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The Extradition of Assange

A study of the ECtHR's case law on Article 3 regarding the extradition of persons with mental illness, in conjunction with diplomatic assurances

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Contents

Summary

On January 4, 2021, the Westminster Magistrates' Court ruled the anticipated extradition of Julian Assange to the United States of America unlawful, stating it would be oppressive towards Mr. Assange's mental health. The ruling was later overturned by the High Court of Justice, as the United States had provided diplomatic assurances to the United Kingdom regarding the treatment of Mr. Assange in the event of his extradition.

The aim of this thesis has been to examine the case of *USA v. Assange*, by applying relevant ECtHR case law pertaining to the event of extraditing persons with mental illness, and analyzing whether an extradition of Assange potentially would violate Article 3 ECHR. Furthermore, this thesis has also aimed to evaluate the role of diplomatic assurances in extradition procedures, specifically examining the assurances provided by the US government in the case of Assange.

The legal dogmatic method has been used to determine *lex lata* in cases of mental illness and extradition in relation to Article 3 ECHR. Noting the difficulties of using the legal dogmatic method while assessing the notion of diplomatic assurances which has evolved through inter-state relations and diplomatic practice, a method of description has also been consulted.

This thesis has found it unclear whether an extradition of Assange would constitute a violation of Article 3 ECHR. Assessing the threshold test laid down by the ECtHR's case law in *Paposhvili v. Belgium*, it seems rather unlikely that a violation would be found. This conclusion was strengthened by the Court's pragmatic approach to diplomatic assurances, and the Court's prior acceptance of assurances provided by the USA. However, considering the ambiguity of potential suicide risk in relation to the *Paposhvili* criterion of "significant reduction in life expectancy", the Court could reach a different conclusion, finding a violation of Article 3 after all.

Sammanfattning

Den fjärde januari år 2021, hindrade Westminster Magistrates' Court Julian Assanges utlämning till USA, eftersom domstolen ansåg utlämningen förtryckande (på engelska *oppressive*) mot Assanges mentala hälsa. Domslutet ändrades senare av The High Court of Justice, då USA lämnat diplomatiska försäkringar (på engelska *diplomatic assurances*) till Storbritannien, kring hur Assange skulle behandlas ifall han utlämnades.

Syftet med denna uppsats har varit att undersöka *USA v. Assange,* genom att applicera relevant praxis från Europadomstolen gällande utlämning av personer med mental ohälsa, och analysera huruvida en utlämning av Assange potentiellt kan strida mot Artikel 3 EKMR. Uppsatsen har också ämnat utreda diplomatiska försäkringars roll i utlämningsförfaranden, specifikt de försäkringar som har tillhandahållits av den amerikanska statsapparaten i *USA v. Assange*.

En rättsdogmatisk metod har använts för att fastställa *lex lata* i situationer av mental ohälsa och utlämning i relation till Artikel 3 EKMR. Denna metod har dock inte använts i förhållande till diplomatiska försäkringar, eftersom dessa har utvecklats genom internationella relationer och diplomatisk praxis. En metod bestående av beskrivning och analys av konceptet har i stället använts.

Utredningen av de för uppsatsen valda frågeställningarna, har funnit det oklart huruvida en utlämning av Assange skulle strida mot Artikel 3. I linje med det ”tröskeltest” som utvecklats av Europadomstolen i *Paposhvili mot Belgien*, verkar en utlämning troligtvis inte strida mot Artikel 3. Denna slutsats stärktes av domstolens pragmatiska syn på diplomatiska försäkringar, och dess tidigare acceptans av diplomatiska försäkringar från USA. Däremot, skulle tvetydigheten av en potentiell självmordsrisk i förhållande till *Paposhvili* kriteriet ”significant reduction in life expectancy” kunna få domstolen att nå en annan slutsats, och döma att Artikel 3 överträtts trots allt.

Abbreviations

CMH	Case Management Hearing
dec.	Decision (ECtHR)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EW	England and Wales
EWHC	England and Wales High Court
GC	Grand Chamber (of the ECtHR)
MagC	Magistrates' Court
NGO	Non-governmental organization
OHCHR	The UN High Commissioner for Human Rights
supermax prison	Super-maximum security prison
UK	The United Kingdom
UN	The United Nations
UNHCR	The United Nations High Commissioner for Refugees
USA/US	The United States of America
VCLT	Vienna Convention on the Law of Treaties
WLR	The Weekly Law Reports

