
Diplomatic Assurances and the State's Responsibility When Considering Extraditing a Person Whose Human Rights May Be Violated

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Vesna Stefanovska

Purpose:

The potential tension between a state's need to protect its citizens from national security risks and to respect fundamental human rights is illustrated by current controversies concerning the use of diplomatic assurances in the context of extradition. The need to respect inviolable human rights brings into play the use of assurances in extradition matters, especially if the right to life and prohibition of torture are concerned.

Design/Methods/Approach:

Inductive and deductive methods are used to systematise legal cases which contain human rights violations in extradition proceedings and hold a direct relationship with diplomatic assurances. The analytical method is applied to obtain a clearer picture about violations of human rights in the extradition process.

Findings:

Diplomatic assurances are given by the requesting states for the purpose of supporting the extradition request and assuring that criminal offenders will not be subjected to ill-treatment or violations of other human rights guaranteed by the European Convention of Human Rights.

Research Limitations/Implications:

In practice, it has been proven that diplomatic assurances are highly problematic because international law does not generally outlaw the use of such assurances, but establishes legal requirements concerning the use of such assurances in the extradition context.

Originality/Value:

The article reflects the use of diplomatic assurances in extradition cases, an area that has received greater attention in past years because many states have been found responsible for human rights violations, but at the same time many suspects have managed to avoid extradition because judicial authorities have denied extradition due to assurances not being given.

UDC: 341.44+342.7

Keywords: diplomatic assurances, extradition, torture, right to life, violation of human rights

Diplomatska zagotovila in odgovornost države pri obravnavanju izročitve oseb, ki so jim morda kršene človekove pravice

Namen prispevka:

Potencialna napetost med potrebami države po zaščiti svojih državljanov pred tveganji nacionalne varnosti in spoštovanjem temeljnih človekovih pravic je razvidna iz perečih polemik glede uporabe diplomatskih zagotovil na področju izročitve. Potreba po spoštovanju nedotakljivih človekovih pravic vodi v uporabo zagotovil v zadevah s področja izročitve, zlasti, če gre za pravico do življenja in prepoved mučenja.

Metode:

Za sistematizacijo pravnih primerov, ki vsebujejo kršitve človekovih pravic v postopkih izročitve in imajo neposredno povezavo z diplomatskimi zagotovitvami, so bile uporabljene induktivne in deduktivne metode. Za osvetlitev kršitev človekovih pravic v postopku izročitve je bila uporabljena analitična metoda.

Ugotovitve:

Države prošilke podajajo diplomatska zagotovila z namenom podpore prošnji za izročitev in z namenom zagotavljanja, da storilci kaznivih dejanj ne bodo podvrženi zlorabam ali kršitvam človekovih pravic, ki jih zagotavlja Evropska konvencija o človekovih pravicah.

Omejitve/uporabnost raziskave:

V praksi se je izkazalo, da so diplomatska zagotovila zelo problematična, saj mednarodno pravo običajno ne prepoveduje uporabe takih zagotovil, temveč določa pravne zahteve glede uporabe teh zagotovil v zadevah s področja izročitve.

Praktična uporabnost:

Prispevek osvetljuje uporabo diplomatskih zagotovil v zadevah s področja izročitve – področja, ki je bilo v preteklih letih deležno večje pozornosti, saj so bile številne države spoznane za krive kršitev človekovih pravic, hkrati pa se je mnogim osumljencem uspelo izogniti izročitvi, ker so pravosodni organi zaradi odsotnosti zagotovil zavrnilo izročitev.

UDK: 341.44+342.7

Ključne besede: diplomatska zagotovila, izročitev, mučenje, pravica do življenja, kršitev človekovih pravic

1 INTRODUCTION

When considering decisions on the extradition of suspects, states cannot turn a blind eye to the potential for breaches of several rights including, among others,

the non-derogable right to freedoms from torture, cruel, inhuman and degrading treatment and the right to a fair trial as well as the principle of legal certainty and freedom from discrimination in order to ensure that they meet their obligations under international human rights law (Silvis, 2014).

