *Human Rights Law Review* (2011): p.127.
[82] J. Becket, "The Greek Case before the European Human Rights Commission", *Human Rights* Vol.1 (1970): pp.100-116.
[83] European Court of Human Rights, report by the Research Division, "National Security and European case-law" (2013):pp.37-38. Available on: https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf. Accessed March 17, 2022.
[84] *Ireland v. the United Kingdom,* application no. 5310/71 (1977) ECtHR.
[85] Council of Europe, factsheet "Derogation in time of emergency" (2022): p.4. Available on: https://www.echr.coe.int/documents/fs_derogation_eng.pdf. Accessed March 20, 2022.

international terrorism, states parties believe that they can operate within the ECHR system and manage with the threat. However, the United Kingdom had used derogation under Article 15 since 9/11.[86] *A. and Others v. the United Kingdom* presents the case, where derogations by the UK were made after the 9/11.[87] Following the events of 9/11 the government of the UK believed that some foreigners on the territory of the United Kingdom were part of the Islamist terrorist operations network linked to al-Qaeda, and consequently there was a risk for the national security. Due to the fact that these individuals were not able to be sent back to their states of origin because of the risk of ill treatment under Article 3, the UK decided to arrest them. The government thought that it would not be consistent under Article 5, and the state has sent derogation under Article 15 adding the provisions from the domestic anti-terrorism legislation, namely Part four of the Anti-terrorism, Crime and Security Act 2001, including the right to detain "suspected international terrorists", who cannot be removed from the UK. The detained persons complained that it is not permissible to be put under a high-security regime, because there was not any threat under public emergency, which threaten life of the nation. In the decision the ECtHR accepted the presence of the public emergency threatening life of the nation. The Court emphasized that the government could not wait for attack to happen, and had to take measures to deal with it.[88] And here the Court reaffirmed, that the state is always put in a better position to assess the existence of such a risk.

Comparing the cases before and after the 9/11 regarding Article 15, it is seen, that the Court has taken another approach. The decision was criticized, because it provides for the potential to lower the threshold required under Article 15, and thus it seems contrary to the international human rights regime. However, there also exists the opinion, that this judgement does not indicate the introduction of a more robust attitude to review under Article 15, but rather is the result of the decision made by the UK,[89] where unjustified measures have been already taken on the domestic level. Namely, the House of Lords said that the measures taken by the UK were discriminatory and disproportionate. Hence, the application of the article requires careful approach from the Court and despite this double margin of appreciation granted to the states, the ECtHR must ensure effective human rights protection by effectively scrutinizing situations.[90] Legal scholars Gross and Ni Aolain argue that the approach chosen by the Court in relation to Article 15 in this way does not ensure effective protection of human rights and

[86] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.147.
[87] *A. and Others v. the United Kingdom,* application no. 3455/05 (2009), ECtHR.
[88] Council of Europe, *supra* note 85, pp.5-6.
[89] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.146
[90] *Ibid.,* pp. 128-130.

put under the threat the essence of the Convention and the Court's ability to ensure such protection.[91]

It can be concluded, that under Article 15.1, High Contracting parties have a right to derogate from their Convention obligations, if there is the ground to believe that the threat falls under all the criteria laid down in the *Greek case.* Since it is the area of high sensitivity the Court has granted the states a wide margin of appreciation, and there have been no additional changes after the 9/11. Overall the states have not used any additional derogation in response to 9/11, however it is seen, that the ECtHR has changed its approach in the *A. and Others v. the UK* by accepting the findings of the domestic courts that there exist the emergency situation which threatens life of the nation, however there also exists a version, that such a decision was influenced by discriminatory[92] decision taken on the national level.

Section two of the Article 15 indicates that Article 3, Article 4.1, Article 7 and Article 2, excepting deaths from lawful acts of war, are non derogable.[93] Consequently, Article 15.1 is applicable only to derogable human rights. The principle of non-refoulement under the ECHR is covered by the Article 3, which is in absolute in its nature and is not derogable according to the Article 15.2.[94] The next section will look into the ECtHR case law regarding Article 3 and thus the non-refoulement principle.

