

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 25424/05

Ramzy

Applicant

v.

The Netherlands

Respondent

WRITTEN COMMENTS

BY

**AMNESTY INTERNATIONAL LTD., THE ASSOCIATION FOR THE PREVENTION OF
TORTURE, HUMAN RIGHTS WATCH, INTERIGHTS, THE INTERNATIONAL
COMMISSION OF JURISTS, OPEN SOCIETY JUSTICE INITIATIVE AND REDRESS
PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN
RIGHTS AND RULE 44 § 2 OF THE RULES OF THE EUROPEAN COURT OF HUMAN
RIGHTS**

22 November 2005

I. INTRODUCTION

1. These written comments are respectfully submitted on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, INTERIGHTS, the International Commission of Jurists, Open Society Justice Initiative and REDRESS (“the Intervenors”) pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.¹

2. Brief details of each of the Intervenors are set out in Annex 1 to this letter. Together they have extensive experience of working against the use of torture and other forms of ill-treatment around the world. They have contributed to the elaboration of international legal standards, and intervened in human rights litigation in national and international fora, including before this Court, on the prohibition of torture and ill-treatment. Together the intervenors possess an extensive body of knowledge and experience of relevant international legal standards and jurisprudence and their application in practice.

II. OVERVIEW

3. This case concerns the deportation to Algeria of a person suspected of involvement in an Islamic extremist group in the Netherlands. He complains that his removal to Algeria by the Dutch authorities will expose him to a “real risk” of torture or ill-treatment in violation of Article 3 of the European Convention on Human Rights (the “Convention”). This case, and the interventions of various governments, raise issues of fundamental importance concerning the effectiveness of the protection against torture and other ill-treatment, including in the context of the fight against terrorism. At a time when torture and ill-treatment – and transfer to states renowned for such practices – are arising with increasing frequency, and the absolute nature of the torture prohibition itself is increasingly subject to question, the Court’s determination in this case is of potentially profound import beyond the case and indeed the region.

4. These comments address the following specific matters: (i) the absolute nature of the prohibition of torture and other forms of ill-treatment under international law; (ii) the prohibition of transfer to States where there is a substantial risk of torture or ill-treatment (“*non-refoulement*”)² as an essential aspect of that prohibition; (iii) the absolute nature of the *non-refoulement* prohibition under Article 3, and the approach of other international courts and human rights bodies; (iv) the nature of the risk required to trigger this prohibition; (v) factors relevant to its assessment; and (vi) the standard and burden of proof on the applicant to establish such risk.

5. While these comments take as their starting point the jurisprudence of this Court, the focus is on international and comparative standards, including those enshrined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”), the International Covenant on Civil and Political Rights (“ICCPR”), as well as applicable rules of customary international law, all of which have emphasised the absolute, non-derogable and peremptory nature of the prohibition of torture and ill-treatment and, through jurisprudence, developed standards to give it meaningful effect. This Court has a long history of invoking other human rights instruments to assist in the proper interpretation of the Convention itself, including most significantly for present purposes, the UNCAT.³ Conversely, the lead that this Court has taken in the development of human rights standards in respect of *non-refoulement*, notably through the *Chahal v. the United Kingdom* (1996) case, has been followed extensively by other international

¹ Letter dated 11 October 2005 from Vincent Berger, Section Registrar to Helen Duffy, Legal Director, INTERIGHTS. The World Organization Against Torture (OMCT) and the Medical Foundation for the Care of the Victims of Torture provided input into and support with this brief.

² “Other ill-treatment” refers to inhuman or degrading treatment or punishment under Article 3 of the Convention and to similar or equivalent formulations under other international instruments. “*Non-refoulement*” is used to refer to the specific legal principles concerning the prohibition of transfer from a Contracting State to another State where there is a risk of such ill-treatment, developed under human rights law in relation to Article 3 of the Convention and similar provisions. Although the term was originally borrowed from refugee law, as noted below its scope and significance in that context is distinct. The term “transfer” is used to refer to all forms of removal, expulsion or deportation.

³ *Aydın v. Turkey* (1997); *Soering v. the United Kingdom* (1989); *Selmouni v. France* (1999); and *Mahmut Kaya v. Turkey* (2000). For full reference to these and other authorities cited in the brief see Annex 2 Table of Authorities.

courts and bodies, and now reflects an accepted international standard.⁴

III. THE 'ABSOLUTE' PROHIBITION OF TORTURE AND ILL-TREATMENT

6. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments.⁵ All international instruments that contain the prohibition of torture and ill-treatment recognise its absolute, non-derogable character.⁶ This non-derogability has consistently been reiterated by human rights courts, monitoring bodies and international criminal tribunals, including this Court, the UN Human Rights Committee ("HRC"), the UN Committee against Torture ("CAT"), the Inter-American Commission and Court, and the International Criminal Tribunal for the Former Yugoslavia ("ICTY").⁷

7. The prohibition of torture and other forms of ill-treatment does not therefore yield to the threat posed by terrorism. This Court, the HRC, the CAT, the Special Rapporteur on Torture, the UN Security Council and General Assembly, and the Committee of Ministers of the Council of Europe, among others, have all recognised the undoubted difficulties States face in countering terrorism, yet made clear that all anti-terrorism measures must be implemented in accordance with international human rights and humanitarian law, including the prohibition of torture and other ill-treatment.⁸ A recent United Nations World Summit Outcome Document (adopted with the consensus of all States) in para. 85 reiterated the point.