The question that should be asked is not whether individuals have a human right to diplomatic protection but whether states, in order to ensure the human rights of their nationals, should have some duty to assert diplomatic protection when fundamental human rights are at stake. When discussing these inviolable human rights, we must mention those at greatest concern in the extradition context, namely the right to life and the prohibition of torture. In the case where these two rights have been engaged in an extradition procedure, diplomatic assurances given by the requesting state may be crucial to enable the criminal offender/fugitive to be extradited. Providing such diplomatic assurances may also help the court to allow a extradition when criminal offender/fugitive has submitted an application before the European Court of Human Rights in Strasbourg (hereinafter referred as the ECtHR) for a possible violation of the human rights prescribed in the European Convention of Human Rights (hereinafter referred as the ECHR). However, assurances by the requesting state that it will not expose the person concerned to torture or to inhuman or degrading treatment or punishment will not normally suffice to exonerate the requested state from its human rights obligations, particularly where there is a pattern of such abuses in the state seeking the extradition (Kapferer, 2003). In such cases, the requested state is bound to refuse the surrender of the wanted person.

Diplomatic assurances were initially provided by European countries to obtain guarantees from nations that imposed the death penalty. Seeking diplomatic assurances to protect human rights began as an earnest effort by European governments to protect the most fundamental right: the right to life. Governments in countries where the death penalty is outlawed have long asked for guarantees against capital punishment before extraditing suspects (Hall, 2008).

2 DIPLOMATIC ASSURANCES IN THE CONTEXT OF INVOLABLE HUMAN RIGHTS

In these times of insecurity and threats of terrorism, governments are taking several measures intended to contribute to security, or to at least minimise the risk of insecurity. When dealing with a suspected terrorist who is not a national or against whom criminal charges have been issued in third countries, governments might be more inclined to expel, return, extradite or otherwise transfer this individual to another country.

The use of 'diplomatic assurances' as a form of guaranteeing that a person will not be subjected to the death penalty or will not be ill-treated following surrender to a state has increased within the context of the fight against terrorism. Many experts (Office for Democratic Institutions and Human Rights, 2007) have argued about the legality and effectiveness of this practice in protecting human rights and fulfilling states' non-derogable obligation not to render, transfer, send

or return a person where there are substantial grounds for believing he or she would be in danger of being subjected to torture.

In argumentation concerning the right to life and not imposing capital punishment on a criminal offender, it must be emphasised that neither the International Covenant on Civil and Political Rights (hereinafter referred as ICCPR) nor the ECHR prohibit capital punishment, although they both have protocols on the abolition of the death penalty (Protocol No 6 (Council of Europe, 1982) and Protocol No 13 (Council of Europe, 2002)).

The principal obligation to protect the right to life is enshrined in Article 2(1) of the ECHR (European Convention on Human Rights [ECHR], 1953):

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

Further, Article 6 the ICCPR (United Nations Office of the High Commissioner for Human Rights, 1966) prescribes the protection of human life in this way:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

It is clear from the above that some governments have used diplomatic assurances in relation to the death penalty. Although imposing capital punishment is prohibited on European soil, problems appear when, for example a criminal offender should be extradited to the United States where the death penalty is in force. In these circumstances, diplomatic assurances are needed to ensure the death penalty will not be used and imposed on the criminal offender.

The most extensive and detailed international case law regarding the prohibition against torture and other cruel treatment is based on Article 3 of the ECHR and has been developed by the European Court and the former European Commission of Human Rights. Although the ECHR does not prohibit a person's extradition to another country, the former European Commission frequently stated in its case law that an extradition measure may in specific circumstances give rise to an issue under Article 3 of the ECHR (Radu & Mititelu, 2014).

For that purpose, Article 3 (ECHR, 1953) prescribes the following:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

A similar provision regarding the ban on subjecting to torture can be found in Article 7 (United Nations Office of the High Commissioner for Human Rights, 1966) which provides that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

The recent practice with the use of diplomatic assurances in extradition when inviolable human rights are engaged such as the right to life and the prohibition

of torture points to the fact that diplomatic assurances are allowed as their use does not conflict with the boundaries set in international conventions and treaties (Van Ginkel & Rojas, 2011). Lying at the core of these legal boundaries is the principle of non-refoulement,¹ which places clear restrictions on the transfer of an individual from one state to another. This principle can be found in the UN Convention on the Status of Refugees (United Nations, 1951, Article 33) which states that:

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

The principle of non-refoulement and its use in extradition proceedings is also enshrined in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Office of the High Commissioner for Human Rights, 1984) which prescribes:

- 1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
- 2. 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.*

In the European Union, the principle of non-refoulement can be found in the Qualification Directive 2004/83/EC (Council of Europe, 2004, Article 21) and in the European Arrest Warrant.² Here the principle is more restrictive than in the Refugee Convention by providing for refoulement only when it is not prohibited by States’ international obligations (Isman, 2005).

