**CONTRIBUTION**

**BY THE GOVERNMENT OF THE REPUBLIC OF LATVIA**

**WITH REGARD TO**

**THE DRAFT REVISED GENERAL COMMENT No.1**

**“ON THE IMPLEMENTATION OF ARTICLE 3**

**OF THE CONVENTION IN THE CONTEXT OF ARTICLE 22”**

1. In reply to the Note Verbale OHCHR/HRTB/CAT/2017 of 7 February 2017 of the Office of the High Commissioner for Human Rights, the Government of the Republic of Latvia submits the following contribution regarding the Draft Revised General Comment No.1 of the Committee Against Torture “On the implementation of Article 3 of the Convention in the context of Article 22”.
2. The contribution will address Chapter IV of the Draft Revised General Comment on the use of diplomatic assurances “in the context of the transfer of a person from one state to another”, in particular, paragraph 20 which reflects the following position:

“20. The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of “non-refoulement”, provided for by article 3 of the Convention, and they should not be used as a loophole to undermine that principle, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.”

1. Thus the current wording of paragraph 20 of the Draft Revised General Comment expressly states that diplomatic assurances are contrary to the principle of *non-refoulement*. At the same time, this paragraph *in fine* contains a statement that diplomatic assurances "should not be used as a loophole to undermine the principle of *non-refoulement* in those cases when there is a genuine and substantial risk of ill-treatment.In other words, the current drafting of paragraph 20 seems internally contradictory, as according to the latter part in those cases when there is no risk of ill-treatment, diplomatic assurances could still be used during the course of deportation and extradition proceedings. For this reason, and also for the reasons explained below, the Government of Latvia (hereinafter – the Government) requests the Committee Against Torture (hereinafter – the Committee) to re-examine the current proposal for paragraph 20.
2. The Government takes note of the concerns underlying paragraph 20, namely, the criticism that the Committee has directed against the use of diplomatic assurances, as they allegedly are unreliable, ineffective and cannot provide adequate guarantees of safety against torture and ill-treatment.[[1]](#footnote-1) Although under certain circumstances such concerns are justified, which is evidenced by the existing jurisprudence of the Committee on the subject matter[[2]](#footnote-2), the Government is of the opinion that diplomatic assurances are not *per se* incompatible with the principle of *non-refoulement* or necessarily ineffective, and can, therefore, be relied upon, and that instead of a blanket ban on the use of diplomatic assurances other avenues should be pursued in order to ensure compliance with the principle of *non-refoulement*.
3. The Government acknowledges that the principle of *non-refoulement* is non-derogable and applies in all circumstances, irrespective of the framework within which the measures at issue have been taken, for example, during the times of armed conflict or in the course of counter-terrorism measures.[[3]](#footnote-3) Given the non-derogable nature of the principle, it is therefore clear that diplomatic assurances must be reliable if they are to be used in that context. Otherwise, their use will undermine the absolute nature of this principle, as suggested in paragraph 20 *in fine*. In other words, diplomatic assurances must satisfy certain objective and measurable criteria in order for them to be effective, adequate and reliable instrument to eliminate in practice the risk of torture and ill-treatment.
4. In this regard the Government invites the Committee to take a substantive approach when addressing the use of diplomatic assurances in the context of *non-refoulement* principle. Such approach would put the emphasis not on the use of diplomatic assurances as such, but rather on the in-depth analysis of the quality and practical effect of such assurances in specific case. In that way the diplomatic assurances can be adequate guarantees of safety and their use would reinforce the absolute and non-derogable nature of the principle of *non-refoulement*, at the same time allowing the States to fulfil their bilateral and multilateral obligations in the area of combating terrorism, organised crime, as well as maintaining effective cooperation in criminal matters. Rather than introducing a blanket ban to use of diplomatic assurances, the substantive approach would focus on the case-by-case analysis of all circumstances of the particular situation. Such a case-by-case approach would allow rejecting the use of diplomatic assurances when the circumstances of the case indicate that they would not ensure compliance with the principle of *non-refoulement* or are ineffective.