8. The absolute nature of the prohibition of torture under treaty law is reinforced by its higher, *jus cogens* status under customary international law. *Jus cogens* status connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, "intransgressible."⁹ There is ample international authority recognising the prohibition of torture as having *jus cogens* status.¹⁰ The prohibition of torture also imposes obligations *erga omnes*, and every State has a legal interest in the performance of such obligations which are owed to the international community as a whole.¹¹

9. The principal consequence of its higher rank as a *jus cogens* norm is that the principle or rule cannot

⁴ See e.g. CAT Communication *T.P.S. v. Canada* (2000); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* (2000); UN Special Rapporteur on Torture, *Reports to General Assembly* (2005, §§ 38-39; 2004, § 28; and 2002, § 32).

⁵ Universal Declaration of Human Rights (Article 5); ICCPR (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples' Rights (Article 5), Arab Charter on Human Rights (Article 13), UNCAT and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The prohibition against torture is also reflected throughout international humanitarian law, in e.g. the Regulations annexed to the Hague Convention IV of 1907, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

⁶ The prohibition of torture and ill-treatment is specifically excluded from derogation provisions: see Article 4(2) of the ICCPR; Articles 2(2) and 15 of the UNCAT; Article 27(2) of the American Convention on Human Rights; Article 4(c) Arab Charter of Human Rights; Article 5 of the Inter-American Convention to Prevent and Punish Torture; Articles 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁷ See HRC General Comment No. 29 (2001); CAT's Concluding observations on the Reports of: the Russian Federation (2001, § 90), Egypt (2002, § 40), and Spain (2002, § 59); Inter-American cases, e.g. *Castillo-Petruzzi et al. v. Peru* (1999, § 197); *Cantoral Benavides v. Peru* (2000, § 96); *Maritzá Urrutia v. Guatemala*, (2003, § 89); this Court's cases, e.g. *Tomasi v. France*, (1992); *Aksoy v. Turkey*, (1996); and *Chabal v. the United Kingdom*, (1996); ICTY cases, e.g. *Prosecutor v. Furundžija* (1998).

⁸ This Court, see e.g. *Klass and Others v. Germany* (1978); *Leander v. Sweden* (1987) and *Rotaru v. Romania* (2000); HRC, General Comment No. 29 (2001, § 7), and Concluding observations on Egypt's Report, (2002, § 4); CAT Concluding observations on Israel's Report (1997, §§ 2-3 and 24); Report to the General Assembly (2004, § 17) and *Statement in connection with the events of 11 September 2001* (2001, § 17); General Assembly Resolutions 57/27(2002), 57/219 (2002) and 59/191 (2004); Security Council Resolution 1456 (2003, Annex, § 6); Council of Europe Guidelines on Human Rights and the Fight Against Terrorism (2002); Special Rapporteur on Torture, *Statement to the Third Committee of the GA* (2001). Other bodies pronouncing on the issue include, for example, Human Rights Chamber for Bosnia and Herzegovina (see e.g. *Boudellaa and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 2003, §§ 264 to 267).

⁹ Advisory Opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004, § 157). See also Article 5,3 Vienna Convention on the Law of Treaties (1969) which introduces and defines the concept of "peremptory norm."

¹⁰ See e.g. the first report of the Special Rapporteur on Torture to the UNHCR (1997, § 3); ICTY judgments *Prosecutor v. Delalic and others* (1998), *Prosecutor v. Kunarac* (2001, § 466), and *Prosecutor v. Furundžija* (1998); and comments of this Court in *Al-Adsani v. the United Kingdom* (2001).

¹¹ See ICJ Reports: *Barcelona Traction, Light and Power Company, Limited*, Second Phase (1970, § 33); *Case Concerning East Timor* (1995, § 29); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1996, § 31). See also Articles 40-41 of the International Law Commission's Draft Articles on State Responsibility ("ILC Draft Articles") and the commentary to the Draft Articles. See ICTY case *Prosecutor v. Furundžija*, (1998, § 151); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2000, § 155); and HRC General Comment 31(2004, § 2).

be derogated from by States through any laws or agreements not endowed with the same normative force.¹² Thus, no treaty can be made nor law enacted that conflicts with a *jus cogens* norm, and no practice or act committed in contravention of a *jus cogens* norm may be “legitimated by means of consent, acquiescence or recognition”; any norm conflicting with such a provision is therefore void.¹³ It follows that no interpretation of treaty obligations that is inconsistent with the absolute prohibition of torture is valid in international law.