In past decades and especially after September 11, the use of diplomatic assurances has increased, although some governments used these assurances

¹ The prohibition of sending, expelling, returning or otherwise transferring (refoulement) a refugee to “territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group” is also known as the principle of non-refoulement. According to the legal principle of non-refoulement (from the French *refouler*, “to force back”), a state may not return a person to a place where the person is sufficiently likely to suffer violations of certain rights.

² The framework decision of the European Arrest Warrant does not stipulate the case of intra EU refugees, citizens of one member state who have been granted asylum in another member state. As such cases exist, and as long as this issue is not highlighted and amended, the same person can be considered both a refugee and a fugitive within the same judicial system. The same person is, therefore, persecuted and protected within the same judicial collaboration. The problems emerging within the framework of the European Arrest Warrant were previously highlighted in 2014 by the European Parliament LIBE Committee, but were never considered by the European Commission.

against torture before those attacks. Even more governments wish to get rid of foreign nationals suspected of involvement in terrorist activities. Instead of prosecuting these suspects, many governments simply transfer them to their home or other states and argue that diplomatic assurances guarantee they will not be tortured and subjected to ill-treatment. In addition, governments, intergovernmental institutions and NGOs have paid increasing attention to assurances against torture and ill treatment in all types of removal cases involving terrorism.

3 USE OF DIPLOMATIC ASSURANCES IN THE EXTRADITION PROCEDURE

In the extradition context, “diplomatic assurances” refer to conditions set by the requested state. The receiving state must ensure that the person concerned will receive treatment which complies with the agreement between the two states. The term more typically refers to the human rights obligations of the requesting state under international law. The most common practice of these assurances covers protection for individuals against the risk of torture in the destination country (Jones, 2006). In fact, these diplomatic assurances enable the sending state to observe and report the treatment given to the individual in the requesting country post-return. Generally speaking, there are various forms of diplomatic assurances such as *notes verbales*, *aide memoire*, memorandum of understanding or agreements including conditions and a clause designating the future of individuals subject to extradition in the requesting state.³

International law does not generally prohibit the use of diplomatic assurances, but is establishing legal requirements concerning such assurances in the terrorism context (Schmid, 2010). In an age of counter terrorism, it is difficult to claim that the use of diplomatic assurances is excluded from international human rights law, while the risk of torture is assessed. It is considered to be in the interest of the person subject to extradition.⁴ However, if we observe the case law of the ECtHR it is obvious that diplomatic assurances play an important role in deciding if there are possible violations of the Convention’s provisions. In most cases, where the Court found there were not violations, this means the given diplomatic assurances were enough for the Court to estimate that extradition was possible and would not violate the guaranteed human rights. In the remaining cases, the

3 According to International Centre for Counter Terrorism (Van Ginkel, & Rojas, 2011), there are three types of diplomatic assurances – diplomatic notes, exchange of letters and memoranda of understanding. One could classify diplomatic assurances as being either soft or hard. Soft diplomatic assurances tend to lack enforcement mechanisms and are often kept confidential. Hard diplomatic assurances tend to provide enforcement mechanisms such as arranged visits to prisoners and documents may be declassified. Nonetheless, the strength and effectiveness of the enforcement mechanisms is still a matter of concern for governments.

4 It should not be forgotten that diplomatic assurances are seen as legally binding instruments. The violation of assurances can be remedied by persons and states. It is possible to apply the UN human rights mechanisms against any breach of the prohibition of torture under the CAT. According to HRW, diplomatic assurances are bilateral political agreements and they have no legal character or force in law.

Court usually found that the given assurances were not reliable enough. Opposite opinions regarding the legal nature of diplomatic assurances exist, such as those who claim that diplomatic assurances are bilateral political agreements, brokered at the diplomatic level. According to them, they are not treaties and have no legal character or force in law. If the assurances are breached, the sending government has no way to hold the receiving government legally accountable.

Before diplomatic assurances against torture became a hot topic in the war on terror, European countries primarily utilised diplomatic assurances in the context of extradition for common (non-political) crimes. In particular sending countries routinely sought diplomatic assurances against the death penalty,⁵ as capital punishment has been effectively banned in Europe for decades (Izumo, 2010). Reliance on diplomatic assurances is not a novel phenomenon. As mentioned above, despite involving cases concerning torture, early diplomatic assurances were noted on extradition agreements between states, particularly in death penalty cases or if the requested state held concerns about the fairness of the judicial proceedings.⁶

Under the jurisprudence of the ECtHR and the Commission of Human Rights, the requested state does not act in violation of the ECHR if it seeks and obtains assurances which effectively eliminate the danger that the requested person will be subjected to treatment which is prohibited by the Convention (Kapferer, 2003).