3.2. Article 3 Prior to the WOT Rhetoric

Non-derogable rights, like in all international human rights conventions, hold a special position in the ECHR. Due to this the ECtHR takes the hardest review in cases regarding Article 2, Article 3-4 and Article 7. This is especially so in cases concerning Article 3, where the Court assesses whether the level of treatment has reached degrading, inhuman or torture. In this regards the Court precludes any discretion from the states, because it had established a uniform definition on the kinds of treatments which are applied though the ECtHR's jurisprudence. Domestic authorities are first to determine the level of threat, however the final decision is made by the ECtHR, because decisions of domestic courts are wholly reviewable by the ECtHR, and

[91] O.Gross and F.Ni Aolain, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights", *Human Rights Quarterly* Vol.23 (2001): p.636.

[92] The House of Lords declared that derogation implemented in this case was incompatible with the Convention, because it discriminated between non-nationals and nationals. Derogation allowed the preventative detention only for non-nationals.

[93]European Convention on Human Rights. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed March 18, 2022.

[94]Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency (2021). Available on: https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf. Accessed March 18, 2022.

there is no any "immunity" given by the margin of appreciation. The situation is the same regarding the cases concerning terrorism, because there is no granted any special treatment when an abuse of non-derogable right is at issue.[95] Meaning that, the ECtHR conducts detailed analyses of the facts, when it reviews the treatment of suspected in terrorism under the Article 3. The Court bases its analyses on the Article 3 not only on its absolute character of this provision but also on the important fact that protection given under it is a fundamental value of democratic society.

In the *Chahal v. the United Kingdom* the Court stated that even in the hardest situations, as the fight against terrorism, the ECHR absolutely precludes inhuman or degrading treatment and torture,[96] and the Court reaffirms this decision. This judgement is important, because it explicitly relates to deportation of a suspected in terrorism individual as a result of national security risk of the receiving state. In this case the UK argued that, even if the provision concerned is of the absolute character, the danger posed by the individual to the national security must be taken into account. In this way the United Kingdom has introduced a balance between the risk posed to the national security and the individual's right to be protected against inadequate treatment or torture. But, if such a balancing would be allowed and states were given margin of appreciation in relation to Article 3, the national security aspect would always prevail.[97] But since there are no any derogations and exceptions granted to the states in relation to Article 3, there is no room for balancing these two concepts.

However, the High Contracting parties, e.g. the UK and Italy, still want to alter the ECtHR's approach to Article 3 by application of balancing test, which could create an exception to ECHR, where terrorism is involved, especially regarding the principle of non-refoulement.[98] It is essential to mention, that under Article 3 it is not contrary to extradite a person for a political offence or deport foreign people, there exist exceptional circumstances when such actions violate Article 3. The *Soering v. the United Kingdom* judgement, already mentioned in the first chapter, serves as a basis for the ECtHR case law, and precludes states to extradite individuals, if there is a risk of being tortured or inadequately treated. And the same principle was extended to cases concerning deportation in *Cruz Varaz v. Sweden.*[99]

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[95] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): pp. 137-138.

[96] *Chahal v. the United Kingdom,* application no. 22414/93 (1996), ECtHR.

[97] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.139.

[98] *Saadi v.Italy,* application no.37201/06 (2008), ECtHR.

[99] C. Michaelson, "the Renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights", *The International and Comparative Law Quarterly* (Cambridge: Cambridge University Press (2012): p.753.