10. The fact that the prohibition of torture is *jus cogens* and gives rise to obligations *erga omnes* also has important consequences under basic principles of State responsibility, which provide for the interest and in certain circumstances the obligation of all States to prevent torture and other forms of ill-treatment, to bring it to an end, and not to endorse, adopt or recognise acts that breach the prohibition.¹⁴ Any interpretation of the Convention must be consistent with these obligations under broader international law.

IV. THE PRINCIPLE OF *NON-REFOULEMENT*

11. The expulsion (or ‘*refoulement*’) of an individual where there is a real risk of torture or other ill-treatment is prohibited under both international conventional and customary law. A number of States, human rights experts and legal commentators have specifically noted the customary nature of *non-refoulement*¹⁵ and asserted that the prohibition against *non-refoulement* under customary international law shares its *jus cogens* and *erga omnes* character. As the prohibition of all forms of ill-treatment (torture, inhuman or degrading treatment or punishment) is absolute, peremptory and non-derogable, the principle of *non-refoulement* applies without distinction.¹⁶ Indicative of the expansive approach to the protection, both CAT and HRC are of the opinion that *non-refoulement* prohibits return to countries where the individual would not be directly at risk but from where he or she is in danger of being expelled to another country or territory where there would be such a risk.¹⁷

12. The prohibition of *refoulement* is explicit in conventions dedicated specifically to torture and ill-treatment. Article 3 of UNCAT prohibits States from deporting an individual to a State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 13(4) of the Inter-American Convention to Prevent and Punish Torture provides, more broadly, that deportation is prohibited on the basis that the individual “will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”

13. The principle of *non-refoulement* is also explicitly included in a number of other international instruments focusing on human rights, including the EU Charter of Fundamental Rights and Inter-American Convention on Human Rights (“I-ACHR”).¹⁸ In addition, it is reflected in other international instruments addressing international cooperation, including extradition treaties, and specific forms of terrorism.¹⁹ Although somewhat different in its scope and characteristics, the principle is also reflected in

¹² See Article 53 of the Vienna Convention on the Law of Treaties 1969; also ICTY *Furundzija* (1998, §§ 153-54).

¹³ Jennings and Watts, *Oppenheim’s International Law* (Vol. 1, Ninth ed.) 8 (1996). See also Article 53, Vienna Convention.

¹⁴ See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes*); see also Advisory Opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004, § 159). In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see Comment 31 (2004, § 2).

¹⁵ See E. Lauterpacht and D. Bethlehem (2001, §§ 196-216).

¹⁶ See e.g. HRC General Comment No. 20 (1992, § 9).

¹⁷ CAT General Comment No. 1(1996, § 2); *Avedes Hamayak Korban v. Sweden* (1997); and HRC General Comment 31(2004).

¹⁸ Article 19 EU Charter of Fundamental Rights; Article 22(8) I-ACHR; Article 3(1) Declaration on Territorial Asylum, Article 8 Declaration on the Protection of All Persons from Enforced Disappearances, Principle 5 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, and Council of Europe Guidelines.

¹⁹ Article 9 International Convention against the Taking of Hostages, Article 3 European Convention on Extradition, Article 5 European Convention on the Suppression of Terrorism, and Article 4(5) Inter-American Convention on Extradition contain a general clause on *non-refoulement*. See also Article 3 Model Treaty on Extraditions.

refugee law.²⁰

14. This principle is also implicit in the prohibition of torture and other ill-treatment in general human rights conventions, as made clear by consistent authoritative interpretations of these provisions. In *Soering* and in subsequent cases, this Court identified *non-refoulement* as an ‘inherent obligation’ under Article 3 of the Convention in cases where there is a “real risk of exposure to inhuman or degrading treatment or punishment.” Other bodies have followed suit, with the HRC, in its general comments and individual communications, interpreting Article 7 of the ICCPR as implicitly prohibiting *refoulement*.²¹ The African Commission on Human Rights and the Inter-American Commission on Human Rights have also recognised that deportation can, in certain circumstances, constitute such ill-treatment.²²

15. The jurisprudence therefore makes clear that the prohibition on *refoulement*, whether explicit or implicit, is an inherent and indivisible part of the prohibition on torture or other ill-treatment. It constitutes an essential way of giving effect to the Article 3 prohibition, which not only imposes on states the duty not to torture themselves, but also requires them to “prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture.”²³ This is consistent with the approach to fundamental rights adopted by this Court, and increasingly by other bodies, regarding the positive duties incumbent on the state.²⁴ Any other interpretation, enabling states to circumvent their obligations on the basis that they themselves did not carry out the ill-treatment would, as this Court noted when it first considered the matter, ‘plainly be contrary to the spirit and intention of [Article 3].’²⁵

The Absolute Nature of the Prohibition on *Refoulement*

16. The foregoing demonstrates that the prohibition on *refoulement* is inherent in the prohibition of torture and other forms of ill-treatment. UN resolutions, declarations, international conventions, interpretative statements by treaty monitoring bodies, statements of the UN Special Rapporteur on Torture and judgments of international tribunals, including this Court, as described herein, have consistently supported this interpretation. It follows from its nature as inherent to it, that the *non-refoulement* prohibition enjoys the same status and essential characteristics as the prohibition on torture and ill-treatment itself, and that it may not be subject to any limitations or exceptions.