4 THE ISSUES OF EXTRADITION AND POSSIBLE HUMAN RIGHTS VIOLATIONS AND SOMEWHERE BETWEEN THEM THE QUESTION OF DIPLOMATIC ASSURANCES

The use of diplomatic assurances has always been located in the tension that exists between extradition and the protection of human rights. First of all, a thin line between extradition and human rights can be detected in their different purposes and achievements. The purpose of extradition as an institution of international criminal law is to surrender a fugitive criminal from one state to another in order to serve a sentence or to undergo a trial for an alleged crime, by any means necessary. For the authorities of the state seeking extradition who look at the fugitive like a criminal offender, the fugitive does not have any rights – they lost their rights when they committed a crime and for that purpose justice must be satisfied and the fugitive should be extradited. In terms of human rights

⁵ With Protocols 6 and 13 to the ECHR there is a *de jure* abolition of the death penalty in almost all Member States of the Council of Europe with Russia being the notable exception and the death penalty has been abolished *de facto*, as no execution has been carried out on the territory of any Council of Europe Member States since 1997.

⁶ Some governments have used diplomatic assurances in relation to the death penalty. Because the death penalty is outlawed in Europe, governments there will not extradite a person to countries like the United States and China, where the death penalty is legal, without an assurance that the death penalty will not be used. But assurances against the death penalty are different from assurances against torture. The use of assurances against the death penalty simply acknowledges the different legal approaches of two states. By contrast, assurances against torture relate to conduct that is criminal in both the sending and the receiving state is practised in secret and is routinely denied.

standards, the situation is completely different, namely, although the fugitive is a subject of extradition, they have rights that must be respected and, on the contrary extradition to the requested state will be impossible.

Powerful states are rarely consistent in how they apply human rights standards to their foreign policy and are rarely willing to give human rights questions priority. These states seldom employ sanctions to coerce other states to improve their human rights record. Indeed, for the most part, states take relatively little interest in the extent of human rights violations in other states, unless one of their citizens is affected (Neumayer, 2006).

In the last few decades, human rights have started to create barriers against enforcement of extradition proceedings. The modern trend of expanding human rights and eliminating the traditional barriers to individual standing has been established in and further developed by a growing number of general, specific, global and regional human right instruments and international treaties. Parties to international treaties generally aspire to comply in the spirit of the Latin expression "*pacta sunt servanda*" meaning that agreements are to be kept and honoured. This trend did not stop with the adoption of those legal instruments that directly sought to protect human rights *per se*, but has also encompassed those other legal concepts and legal instruments whose primary focus is not the protection of human rights. It must be stressed that in the past decades extradition has been showing a clear concern for the protection of the requested person in extradition proceedings.

5 THE STATE'S RESPONSIBILITY WHEN CONSIDERING EXTRADITING A PERSON WHOSE HUMAN RIGHTS MAY BE VIOLATED

Human rights can be violated by governmental and non-governmental entities. The focus of human rights treaties appears to have supported an argument that human rights obligations under international law apply to all states, especially those which have ratified the international conventions (Cassimatis, 2007). Prohibitions against torture, summary execution, and prolonged arbitrary detention found their way into customary international law at the same time as the international human rights community became more effective in publicising and arousing worldwide condemnation of the worst governmental abuses (Rocht-Arriaza, 1990).

The jurisprudence on the nature of a state's obligation is to ensure that persons being extradited are not knowingly exposed to a real risk of ill-treatment by the accepting state. Traditionally, the risk of ill-treatment has typically emanated from the State directly, i.e. the imposition of the death penalty or corporal punishment, or because the receiving state could not adequately protect individuals from acts of ill-treatment by non-State actors (Long, 2002). The Court recalled the established principle that the returning state owes a duty to ensure that persons are not subjected to treatment or punishment in violation of Article 3, regardless of the conduct of the person to be expelled, or whether that person has entered the returning state in a technical sense, i.e. a legal sense. According to this,

safeguarding the basic and inviolable human rights is the most important task of every state, irrespective of the crime committed or how heinous it was, human life is irreplaceable. This engages the responsibility of the states that ratified the ECHR and many other international instruments. According to the above theory of responsibility, the state is not being held directly responsible for the acts of another state but for facilitating, through the extradition process, a denial of the applicant's rights by that other state.