As it is seen, the ECtHR argues that the interests of states' in the form of national security cannot serve as limits to the protection granted under Article 3, and consequently it precludes any exceptions and derogations to the protection against torture, inhuman or degrading treatment or punishment.[100] The ECtHR has a special standing on the terrorism cases concerning derogable rights. In these circumstances the Court grants the States a wide margin of appreciation to fight terrorism threats, and it is ready to lower certain standards under the ECHR. However, as mentioned above, it is not the case for the cases under Article 3. The Court argues that its position in relation to terrorism is not unique, and it does not differ from the threat possessed, for example, from espionage or any other organised crime, and consequently, there is no need to develop new approaches and provisions for fighting terrorism. The ECtHR argues that the Convention is adaptable and secure enough to deal with any application handled to the Court.[101] The main standing of the Court is that parties to the Convention are able to effectively fight terrorism threats without grave violations of the ECHR, [102] and if the states consider that it is impossible, they have an option to turn to the derogations under Article 15, if all of the criteria under "emergency situation" are satisfied. The judgements from the above mentioned cases were issued prior to the 9/11. The following cases in the next section were decided already after the 9/11 attack.

3.3. The WOT before the ECtHR

The ECtHR implements the supervisory role to review the domestic courts' judgments to ensure human rights standards, and not to let states parties to the Convention curtail human rights for the sake of security. After 9/11 the United Kingdom had extensively opposed the Court's decision in *Soering* and *Chahal* cases, namely the decision to include absolute non-refoulement protection under the Article 3 ECHR. Furthermore, in the case *Brogan and Others v. the United Kingdom*, the state concerned again reattempted to establish a balancing test under Article 3 between the protection of human rights and national security.[103] It is not surprising that countries are worried about the impact of the principle of non-refoulement on the state security after the emergence of the new form of international terrorism.[104] This section is aimed to examine how the Court deals with the post 9/11 cases and whether there are differences between

[100] Smith, *supra* note 97, p.139.
[101] *Ibid.*, p.140.
[102] *Ibid.*
[103] *Brogan and Others v. the UK*, application no.11209/84 (1988), ECtHR.
[104] Vijay M. Padmanabhan, "To transfer or not to transfer: identifying and protecting relevant human rights interests in non-refoulement", *Fordham Law Review* (2011): p.90.

pre and post 9/11 case law concerning the non-refoulement principle due to the introduction of the WOT rhetoric.

As mentioned above, the major part of the states and the Court refused to explicitly make any distinctions between terrorism threats prior to and post 9/11 events. Even though, in the case *Saadi v. Italy* of 2008, the ECtHR recognized that countries face difficulties in modern times while protecting their nations from terrorist threats, the Court referred to its previous case law[105], emphasizing by this that its approach regarding the non-refoulement principle has not been changed after the 9/11. However, in this case, Italy came closest to claim that terrorist acts had reached alarming proportions in Europe.[106] The applicant Nassim Saadi was a Tunisian national living in Italy, who in 2005 was suspected of being in charge of international terrorism. The Italian government decided to enforce his deportation to Tunisia, where was a substantial risk of facing inadequate treatment or torture. The ECtHR had unanimously decided that deportation, in this case, would violate Article 3 and thus Saadi's fundamental human rights.[107] The United Kingdom was an intervenor party to the case, and argued that inflexibility of the non-refoulement principle under Article 3 precludes states to take legitimate actions to protect their nations from external threats.[108] Italy and the UK together claimed that the existing Court's standards, as the decision in the *Chahal* case, should be amended and reconsidered in the context of persons who create a particular threat to the community as a whole. However, the Court had rejected the fair balance principle concerning Article 3 and stated that measures to counter-terrorism must fit within this Article. The judgment outlined that balancing the concept of "danger" for the community and "risk" of an individual being tortured cannot be weighed against each other, since these concepts exist independently.[109]As a result, the ECtHR rejected any introduction of the margin of appreciation to Article 3, because it is absolute.[110]

Before the *Saadi v. Italy*, in the case *Ramzy v. Netherlands* several NGOs intervened before the ECtHR to safeguard the fundamental rights of the applicant. The case concerned an applicant at the risk to be deported to Algeria, where, as he claimed, he would be tortured or ill-treated due to his terrorism- related charges. The UK again and other European governments had intervened in the case to challenge the absolute nature of the prohibition under the ECHR