17. The jurisprudence of international bodies has, moreover, explicitly given voice to the absolute nature of the principle of *non-refoulement*. In its case law, this Court has firmly established and re-affirmed the absolute nature of the prohibition of *non-refoulement* under Article 3 of the Convention.²⁶ In paragraph 80 of the *Chahal* case, this Court made clear that the obligations of the State under Article 3 are “equally absolute in expulsion cases” once the ‘real risk’ of torture or ill-treatment is shown. The CAT has followed suit in confirming the absolute nature of the prohibition of *refoulement* under Article 3 in the context of particular cases.²⁷ Likewise, other regional bodies have also interpreted the prohibition on torture and ill-treatment as

²⁰ The principle of *non-refoulement* applicable to torture and other ill-treatment under human rights law is complementary to the broader rule of *non-refoulement* applicable where there is a well founded fear of ‘persecution’ under refugee law, which excludes those who pose a danger to the security of the host State. However, there are no exceptions to *non-refoulement*, whether of a refugee or any other person, when freedom from torture and other ill-treatment is at stake. See Articles 32 and 33 of the Convention Relating to the Status of Refugees, 1951, *Chahal* case (1996, § 80), the New Zealand case of *Zaoui v. Attorney General* (2005); and Lauterpacht and Bethlehem (2001, §§ 244 and 250).

²¹ See HRC General Comments No. 20 (1990, at § 9), and No. 31 (2004, §12). For individual communications, see e.g. *Chitat Ng v. Canada*, (1994, § 14.1); *Cox v. Canada* (1994); *G.T. v. Australia* (1997).

²² See African Commission on Human Rights, *Modise v. Botswana*, and I-A Comm. HR Report on *Terrorism and Human Rights* (2004).

²³ Report of the Special Rapporteur to the Third Committee of the GA (2001, § 28).

²⁴ See Special Rapporteur on Torture Report (1986, § 6) and Report (2004, § 27); HRC General Comments No. 7 (1982) and No. 20 (1992); Articles 40-42 and 48 of the ILC Draft Articles; ICTY *Furundzija* judgment (1998, § 148).

²⁵ *Soering v. UK* (1989, § 88).

²⁶ *Soering v. UK* (1989, § 88); *Ahmed v. Austria* (1996 § 41); *Chahal v. UK* (1996).

²⁷ See CAT *Tapia Paéz v. Sweden*, (1997, at § 9.8) and *Pauline Muzonzozo Paku Kisoki v. Sweden* (1996).

including an absolute prohibition of *refoulement*.²⁸

Application of the non-refoulement principle to all persons

18. It is a fundamental principle that *non-refoulement*, like the protection from torture or ill-treatment itself, applies to *all persons* without distinction. No characteristics or conduct, criminal activity or terrorist offence, alleged or proven, can affect the right not to be subject to torture and ill-treatment, including through *refoulement*. In the recent case of *N. v. Finland* (2005), this Court reiterated earlier findings that “[a]s the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, *the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration* (emphasis added).” The same principle is reiterated in other decisions of this Court and of other bodies.²⁹

Application of the non-refoulement principle in the face of terrorism or national security threat

19. The jurisprudence of other regional and international bodies, like that of this Court, rejects definitively the notion that threats to national security, or the challenge posed by international or domestic terrorism, affect the absolute nature of the prohibition on *non-refoulement*. In *Chahal*, this Court was emphatic that no derogation is permissible from the prohibition of torture and other forms of ill-treatment and the obligations arising from it (such as *non-refoulement*) in the context of terrorism. This line of reasoning has been followed in many other cases of this Court and other bodies including the recent case of *Agiza v. Sweden* in which CAT stated that “the Convention’s protections are absolute, even in the context of national security concerns.”³⁰

20. Thus no exceptional circumstances, however grave or compelling, can justify the introduction of a “balancing test” when fundamental norms such as the prohibition on *non-refoulement* in case of torture or ill-treatment are at stake. This is evident from the concluding observations of both HRC and CAT on State reports under the ICCPR and UNCAT, respectively.³¹ On the relatively few occasions when states have introduced a degree of balancing in domestic systems, they have been heavily criticised in concluding observations of CAT,³² or the HRC.³³ This practice follows, and underscores, this Court’s own position in the *Chahal* case where it refused the United Kingdom’s request to perform a balancing test that would weigh the risk presented by permitting the individual to remain in the State against the risk to the individual of deportation.

Non-Refoulement as Jus Cogens

21. It follows also from the fact that the prohibition of *refoulement* is inherent in the prohibition of torture and other forms of ill-treatment, and necessary to give effect to it, that it enjoys the same customary law, and *jus cogens* status as the general prohibition. States and human rights legal experts have also specifically asserted that the prohibition against *non-refoulement* constitutes customary international law, and enjoys *jus cogens* status.³⁴ As noted, one consequence of *jus cogens* status is that no treaty obligation, or

²⁸ See *Modise* case and Report on Terrorism and Human Rights.