In cases where a possibility for human rights violations in extradition proceedings exists, states are obliged to protect the inviolable human rights and seek diplomatic assurances to ensure that capital punishment will not be imposed or the person requested in extradition will not be subjected to torture or inhuman or degrading treatment. However, it must be acknowledged that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether the assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the relevant time.

6 PRACTICAL APPLICATION OF DIPLOMATIC ASSURANCES IN EXTRADITION CASES AND POSSIBLE HUMAN RIGHTS VIOLATIONS

An assurance issued in the extradition context was the assurance in *Soering* (ECtHR, 1988), an assurance for the purpose of securing the returnee from the death sentence. Further, the alleged terrorists Mamatkulov and Askarov (ECtHR, 1999) were subjected to extradition. The Turkish police arrested Mamatkulov under an international arrest warrant when he entered Turkey, and Uzbekistan had requested his extradition under a bilateral treaty with Turkey. Turkey also arrested Askarov upon a request for his extradition. Both applicants were suspected of planning and organising terrorist attacks against the leaders of Uzbekistan. The government of Uzbekistan issued assurances that Mamatkulov and Askarov would not be tortured. The assurance was given in the specific context of extraditing them and only concerned the two individuals Mamatkulov and Askarov.

In practice there are many cases where the given assurances were not enough for the Court. For example, the case of *Metin Kaplan* (ECtHR, 2002) where a German court refused a request by Turkey to extradite Kaplan, the leader of a banned Islamist fundamentalist group. The Court held that diplomatic assurances from the Turkish Government would not provide sufficient protection for Kaplan from human rights violations. Contrary to the above, in the judgement of *Abu Qatada* in 2012, the ECtHR considered "terrorist violence" as a threat and a violation of the human rights of populations. Moreover, the Court accepts extradition as part of policies combating terrorism. The Court's concern is with the human rights of deportees in the receiving state (ECtHR, 2009). In the *Saadi* case (ECtHR, 2006), the Court assessed the reliability of diplomatic assurances,

instead of ruling that diplomatic assurances in themselves breached Article 3 of the Convention. The assurances given by states applying torture and mistreatment as methods of exerting pressure against some groups on grounds of their political, minority or ethnic identity cannot be reliable. In *Suresh v. Canada* (Supreme Court of Canada, 2002), the Canadian Supreme Court prevented Manickavasagam Suresh – a member of the Tamil Tigers being held in Canadian custody – from being extradited to Sri Lanka. Yet, the Court ruled that whereas international law contains an absolute ban on returning detainees to countries where there is a risk of torture, the possibility may be present in exceptional circumstances related to national security. In the case of *Chahal v. United Kingdom* (ECtHR, 1993), the ECtHR ruled that the return to India of a Sikh activist would violate the UK's absolute obligation not to return a person to the risk of torture, despite diplomatic assurances proffered by the Indian government.

Human Rights Watch in its Report "Empty Promises: Diplomatic Assurances No Safeguard against Torture" (Human Rights Watch, 2004) highlights the problem of diplomatic assurances being used to circumvent the principle of non-refoulement. According to Human Rights Watch, the growing weight of evidence and international expert opinion indicates that diplomatic assurances cannot protect people at risk of torture from such treatment upon return. Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a fig leaf to cover their own complicity in torture.

It is important that the guarantees given by the requesting state must eliminate as far as possible the risks of mistreatment on the basis of "adequacy, effective control and credibility". It is not easy to rely on assurances given by some states which have poor human rights records. For those reasons, assurances have so far been mainly given over the risk of torture.

Human Rights Watch (2004) has developed assessment criteria that advocate prohibiting the use of diplomatic assurances in relation to the risk of torture, if the following situations exist in the requesting country:

- there is substantial and credible evidence that torture is systematic, widespread, endemic or a recalcitrant and enduring problem;
- governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture or
- the government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group for torture and the person subject to return is associated with that group.

The process of effective monitoring the practice and use of diplomatic assurances is more than needed. For that purpose and following the terrorist attacks in the United States, in November 2001, the Council of Europe's Steering Committee for Human Rights (CDDH) created the Group of Specialists on Human Rights and the Fight against Terrorism (Group of Specialists on Human Rights and the Fight against Terrorism, 2005) which was required to:

- start a reflection on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures and

- consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals.