[105] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.144.
[106] *Saadi v.Italy*, application no.37201/06 (2008), ECtHR.
[107] M. Nijhoff, "Saadi v. Italy", *Human Rights Case Digest* Vol.18 (2007):p.655-656.
[108] Smith, *supra* note 105, p.150.
[109] *Saadi v.Italy*, application no.37201/06 (2008), ECtHR.
[110] Smith, *supra note* 97.

of transferring persons to states where a risk of ill-treatment or torture exists.[111] The intervening governments argued that despite there was a positive obligation to protect an individual against torture, this was not a limitless obligation, highlighting that the fact that the transferring state would not itself be subjecting the applicant to torture. Furthermore, governments argued that countries had a right to transfer aliens to protect their nationals' fundamental right to life and save them from external threats by the use of immigration legislation. Consequently, the opposite argument coming from the intervening NGOs was that the operative concern saved by the non-refoulement principle is the risk to the applicant, rather than the risk to the nation at large. Meaning that putting the national security risks as a priority over the individuals transferred to states where they may be at risk of ill-treatment or torture erodes the global anti-torture regime, as well as abuses human rights. It is evident, that the aspect of national security poses difficult cases for policy-makers however it is not a substantial reason to recalibrate the traditional interpretation of the non-refoulement principle as it is enshrined in international law. [112] It must be understood that the erosion of the global anti-torture regime is more dangerous and the individuals who would be transferred in such circumstances will suffer for life.

The latter case where the decision from *Saadi v. Italy* was reaffirmed is *A v. Netherlands.*[113] The applicant of the case was considered a threat to national security due to his terrorism-related charges. Due to his participation in an opposition group in Libya, he would be subjected to torture on his return to the state of origin. He argued that the Netherlands has failed to investigate his claim regarding the risk of transfer, which is contrary to Article 3. The Court reaffirmed the principles elaborated in the case *Saadi v. Italy* that the prohibition of non-refoulement under Article 3 ECHR is absolute, regardless of the actions of the individual concerned, despite the fact of how dangerous or undesirable this may be.[114]

To conclude, the examination of the cases mentioned above decided after the 9/11 events demonstrate that the Court had not changed its approach even before the WOT rhetoric, which originally required a shift in the interplay between human rights and national security. The Court stands firm to its standards in these cases, rejecting any balancing or giving a margin

[111]"Ramzy v. Netherlands", available on: https://interights.org/ramzy/index.html#:~:text=Thecaseraisedimportantissues,oftortureandillDtreatment. Accessed April 19, 2022.
[112] A. Jillions, "When a gamekeeper turns poacher: torture, diplomatic assurances and the politics of trust", *The Royal Institute of International Affairs,* Vol. 91, No.3 (2015): p.491.
[113]"Ramzy v. Netherlands", available on: https://interights.org/ramzy/index.html#:~:text=Thecaseraisedimportantissues,oftortureandillDtreatment. Accessed April 19, 2022.
[114] *A v. Netherlands*, application no 4900/06, (2010), ECtHR.

of appreciation to the cases concerning non-refoulement principle.[115] Hence, the ECtHR stipulates that it is capable of dealing with terrorism-related cases within its legal regime and without shifting its approach.

3.4. Diplomatic Assurances in the Case Law

It has been concluded that despite the willingness of certain states to change the current legal framework covering the non-refoulement principle and the global influence of the WOT rhetoric, the Court had not changed its approach regarding the principle and its standing on Article 3 ECHR. The second part of the thesis has examined the role of diplomatic assurances in the post- 9/11 era, and how states utilize them. The analysis has indicated that diplomatic assurances do not provide for the effective safeguarding of individuals transferred to the states where a substantial risk of ill-treatment or torture exists. This section is going to look at one of the most famous case- *Abu Qatada v. the UK*, to see the Court's reliance on such policy-making tool and the overall attitude to diplomatic assurances while preserving the non-refoulement principle.