²⁹ See *inter alia* *Ahmed v. Austria* (1996); and CAT *Tapia Paéz v. Sweden* (1997, § 14.5); *M. B. B. v. Sweden* (1998, § 6.4).

³⁰ See CAT *Agiza v. Sweden* (2005, § 13.8); *Aemei v. Switzerland* (1997, § 9.8); *M.B.B. v. Sweden*, §6.4; *Arana v. France*, (2000, § 11.5).

³¹ E.g. CAT’s Concluding Observations on Germany (2004), commending the reaffirmation of the absolute ban on exposure to torture, including through *refoulement*, even where there is a security risk.

³² See CAT’s Concluding Observations on Sweden’s Report (2002, §14); and on Canada’s Report (2005, § 4(a)).

³³ See also HRC Concluding Observations on Canada’s Report (1999, §13) condemning the Canadian *Suresh* case, which upheld a degree of balancing under Article 3, based on national law, and *Mansour Abani v. Canada*, (2002, § 10.10) where HRC also clearly rejected Canada’s balancing test in the context of deportation proceedings.

³⁴ See Lauterpacht and Bethlehem (2001, § 195); Bruin and Wouters (2003, § 4.6); Allain (2002); Report of Special Rapporteur on Torture to the GA (2004); IACHR Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (2000, § 154). There has also been considerable support among Latin American States for the broader prohibition of *non-refoulement* in refugee law as

interpretation thereof, inconsistent with the absolute prohibition of *refoulement*, has validity under international law.

22. Certain consequences also flow from the *jus cogens* nature of the prohibition of torture itself (irrespective of the status of the *non-refoulement* principle), and the *erga omnes* obligations related thereto. The principle of *non-refoulement* is integral - and necessary to give effect - to the prohibition of torture. To deport an individual in circumstances where there is a real risk of torture is manifestly at odds with the positive obligations not to aid, assist or recognise such acts and the duty to act to ensure that they cease.³⁵

V. THE OPERATION OF THE RULE

The General Test

23. When considering the obligations of States under Article 3 in transfer cases, this Court seeks to establish whether “*substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.*”³⁶ This test is very similar to those established by other bodies. Article 3 (1) of the UNCAT requires that the person not be transferred to a country where there are “*substantial grounds for believing that he would be in danger of being subjected to torture.*” The HRC has similarly affirmed that the obligation arises “*where there are substantial grounds for believing that there is a real risk of irreparable harm.*”³⁷ The Inter-American Commission for Human Rights has likewise referred to “*substantial grounds of a real risk of inhuman treatment.*”³⁸

24. The legal questions relevant to the Court’s determination in transfer cases, assuming that the potential ill-treatment falls within the ambit of Article 3, are: first, the nature and degree of the risk that triggers the *non-refoulement* prohibition; second, the relevant considerations that constitute ‘substantial grounds’ for believing that the person faces such a risk; third, the standard by which the existence of these ‘substantial grounds’ is to be evaluated and proved. The comments below address these questions in turn.

25. A guiding principle in the analysis of each of these questions, apparent from the work of this Court and other bodies, is the need to ensure the effective operation of the *non-refoulement* rule. This implies interpreting the rule consistently with the human rights objective of the Convention; the positive obligations on States to prevent serious violations and the responsibility of the Court to guard against it; the absolute nature of the prohibition of torture and ill-treatment and the grave consequences of such a breach transpiring; and the practical reality in which the *non-refoulement* principle operates. As this Court has noted: “The object and purpose of the Convention as an instrument for the protection of individual human beings require that *its provisions be interpreted and applied so as to make its safeguards practical and effective.*”³⁹

Nature and Degree of the Risk

26. This Court, like the CAT, has required that the risk be “real”, “foreseeable”, and “personal”.⁴⁰ There is no precise definition in the Convention case law of what constitutes a “real” risk, although the Court has established that “mere possibility of ill-treatment is not enough”,⁴¹ just as certainty that the ill-treatment will occur is not required.⁴² For more precision as to the standard, reference can usefully be made to the jurisprudence of other international and regional bodies which also apply the ‘real and foreseeable’ test.

“imperative in regard to refugees and in the present state of international law [thus it] should be acknowledged and observed as a rule of *jus cogens*” (Cartagena Declaration of Refugees of 1984, Section III, § 5).

³⁵ ILC Draft Articles, Article 16.

³⁶ *N v. Finland* (2005).

³⁷ HRC General Comment 31 (2004).

³⁸ *Report on Terrorism and Human Rights* (2002), *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, (2000, § 154).

³⁹ *Soering v. the United Kingdom*, (1989, § 87), emphasis added.

⁴⁰ CAT General Comment 1 (1997); *Soering v. the United Kingdom* (1989, § 86); *Shamayev and 12 others v. Russia* (2005).

⁴¹ See *Vilvarajab*, (1991, § 111).