This Group was set up in 2001 in order to elaborate guidelines based on the principles of the protection of human rights, respect for democracy and the rule of law for member states when taking action against terrorism. Their work resulted in the adoption in July 2002 of the Guidelines on Human Rights and the Fight against Terrorism by the Committee of Ministers of the Council of Europe. The final report was adopted in March 2006 when the Group was abolished.

The European Parliament, the Parliamentary Assembly of the Council of Europe (PACE)⁷ and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT)⁸ appear to be moving toward restricting the circumstances in which diplomatic assurances against torture should be relied upon. The Netherlands has maintained a strong stance against relying on diplomatic assurances against torture. In contrast, Denmark and Switzerland have shown signs of increasing acceptance of their use and the United Kingdom has mobilised on an international level to garner support for a policy of deportation with assurances. Germany seems to have had differences of opinion within its own government (Izumo, 2010).

There is a broad consensus among international human rights bodies that diplomatic assurances do not provide an effective safeguard against torture and ill-treatment. In 2006, Louise Arbour, the UN High Commissioner for Human Rights, condemned the dubious practice of seeking diplomatic assurances. According to Thomas Hammarberg, the former Council of Europe's Commissioner for Human Rights (2006–2012), "diplomatic assurances are not credible and have also turned out to be ineffective in well-documented cases" (Human Rights Watch, 2006). The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. The observed weakness inherent in the practice of diplomatic assurances lies in the fact that there is an apparent need for such assurances (Silvis, 2014). According to Mr. Johannes Silvis, a judge at the European Court of Human Rights: "*in the jurisprudence of the European Court of Human Rights it is essential that assurances are not part of a trade off balancing national security interests, human rights protection and*

7 The Parliamentary Assembly of the Council of Europe (PACE) is composed of representatives of all Member States of the Council of Europe, with the number of representatives determined in proportion to the size of each Member State. PACE meets four times per year and its functions include electing the Commissioner for Human Rights and the members of the European Court of Human Rights. The Commissioner for Human Rights, who acts as an independent institution rather than a national representative, monitors and promotes human rights protection by Council of Europe Member States (Council of Europe, 2014).

8 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) is a monitoring body created pursuant to the CAT which affirms the absolute prohibition of torture and inhuman or degrading treatment. The Committee examines the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. It visits detention centres (prisons, attendance centres, police stations, psychiatric wards, deportation prisons, etc.) and inspects the treatment of arrested persons (Council of Europe, 2017).

international cooperation. Whether such assurances can be accepted as relevant facts for the assessment of a risk is a delicate exercise” (Silvis, 2014, p.18).

Diplomatic assurances are highly problematic because they create a two tiered system among detainees. According to the multilateral framework of human rights, all detainees are entitled to the equal protection of existing instruments and must be treated according to international law.

7 CONCLUSION

To avoid the risk of violating their obligations under international law while fighting the threat of terrorism, states rely on diplomatic assurances when considering the return of asylum seekers to another country or when they need to extradite a person upon an extradition request. Diplomatic assurances are formal promises made by the government in the country of return stating that the returnee will not be subjected to illegal treatment upon their return.

Giving or receiving diplomatic assurances with regard to transferring a person from one jurisdiction to another is a longstanding practice in extradition proceedings. They were mainly sought in order to satisfy the obligations of the requested state arising from constitutional and human rights norms, when it was feared the death penalty would be imminent or fair trial standards would not be observed. Diplomatic assurances are increasingly sought in cases where the sending state fears the individual involved will be exposed to torture and ill-treatment upon their return.

International criminal law enforcement is not well served by a system that tolerates the refusal to extradite in some cases where the human rights of the fugitive are at risk in the requesting state, but fails to provide the decision makers of the requested state with clear standards or guidelines by which to make such a decision. If we observe this from a different point of view and if extradition proceedings are enforced as they should be, i.e. in line with human rights standards, there is no fear that human rights may be violated. Accordingly, it is quite difficult to achieve such a balance between extradition and human rights because we are human beings entitled to inviolable human rights and institutions are entitled to apply justice and assure that criminal offenders and/or terrorists will be extradited the committed crimes. On some occasions, it has been proven that the extradition law failed to provide a proper legal framework for balancing the human rights of the fugitive and the interest of states in the suppression of transnational crime. The concept of human rights holds tremendous meaning and brings a great responsibility along with it. The existence of human rights tells us that state power is not unlimited and that state authorities cannot encroach upon certain rights and freedoms because they must respect and obey them. In this context, the state's towards its citizens in order to respect their human rights and that those rights should belong equally to every citizen must be stressed.