One of the most resonant cases regarding diplomatic assurances has been the *Abu Qatada v. the UK,* where the United Kingdom was attempting to remove the applicant to face trial in his state of origin for terrorist offenses. The applicant is a Jordanian national who was residing in the UK since 1993. Abu Qatada was detained under the 2001 Anti-Terrorism, Crime and Security Act till 2005, and was subjected to a control order. Later in 2005, the UK's government tried to deport him back to Jordan for a trial due to his terrorism-related charges. The applicant appealed against this decision because he would be tortured on his return. Contrary, the House of Lords has decided that diplomatic assurances received from Jordan provided for robust protection of the applicant's human rights. The ECtHR had blocked the decision to deport Abu Qatada because diplomatic assurances had lacked guarantees for a fair trial and did not establish safeguards to prevent the information obtained through torture from being utilized as evidence in the national court.[116] If doing so, the Court would stay in its position regarding the absolute nature of Article 3, and thus non-refoulement principle. However, after the additional assurances received from Jordan, the applicant was transferred to Jordan in 2013.[117]

[115] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): p.151.
[116] *Abu Qatada v. the United Kingdom,* application no.8139/09, (2012), ECtHR.
[117] *Ibid.*

The Court's role in the decision was to examine whether the diplomatic assurances received from Jordan were sufficient enough to avoid any ill-treatment or torture under Article 3. In its examination, the ECtHR acknowledged that torture was a widespread practice by Jordan authorities and no safeguards were provided to avoid it.[118] It could be sufficient enough to block the transfer at this stage, because why would the state with a poor human rights record, which does not comply with its obligations under international law, comply with non-binding assurances. But, the Court decided to rely on the SIAC's [Special Immigration Appeals Commission] reasoning, which argued that the applicant would not face a real risk. Consequently, the MoU was accepted as sufficient. Such a decision was based on several aspects: violation of MoU would lead to serious consequences for diplomatic relations between the states, and independent monitoring bodies would monitor the post-transfer of an applicant.[119] As it was discussed in the second chapter, exactly these operational aspects usually provide difficulties with the use of diplomatic assurances, however, it can be concluded that the guarantees provided by Jordan inspired confidence. However, again, why does the state which constantly and routinely violates the human rights regime should be trusted?

The decision to accept these assurances as reliable to remove the risk of torture or ill-treatment of the applicant weakens the application of the principle of non-refoulement in the traditional context of Article 3 of the Convention. Although if compare the issued diplomatic assurances for Abu Qatada with other diplomatic assurances in the cases e.g. *Agiza v. Sweden or Alzery v. Sweden,* these were more comprehensive, but still too weak to rely on them.[120] It can be concluded that in the *Abu Qatada* judgment the Court had established too low threshold on which it assessed the risk of torture and inadequate treatment, which in turn enabled the ECtHR to avoid violation of non-refoulement principle.[121] In this case, the new jurisprudence of the Court has been established, and can be concluded that in this particular case, the Court has become an advocate against human rights.

3.5. Concluding Remarks

This thesis was aimed at analyzing whether the balance between the principle of non-refoulement and national security has been recalibrated due to the 9/11 events. The conclusions

[118] C. Michaelson, "The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights", *The International and Comparative Law Quarterly* Vol. 61 No.3 (2012): pp.759-760.
[119] *Ibid.*
[120] Michaelson, *supra note* 99, p. 764.
[121] M. Farzamfar, "Diplomatic Assurances in Cases of Expulsion to Torture: A Critical Analysis," in *Finnish Yearbook of International Law 24* (2014): pp.70-72.

of the work will be presented at the end of the thesis, however here the author would like to recall Dworkin's thoughts regarding the concept of a fair balance between these two aspects.