5. When examining the use of diplomatic assurances in the context of *non-refoulement* principle on the case-by-case basis, a distinction should be made between their practical application and the quality of the assurances provided, with the practical application being given a priority. The practical application would concern the general situation in the receiving State, which – and not the existence of an assurance – must be determinative in assessing whether an individual faces a real risk of ill-treatment. Thus, before addressing the content of diplomatic assurances, the general human rights situation in the receiving State has to be examined from all possible and reliable sources, as even the existence of domestic safeguards and accession to relevant international human rights treaties cannot in itself be sufficient to ensure adequate protection against ill-treatment where consistent practices, which are manifestly contrary to fundamental rights, are resorted to or tolerated by the authorities. In examples like this, the risks of ill-treatment cannot be displaced by the diplomatic assurances, as even the existence of specific and explicit assurances would not be sufficient to ensure adequate protection against the risk of ill-treatment. In such cases the existence of diplomatic assurance will carry little to no weight, even if the assurances are explicit and specific. Thus, the existence of an assurance, although an important factor, should be just one element of the assessment.
6. When following the afore-mentioned substantive approach, in cases where the general situation in itself does not indicate a real risk of ill-treatment, the next element of the assessment should refer to the quality of diplomatic assurances. In this regard the Government wishes to draw the Committee’s attention to several objective criteria, which can provide a useful guidance when examining the content of the assurances. It must be, however, stressed that the following criteria should be treated as alternative, not cumulative. However, the co-existence of several alternative criteria appears to be more convincing in support that the principle of *non-refoulement* will be respected in the particular case.
7. With regard to the afore-mentioned criteria, first and foremost, the diplomatic assurances must be explicit and specific, since assurances which are too broad, general and vague will inevitably raise serious issues with regard to their practical value.
8. The next criterion concerns the authority issuing the assurances in the receiving state. Namely, the said authority must have sufficiently high position so that the assurances will be binding upon other institutions. In other words, the assurances would be considered unreliable when the issuing authority was not empowered to provide such assurances on behalf of the State. In addition, it has to be verified whether the assurances issued by the central government will be binding upon the local authorities.
9. A separate assessment should be made as to whether assurances concern treatment which is legal or illegal in the receiving State. In those cases when the treatment in itself is considered illegal, the diplomatic assurances normally should be deemed as sufficient guarantees of safety, since the law itself protects the individual from being subject to the proscribed treatment and the assurances constitute an additional safeguard against such treatment. At the same time, this criterion is particularly relevant in the cases of extradition where the law of the receiving state provides for a death penalty for the offence for which the individual is being extradited, which would require the text of the assurances to include a specific reference to address this issue.
10. Existence of long and strong bilateral relations between the sending and receiving States can serve as an additional indicator towards reliability of assurances, especially if assurances had been provided in past and there is a consistent record of the receiving State abiding them, as well as whether the compliance with the assurances can be objectively and reliably verified through the existing diplomatic or other monitoring mechanisms, including providing access to the legal representatives of the individual concerned.
11. Another criterion to be considered is the existence of an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms, and whether it is willing to investigate allegations of torture and to punish those responsible. Additional information, which could be examined in conjunction with the afore-mentioned requirement is whether the particular individual has previously been ill-treated in the receiving State.
12. Finally, it should be taken into account whether there has been an opportunity for reliability of the assurances to be examined by the domestic courts of the sending State and whether there are effective safeguards in place for the individuals concerned to participate in the domestic proceedings and present their statements and evidence with regard to reliability of the assurances.
13. In the light of the afore-mentioned, the Government does not share the view expressed in paragraph 20 of the Draft Revised General Comment that diplomatic assurances should not be used under any circumstances. Instead, the Government holds a firm opinion that the use of reliable diplomatic assurances, *per se*, does not amount to violation of the principle of *non-refoulement* and accordingly invites the Committee to elaborate Chapter IV of the Draft Revised General Comment with the criteria providing guidance when deciding upon reliability of diplomatic assurances.
1. *Ahmed Hussein Mustafa Kamil Agiza v Sweden*, *c*ommunication No.233/2003, CAT/C/34/D/233/2003, 24 May 2005. *Mohammed Alzery v Sweden*, communication No.1416/2005, CCPR/C/88/D/1416/2005, 25 October 2006. [↑](#footnote-ref-1)
2. Ibid, *Agiza*. [↑](#footnote-ref-2)
3. Human Rights Committee, *General Comment No.29 on States of* Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraph 11. *Gorki Ernesto Tapia Paez v. Sweden*, communication No.39/1996, CAT/C/18/D/39/1996, 28 April 1997, paragraph 14.5. [↑](#footnote-ref-3)