The aim of this article was to show the 'battle' existing between extradition as a judicial procedure and human rights as an obstacle to extradition in certain cases. In the legal practice of the ECtHR, in cases concerning prohibition of torture and other forms of ill-treatment these diplomatic assurances were important in

order for the Court to decide if there was a possible violation of the Convention's rights or to grant extradition based on the lack of violation.

However, the major weakness of diplomatic assurances lies in the fact that they are not legally binding and, unfortunately, have not always been respected by states.

The use of diplomatic assurances in extradition proceedings can be seen as a 'double-dulled sword'. In fact, whether such assurances can be accepted as relevant facts for the assessment of a risk is a delicate exercise. The biggest problem appears with the question: Should the requesting state respect its own domestic law or its obligations under international human rights law? In my opinion, although some diplomatic assurances include arrangements for post-return monitoring, we must be exceptionally careful because practice shows that these monitoring sometimes fail. It must also be pointed out that reliance on diplomatic assurances does not relieve states of their international human rights obligations. This means the obligation to ensure that an individual is not tortured or ill-treated applies to both the requesting state and the requested state.

The requested state should carefully analyse each request for extradition in circumstances when guaranteed human rights are involved and there is a possibility they may be violated. According to this, each case should be assessed on its own merits and general policies in this respect should be avoided. Many factors play an important role in deciding whether to accept diplomatic assurances and grant extradition, or to reject diplomatic assurances and deny extradition such as:

- the length and strength of bilateral relations between the requested and requesting state;
- identifying if the requesting state allows torture (is it systematic or widespread) and if there is a willingness to cooperate with international monitoring mechanisms;
- whether the assurances are specific or general;
- whether there is an effective system of protection against torture;
- the reliability of the assurances given by the requesting state;
- whether they have been given by a state that has ratified the international human rights conventions and
- which human rights can be engaged (especially if they are the inviolable and guaranteed human rights) and many other factors.

Enforcement mechanisms for diplomatic assurances should be further developed and at the same time strengthened. There is a need to ensure that states comply with the use of diplomatic assurances, but they must also be exceptionally careful. In that sense, sometimes and in specific circumstances a possible violation of human rights should be prevented and not cured because the process of curing them is long and exhausting and the result is not always successful; sometimes it leaves wounds that cannot be cured easily.

REFERENCES

- Cassimatis, A. (2007). *Human rights related trade measures under international law: The legality of trade measures imposed in response to violations of human rights obligations under general international law*. Leiden: Martinus Nijhoff.

- Council of Europe. (1982). *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty*. Retrieved from http://www.echr.coe.int/Documents/Library_Collection_P6_ETS114E_ENG.pdf
- Council of Europe. (2002). *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*. Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187>
- Council of Europe. (2004). *Directive 2004/83/EC on minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the contents of protection granted*. Retrieved from <http://www.aedh.eu/Council-Directive-2004-83-EC-on.html>
- Council of Europe. (2014). *Parliamentary Assembly*. (2014). Retrieved from <http://assembly.coe.int/nw/Home-EN.asp>
- Council of Europe. (2017). *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*. Retrieved from <http://www.coe.int/en/web/cpt>
- European Convention on Human Rights. (1953). *Strasbourg: European Court of Human Rights; Council of Europe*. Retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf
- European Court of Human Rights [ECtHR]. (1993). *Chahal v. United Kingdom*, No.22414/93. Retrieved from <http://hudoc.echr.coe.int/eng>
- European Court of Human Rights [ECtHR]. (1999). *Mamatkulov and Askarov v. Turkey*, No.46827/99. Retrieved from <http://hudoc.echr.coe.int/eng>
- European Court of Human Rights [ECtHR]. (1988). *Soering v. the United Kingdom*, No.14038/88. Retrieved from <http://hudoc.echr.coe.int/eng>
- European Court of Human Rights [ECtHR]. (2002). *Metin Kaplan, v. Turkey* No.308/02-147. Retrieved from <http://hudoc.echr.coe.int/eng>
- European Court of Human Rights [ECtHR]. (2006). *Saadi v. Italy*, No.37201/06. Retrieved from <http://hudoc.echr.coe.int/eng>
- European Court of Human Rights [ECtHR]. (2009). *Othman (Abu Qatada) v. the United Kingdom*, Application No.8139/09. Retrieved from <http://hudoc.echr.coe.int/eng>
- Group of Specialist on Human Rights and the Fight against Terrorism. (2005). *Meeting report, Doc. No. DH-S-TER 018*. Retrieved from http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2005_018_en.pdf
- Hall, J. (2008). *Mind in gap: Diplomatic assurances and the erosion of the global ban on torture, human rights watch*. Human Rights Watch. Retrieved from <https://www.hrw.org/legacy/wr2k8/diplomatic/diplomatic.pdf>
- Human Rights Watch. (2004). *Empty promises: Diplomatic assurances no safeguard against torture*. Retrieved from <https://www.hrw.org/sites/default/files/reports/diplomatic0404.pdf>
- Human Rights Watch. (2006). *Diplomatic assurances against torture: Questions and answers*. Retrieved from https://www.hrw.org/sites/default/files/related_material/ecaqna1106web.pdf