Dworkin argued that trying to find a fair balance between human rights and security aspects implies that someone can judge when a proper balance is being found. The scholar considers the terms "trade-off" and "balance" as deeply misleading concepts, where a certain level of objectiveness, which does not exist in the reality, should be found.[122] This oversimplifies the balance between counteracting interests since some interests will overweight others, particularly interests of a majority vs. interests of the minority. It contributes to glossing over difficult questions about who shall make the decisions and who will be affected by the result- final judgment. Combating terrorism in this way produces a scenario when "our" rights are chosen instead of the rights of the "others" when the rights of the "others" are violated to save "ours". Dworkin believes that this type of mindset creates a new balance between human rights and security, which is incorrect. He argues that the current regimes do not function on a "sliding scale" of human rights preservation, which depends upon the degree of risk a person poses to society. [123] Dworkin suggests that society[124] must ensure justice for everyone even if it comes at the expense of "our" interests.

CONCLUSION

The principle of non-refoulement is a fundamental principle enshrined in the international and regional law, according to which states should not send individuals back to the states where a substantial risk to torture, inhuman or degrading treatment might take place. States possess absolute sovereignty over their territories, hence they can decide who can or cannot enter their borders, unless it is otherwise stated by law. Prior to the establishment of the Convention Relating to the Status of Refugees, the principle of non-refoulement was not widely recognized. Today the principle of non-refoulement is officially enshrined in international and regional law. Although the principle is mostly associated with the refugee law, it is also significant in the wider sense of the protection of fundamental human rights.

In order to receive the protection from refoulement under the Refugee Convention Article 33 (1), a person shall fall under Article 1A. If an individual falls under Article 33(2), he

[122] J. Stepockina, "Human Rights Challenges in the Context of Counter-Terrorism". Research paper in Interdisciplinary Research: Law and Politics (2022): pp.6-7.
[123] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?", *Human Rights Law Review* (2011): pp.150-151.
[124] By the "society" here is meant individuals worldwide and national governments, whose perception of terrorism was changed due to the new form of terrorism and launched new policies against terrorism.

or she is not entitled to such protection according to the national security priorities, and not always but most likely individuals who commit terrorism-related acts fall exactly under the exclusion clause. Hence, refuges that have charges with terrorism-related crimes are the most challenging dilemmas for the receiving state, because on the one hand these are de facto refugees, so they cannot be sent back to the risk of being tortured or inadequately treated. However on the other hand, these individuals do not deserve international protection since they are subjects to the exclusion clause of Article 33 (2). However according to the human rights law everyone without any exceptions is entitled to the protection against torture, and thus against refoulement, because prohibition of torture is a *jus cogens* norm, which cannot be overridden in any case. The right is of absolute nature and is recognized by every human rights convention, e.g. CAT, ICCPR and ECHR. The analyses of the applicable legislation has shown that states have a positive obligation to protect persons form the refoulement to the risk of torture or inadequate treatment whether under refugee law, if applicable to a certain situation, or under human rights law, which guarantees an absolute protection. However, after 9/11 international community has become more aware of the national security aspect and of individuals coming in.

After the 9/11 the form of international terrorism has changed, thus it started to possess a greater danger. The tactics, operational range, organizational structure and motivations of terrorist organizations has become more powerful, cruel, wide-reaching and threatening, which in turn produced implications for policy level decisions and global security. The WOT rhetoric adopted in the aftermath of 9/11 has become a new policy to fight a new form of terrorism, that produced an exceptional framework which displaced prior human rights –based regime, and contributed to the permanent erosion of it. On this background, states started more actively to use diplomatic assurances. The examination of the use of diplomatic assurances demonstrated that the states, especially the UK, conclude MoUs in order to transfer suspected in terrorism individuals, while formally fulfilling their international obligations of non-refoulement and protecting national security. However, the effectiveness of this tool is another challenge, because while using DA, states rather engage in a wishful thinking that those are effective. Human rights groups e.g. Amnesty International and Human Rights Watch together with more authoritative organizations e.g. Committee against Torture are for the complete rejection of the use of diplomatic assurances, because these are unreliable and not trustful as safeguards against torture. Firstly, these agreements do not have legal effect. Secondly, there are no sanctions that would contribute to their enforcement. Thirdly, there are operational difficulties. Lastly, DAs erode global anti-torture regime. The case law e.g., *Agiza and Alzery v. Sweden, Mamatkulov*

and Askarov v. Turkey, demonstrate that despite the presence of DAs, individuals still turned up to be subjected to torture and inadequate treatment in the receiving state. Thus, diplomatic assurances do not contribute to the harmonized balance between national security and the principle of non-refoulement at the moment, but rather erode it.