Notably, the CAT has held that the risk “must be assessed on grounds that go beyond mere theory or suspicion”, but this does not mean that the risk has to be “highly probable”.⁴³

27. The risk must also be “personal”. However, as noted in the following section, personal risk may be deduced from various factors, notably the treatment of similarly situated persons.

Factors Relevant to the Assessment of Risk

28. This Court and other international human rights courts and bodies have repeatedly emphasised that the level of scrutiny to be given to a claim for *non-refoulement* must be “rigorous” in view of the absolute nature of the right this principle protects.⁴⁴ In doing so, the State must take into account “all the relevant considerations” for the substantiation of the risk.⁴⁵ This includes both the human rights situation in the country of return and the personal background and the circumstances of the individual.

General Situation in the Country of Return

29. The human rights situation in the state of return is a weighty factor in virtually all cases.⁴⁶ While this Court, like CAT,⁴⁷ has held that the situation in the state is not sufficient *per se* to prove risk, regard must be had to the extent of human rights repression in the State in assessing the extent to which personal circumstances must also be demonstrated.⁴⁸ Where the situation is particularly grave and ill-treatment widespread or generalised, the general risk of torture or ill-treatment may be high enough that little is required to demonstrate the personal risk to an individual returning to that State. The significant weight of this factor is underlined in Article 3(2) of UNCAT: “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

Personal Background or Circumstances

30. The critical assessment in *non-refoulement* cases usually turns on whether the applicant has demonstrated “specific circumstances” which make him or her personally vulnerable to torture or ill-treatment. These specific circumstances may be indicated by previous ill-treatment or evidence of current persecution (e.g. that the person is being pursued by the authorities), but neither is necessary to substantiate that the individual is ‘personally’ at risk.⁴⁹ A person may be found at risk by virtue of a characteristic that makes him or her particularly vulnerable to torture or other ill-treatment. The requisite ‘personal’ risk does not necessarily require information specifically about that person therefore, as opposed to information about the fate of persons in similar situations.

Perceived Association with a Vulnerable Group as a Strong Indication of the Existence of Risk

31. It is clearly established in the jurisprudence of the CAT that, in assessing the “specific circumstances” that render the individual personally at risk, particular attention will be paid to any evidence

⁴² *Soering*, (1989, § 94).

⁴³ See e.g. *CAT X.Y.Z. v. Sweden* (1998); *A.L.N. v. Switzerland* (1998); *K.N. v. Switzerland*; and *A.R. v. The Netherlands* (2003).

⁴⁴ *Chahal v. the United Kingdom*, 91996, § 79); *Jabari v. Turkey* (2000, § 39).

⁴⁵ UNCAT Article 33 (2).

⁴⁶ As held by CAT, the absence of a pattern of human rights violations “does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.” See e.g. *Seid Mortesa Aemei v. Switzerland* (1997).

⁴⁷ CAT has explained that although a pattern of systematic abuses in the State concerned is highly relevant, it “does not as such constitute sufficient ground” for a situation to fall under Article 3 because the risk must be ‘personal’.

⁴⁸ *Vilvarajah* (1991, § 108).

⁴⁹ See eg. *Shamayev and 12 otebrs v. Russia* (2005, § 352); *Said v. the Netherlands* (2005, § 48-49).

that the applicant belongs, or is *perceived* to belong,⁵⁰ to an identifiable group which has been targeted for torture or ill-treatment. It has held that regard must be had to the applicant's political or social affiliations or activities, whether inside *or outside* the State of return, which may lead that State to identify the applicant with the targeted group.⁵¹

32. Organisational affiliation is a particularly important factor in cases where the individual belongs to a group which the State in question has designated as a "terrorist" or "separatist" group that threatens the security of the State, and which for this reason is targeted for particularly harsh forms of repression. In such cases, the CAT has found that the applicant's claim comes within the purview of Article 3 even in the absence of other factors such as evidence that the applicant was ill-treated in the past,⁵² and even when the general human rights situation in the country may have improved.⁵³

33. In this connection, it is also unnecessary for the individual to show that he or she is, or ever was, personally sought by the authorities of the State of return. Instead, the CAT's determination has focused on the assessment of a) how the State in question treats members of these groups, and b) whether sufficient evidence was provided that the State would believe the particular individual to be associated with the targeted group. Thus in cases involving suspected members of ETA, *Sendero Luminoso*, PKK, KAWA, the People's Mujahadeen Organization and the Zapatista Movement, the CAT has found violations of Article 3 on account of a pattern of human rights violations against members of these organisations, where it was sufficiently established that the States concerned were likely to identify the individuals with the relevant organisations.⁵⁴

34. In respect of proving this link between the individual and the targeted group, the CAT has found that the nature and profile of the individual's activities in his country of origin *or abroad*⁵⁵ is relevant. In this respect, human rights bodies have indicated that a particularly important factor to be considered is the extent of publicity surrounding the individual's case, which may have had the effect of drawing the negative attention of the State party to the individual. The importance of this factor has been recognized both by this Court and the CAT.⁵⁶