- Isman, S. (2005). *Diplomatic assurances – safeguard against torture or undermining the prohibition of refoulement?* (Master's thesis). Lund: Faculty of Law. Retrieved from <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1558562&fileId=1564695>
- Izumo, A. (2010). Diplomatic assurances against torture and ill-treatment: European Court of Human Rights jurisprudence. *Columbia Human Rights Law Review*, 42(1), 235–277. Retrieved from <http://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr42&div=10&id=&page=>
- Jones, M. (2006). Lies, damned lies and diplomatic assurances: The misuse of diplomatic assurances in removal proceedings. *European Journal of Migration and Law*, 8(1), 9–39.
- Kapferer, S. (2003). *Legal and protection policy: The interface between extradition and asylum*. Geneva: United Nations High Commissioner for Refugees. Retrieved from <http://www.unhcr.org/3fe84fad4.pdf>
- Long, D. (2002). *Guide to jurisprudence on torture and ill-treatment – Article 3 of the European Convention for the Protection of Human Rights*. Geneva: Association for the Prevention of Torture. Retrieved from http://www.ap.t.ch/content/files_res/Article3_en.pdf
- Neumayer, E. (2006). Do international human rights treaties improve respect for human rights. *The Journal of Conflict Resolution*, 49(6), 925–953. Retrieved from https://www.jstor.org/stable/30045143?seq=1#page_scan_tab_contents
- Office for Democratic Institutions and Human Rights. (2007). *Background paper on extradition and human rights in the context of counter-terrorism: Workshop on legal co-operation in criminal matters related to terrorism*. Vienna: OSCE. Retrieved from <http://www.osce.org/odihr/24392?download=true>
- Radu, M., & Mititelu, C. (2014). The observance of human rights and freedoms in the extradition proceedings at national and international levels. *Journal of Danubian Studies and Research*, 3(2), 100–109. Retrieved from <http://journals.univ-danubius.ro/index.php/research/article/view/2085>
- Roht-Arriaza, N. (1990). State responsibility to investigate and prosecute grave human rights violations in international law. *California Law Review*, 78(2), 449–513.
- Schmid, E. (2010). *The end of the road on diplomatic assurances: The removal of suspected terrorists under international law*. Retrieved from <http://projects.essex.ac.uk/ehrr/V8N1/Schmid.pdf>
- Silvis, J. (2014). *Extradition and human rights – diplomatic assurances and human rights in the extradition context*. Presentation at PC-OC meeting, May 20, 2014. Strasbourg: Council of Europe. Retrieved from https://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/Documents%202014/Special%20session%20Extradition%20-%20Extradition%20and%20human%20rights%20-%20Silvis.pdf
- Supreme Court of Canada. (2002). *Suresh v. Canada*, No.27790/02. Retrieved from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do>
- United Nations. (1951). *UN Convention on the Status of Refugees*. Retrieved from <http://www.unhcr.org/1951-refugee-convention.html>

- United Nations Office of the High Commissioner for Human Rights. (1966). *International Covenant on Civil and Political Rights*. Retrieved from <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- United Nations Office of the High Commissioner for Human Rights. (1984). *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>
- Van Ginkel, B., & Rojas, F. (2011). *Use of diplomatic assurances in terrorism-related cases: In search of a balance between security concerns and human rights obligations*. The Hague: International Centre for Counter Terrorism. Retrieved from <https://www.icct.nl/download/file/ICCT-van-Ginkel-EM-Paper-Diplomatic-Assurances.pdf>

About the Author:

Vesna Stefanovska, PhD, earned the title Doctor of Juridical Sciences at the South East European University (Republic of Macedonia). Her research field of interest is international law. The author also has two master's degrees – LL.M in International Law and LL.M in Civil Law. E-mail: vesna.stefanovska87@gmail.com