When the Court deals with the cases of high sensitivity, the margin of appreciation for states is being used. According to the ECtHR case law the major part of member states have not used any derogation from the Convention in response to 9/11, however the UK has used the derogation article in the case *A. and others v. the UK.* Comparing the case law regarding Article 15 before and after the 9/11, it could be concluded that the Court has taken another approach, giving a wider margin of appreciation to the states. But this conclusion is not one-sided due to the fact the decision already made on the national level was unjustified and discriminative. Thus it cannot be concluded that it was the Court's new approach, which introduced a lower threshold required under Article 15 for the sake of national security.

Analyzing the ECtHR case law regarding Article 3 of the Convention prior to 9/11 it is seen that the Court argued that the interests of the states, namely national security, cannot serve as limits to the protection given to individuals under Article 3. Thus it precludes any derogations and exceptions against protection from torture, degrading or inhuman treatment. Prior to 9/11 the Court stated that terrorism does not possess any special threat to security and the Convention is adaptable and secure enough to deal with any application. The background for these decisions was established in the case law- *Chahal v. the UK, Soering v. the UK* and *Cruz Varaz v. Sweden.*

After 9/11, in the case *Saadi v. Italy* the ECtHR recognized that the states face difficulties while countering terrorism, however it still referred to its previous judgments. Cases *A v. Netherlands* and *Ranzy v. Netherlands* also demonstrate that the Court had not changed its approach in relation to terrorism threat. The Court rejected any balancing tests in relation to Article 3, despite the fact that governments, e.g. Italy and the UK, were actively promoting completely new approach prioritizing national security even stronger than prior to 9/11. It is seen, that even before the WOT rhetoric, which originally required a shift in the interplay between human rights and national security, the Court held firm to its approach to protect individuals against refoulement.

Lastly, the examination of the case law regarding the use of diplomatic assurances demonstrates that after the judgment in the case *Abu Qatada v. the UK* the Court has changed its approach and it has become an advocate against human rights. By allowing the UK to send the applicant to Jordan under the issued diplomatic assurances, the Court has weakened the application of the principle of non-refoulement in the traditional context of Article 3. It has

been shown that diplomatic assurances themselves are not trustworthy and reliable instruments, moreover the use of them erode the global anti-torture regime. However, it is a separate topic for the research.

To answer the research question, the author holds that 9/11 impacted striking balance between the principle of non-refoulement and national security. It had not changed the justifications and approach of the Court regarding Articles 3 and 15, because the ECtHR continues to protect the fundamental human rights against torture and inhuman and degrading treatment, arguing that the Convention is capable of dealing of this type of threat. 9/11 rather changed the perception of the states regarding terrorism-related crimes, meaning that the member states started to be more aware of their security and in the cases, where these two concepts confront, states prioritize national security aspect by jeopardizing the protection against refoulement. However, the case *Abu Qatada v. the UK* shows another approach of the Court, but this is related to the topic of the use of diplomatic assurances.

The author suggests that it is essential to draw the attention of the international community to the recalibrated balance, because by recalibrating it the society put international human rights regime under degradation, which is reflected not only upon the individuals, who are connected to terrorist organizations, but rather is reflected upon all humans. As R. Dworkin argues, the current legal system adopted after 9/11 is discriminatory and contrary to shared humanity, which promotes for the search of non-existing balance.[125]

For further research the author suggests to examine forthcoming decisions and judgments of the Court related to the principle of non-refoulement, namely Article 3. Additionally, it is essential to evaluate the role of diplomatic assurances in these forthcoming cases.

[125] R. Smith, "The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?" *Human Rights Law Review* (2011): pp.150-151.

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