Standard and Burden of Proving the Risk

35. While the Court has not explicitly addressed the issue of standard and burden of proof in transfer cases, it has held that in view of the fundamental character of the prohibition under Article 3, the examination of risk "must necessarily be a thorough one".⁵⁷ It has also imposed on States a positive obligation to conduct a 'meaningful assessment' of any claim of a risk of torture and other ill-treatment.⁵⁸ This approach is supported by CAT,⁵⁹ and reflects a general recognition by this and other tribunals that, because of the specific nature of torture and other ill-treatment, the burden of proof cannot rest alone with the person alleging it, particularly in the view of the fact that the person and the State do not always have equal access to the evidence.⁶⁰ Rather, in order to give meaningful effect to the Convention rights under Article 3 in transfer cases, the difficulties in obtaining evidence of a risk of torture or ill-treatment in another

⁵⁰ It is not necessary that the individual *actually* is a member of the targeted group, if believed so to be and targeted for that reason. See CAT *A. v. The Netherlands* (1998).

⁵¹ See CAT General Comment 1 (1997, § 8 (e)).

⁵² *Gorki Ernesto Tapia Paez v. Sweden* (1997).

⁵³ See *Josu Arkanuz Arana v. France* (2000), finding that gross, flagrant or mass violations were unnecessary in such circumstances.

⁵⁴ See *inter alia* CAT, *Cecilia Chipana v. Venezuela* (1998); *Abmed Hussein Mustafa Kamil Agiza v. Sweden* (2005); *Kaveh Yaragh Tala v. Sweden* (1998); *Seid Mortesa Aemei v. Switzerland* (1996).

⁵⁵ See e.g. *Seid Mortesa Aemei v. Switzerland* (1997); *M.K.O. v. The Netherlands* (2001).

⁵⁶ *N v. Finland* (2005, § 165); *Venkadajalasarma v. the Netherlands* (2004); *Said v. the Netherlands* (2005, § 54); *Thampibillai v. the Netherlands* (2004, § 63). See also CAT *Sadiq Shek Elmi v. Australia* (1999, § 6.8).

⁵⁷ *Said v. the Netherlands* (2005, § 49), *N. v Finland* (2005); *Jabari v. Turkey* (2000, § 39).

⁵⁸ See *Jabari v. Turkey* (2000).

⁵⁹ E.g. CAT General Comment 1 (1997, § 9(b)).

State - exacerbated by the inherently clandestine nature of such activity and the individual's remoteness from the State concerned - should be reflected in setting a reasonable and appropriate standard and burden of proof and ensuring flexibility in its implementation.

36. The particular difficulties facing an individual seeking to substantiate an alleged risk of ill-treatment have been recognized by international tribunals, including this Court. These are reflected, for example, in the approach to the extent of the evidence which the individual has to adduce. The major difficulties individuals face in accessing materials in the context of transfer is reflected in the Court's acknowledgment that substantiation only "to the greatest extent practically possible" can reasonably be required.⁶¹ Moreover, CAT's views have consistently emphasised that, given what is at stake for the individual, lingering doubts as to credibility or proof should be resolved in the individual's favour: "even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, [the Committee] must ensure that his security is not endangered."⁶² In order to do this, it is not necessary that all the facts invoked by the author should be proved."⁶³

37. An onus undoubtedly rests on individuals to raise, and to seek to substantiate, their claims. It is sufficient however for the individual to substantiate an 'arguable' or '*prima facie*' case of the risk of torture or other ill-treatment for the *refoulement* prohibition to be triggered. It is then for the State to dispel the fear that torture or ill-treatment would ensue if the person is transferred. This approach is supported by a number of international tribunals addressing questions of proof in transfer cases. For example, the CAT suggests that it is sufficient for the individual to present an '*arguable case*' or to make a '*plausible allegation*'; then it is for the State to prove the lack of danger in case of return.⁶⁴ Similarly, the HRC has held that the burden is on the individual to establish a '*prima facie*' case of real risk, and then the State must refute the claim with 'substantive grounds'.⁶⁵ Most recently, the UN Sub-Commission for the Promotion of Human Rights considered that once a general risk situation is established, there is a 'presumption' the person would face a real risk.⁶⁶

38. Requiring the sending State to rebut an arguable case is consistent not only with the frequent reality attending individuals' access to evidence, but also with the duties on the State to make a meaningful assessment and satisfy itself that any transfer would not expose the individual to a risk of the type of ill-treatment that the State has positive obligation to protect against.

An Existing Risk Cannot be Displaced by "Diplomatic Assurances"

39. States may seek to rely on "diplomatic assurances" or "memoranda of understanding" as a mechanism to transfer individuals to countries where they are at risk of torture and other ill-treatment. In practice, the very fact that the sending State seeks such assurances amounts to an admission that the person would be at risk of torture or ill-treatment in the receiving State if returned. As acknowledged by this Court in *Chahal*, and by CAT in *Agiza*, assurances do not suffice to offset an existing risk of torture.⁶⁷ This view is shared by a growing number of international human rights bodies and experts, including the UN Special

⁶⁰ See e.g. HRC, *Albert Womah Mukong v. Cameroon* (1994); I-ACHR, *Velasquez Rodriguez v. Honduras* (1988, § 134 *et seq.*).

⁶¹ E.g. *Said v. the Netherlands* (2005, § 49); *Babaddar v. the Netherlands*, (1998, § 45).

⁶² Emphasis added.

⁶³ *Seid Mortesa Aemei v. Switzerland* (1997).

⁶⁴ CAT General Comment 1 (1997, § 5): "The burden of proving a danger of torture is upon the person alleging such danger to present an 'arguable case'. This means that there must be a factual basis for the author's position sufficient to require a response from the State party." In *Agiza v. Sweden* (2005, § 13.7) the burden was found to be on the State to conduct an "effective, independent and impartial review" once a 'plausible allegation' is made. Similarly, in *A.S. v. Sweden* (2000, § 8.6) it was held that if sufficient facts are adduced by the author, the burden shifts to the State "to make sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture."

⁶⁵ See HRC, *Jonny Rabin Byaburanga v Denmark*, (2004, §§ 11.2-3).

⁶⁶ UN Sub-Commission for the Promotion and Protection of Human Rights, Resolution 2005/12 on Transfer of Persons, (2005, § 4); see similarly, European Commission for Human Rights in the *Cruz Varas* case (1991).

⁶⁷ *Chahal v. the UK* (1996, § 105); *Agiza v. Sweden* (2005, § 13.4).

Rapporteur on Torture,⁶⁸ the Committee for Prevention of Torture,⁶⁹ the UN Sub-Commission,⁷⁰ the Council of Europe Commissioner on Human Rights,⁷¹ and the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.⁷² Most recently, the UN General Assembly, by consensus of all States, has affirmed “that diplomatic assurances, where used, do not release States from their obligations, under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*.”⁷³ Reliance on such assurances as sufficient to displace the risk of torture creates a dangerous loophole in the *non-refoulement* obligation, and ultimately erodes the prohibition of torture and other ill-treatment.

40. Moreover, assurances cannot legitimately be relied upon as a factor in the assessment of relevant risk. This is underscored by widespread and growing concerns about assurances as not only lacking legal effect but also as being, in practice, simply unreliable, with post-return monitoring mechanisms incapable of ensuring otherwise.⁷⁴ While effective system-wide monitoring is vital for the long-term prevention and eradication of torture and other ill-treatment, individual monitoring cannot ameliorate the risk to a particular detainee.

41. The critical question to be ascertained by the Court, by reference to all circumstances and the practical reality on the ground, remains whether there is a risk of torture or ill-treatment in accordance with the standards and principles set down above. If so, transfer is unlawful. No ‘compensating measures’ can affect the peremptory *jus cogens* nature of the prohibition against torture, and the obligations to prevent its occurrence, which are plainly unaffected by bilateral agreements.

VI. CONCLUSION

42. The principle of *non-refoulement*, firmly established in international law and practice, is absolute. No exceptional circumstances concerning the individual potentially affected or the national security of the State in question can justify qualifying or compromising this principle. Given the inherent link between the two, and the positive nature of the obligation to protect against torture and ill-treatment, no legal distinction can be drawn under the Convention between the act of torture or ill-treatment and the act of transfer in face of a real risk thereof. Any unravelling of the *refoulement* prohibition would necessarily mean an unravelling of the absolute prohibition on torture itself, one of the most fundamental and incontrovertible of international norms.

43. International practice suggests that the determination of transfer cases should take account of the absolute nature of the *refoulement* prohibition under Article 3, and what is required to make the Convention’s protection effective. The risk must be real, foreseeable and personal. Great weight should attach to the person’s affiliation with a vulnerable group in determining risk. Evidentiary requirements in respect of such risk must be tailored to the reality of the circumstances of the case, including the capacity of the individual to access relevant facts and prove the risk of torture and ill-treatment, the gravity of the potential violation at stake and the positive obligations of states to prevent it. Once a *prima facie* or arguable case of risk of torture or other ill-treatment is established, it is for the State to satisfy the Court that there is in fact no real risk that the individual will be subject to torture or other ill-treatment.

⁶⁸ See Report of Special Rapporteur on Torture to the General Assembly, (2004, § 40).

⁶⁹ See CPT 15th General Report, (2004-2005, §§ 39-40).

⁷⁰ See above note 70, at § 4.

⁷¹ Report by Council of Europe Commissioner for Human Rights (2005, §§ 12-3).

⁷² Report of the UN Independent Expert (2005, §§ 19-20).

⁷³ See UN Declaration (2005, § 8).

⁷⁴ Courts in Canada (*Mahjoub*), the Netherlands (*Kaplan*), and the United Kingdom (*Zakaev*) have blocked transfers because of the risk of torture despite the presence of diplomatic assurances. There is credible evidence that persons sent from Sweden to Egypt (*Agiza & Al-Zari*) and from the United States to Syria (*Arar*) have been subject to torture and ill-treatment despite assurances: for more information on practice, see Human Rights Watch, ‘Still at Risk’ (2005); Human Rights Watch, ‘Empty Promises’ (2004).