1 Introduction

1.1 Background

In 2010, Julian Assange's internet platform *Wikileaks* released a multitude of undisclosed US military information.[1] Since then, Assange's story has been covered heavily by international media,[2] and on April 11, 2019, Assange was arrested by British police.[3] Since then, Assange's awaited extradition to the United States has shined a light on the extradition process in relation to mental illness, as the Magistrates' Court in London denied the extradition of Assange in 2021 due to it being oppressive to his mental health.[4] The High Court of Justice later ruled in favor of an extradition, after the US government provided diplomatic assurances concerning the treatment of Assange in the case of extradition.[5]

This is not the first time mental health issues have been raised in removal hearings. The European Court of Human Rights in Strasbourg (ECtHR/the Court) ruled on the matter as recently as December 2021.[6] But what is the ECtHR's view on mental illness and extradition? There is a fine balance between the interests derived from State sovereignty and States wanting to uphold internal and external security, in juxtaposition to human rights and protecting the individual – something that has been put to the test in *USA v. Assange,* also in the form of diplomatic assurances. What role can these assurances play, and what legal value do they have?

[1] Reuters staff (2021).
[2] Ibid.
[3] Ibid.
[4] *United States Of America v Assange* [2021] EW (Westminster MagC) (04 January 2021), para. 363.
[5] *Govt of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, DC, para. 61.
[6] *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021.

1.2 Purpose and Research Questions

This thesis aims to examine how mental illness affects extradition, with special attention to the State obligations to protect individuals against torture and ill-treatment, specified in Article 3 of the European Convention on Human Rights[7] (ECHR/the Convention). The analysis will focus on *USA v. Assange*, and how it relates to the legal complexities of extradition combined with mental illness and Article 3 ECHR. It will also evaluate the role of diplomatic assurances in extradition processes.

To fulfill the aim, this thesis will answer the following principal research question and two additional sub-questions:

Applying the ECtHR's case law on Article 3 ECHR regarding extradition of mentally ill persons, including the ECtHR's understanding of diplomatic assurances – what could the outcome of a potential Assange case at the ECtHR look like?

- *How does the ECtHR decide if the threshold of a violation of Article 3 is reached in cases of extradition of a person with mental illness?*
- *What is a diplomatic assurance, what role does it play in the extradition process, and what legal value does it have?*

1.3 Scope and Delimitations

USA v. Assange contains many interesting aspects; however, this thesis will only cover the issue of mental illness in relation to Article 3 ECHR, and the concept of diplomatic assurances. Article 8 ECHR, protecting private and family life, will not be discussed although it is an interesting aspect – especially considering Assange's recent wedding to a British national with whom he has two children.[8]

[7] *The European Convention on Human Rights*, as amended by Protocols Nos. 11, 14 and 15, 4 November 1950, Rome.
[8] Bryson Taylor (2022).

Cases of expulsion have been examined in this thesis, e.g., *Savran*, keeping in mind that these do not provide the same legal framework as cases of extradition. Expulsion cases are nonetheless relevant: the ECtHR stated in *Harkins and Edwards v. the United Kingdom* that it would not be appropriate to make a legal distinction between extradition and expulsion regarding the threshold tests applied to the cases, when examining whether an Article 3 violation had or could occur.[9]

Due to limited time and space, the notion of extraditing persons accused of so-called political offenses will not be examined. Assange has been charged with espionage (among other things),[10] which according to Petersen is a textbook example of a political offense.[11]

Finally, this thesis applies the ECHR and the ECtHR's case law, and therefore the *Extradition Act 2003*[12]*,* which the British courts base their judgments on in *USA v. Assange* (more specifically Section 91 regarding oppression of mental health), will not be examined. The Extradition Treaty between the United Kingdom and the United States[13], ratified in 2007, will also not be considered.

1.4 Method and Material

Primarily, the legal dogmatic method will be used to determine *lex lata* (the law as it is)[14] in cases of mental illness and extradition in relation to Article 3

[9] *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012, para. 120.
[10] United States District Court for the Eastern District of Virginia, Alexandria Division, *United States of America v. Julian Paul Assange*, Second superseding indictment, Criminal No. 1:18-cr-111 (CMH), 24 June 2020.
[11] Petersen (1992), p. 775.
[12] *Extradition Act 2003,* c. 41.
[13] *Extradition Treaty between Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America with Exchange of Notes*, 31 March 2003, Washington, Treaty Series No. 13 (2007), Cm 7146.
[14] Kleineman (2018), pp. 36-37.

ECHR. The analysis will also discuss *lex ferenda* (what the law should be).[15] The legal dogmatic method requires research on the different sources of law such as codified law, case law from international and domestic courts, legal principles, and doctrines.[16] The method therefore suits this thesis' purpose well, as the provided research questions demand a systematical review of case law from the ECtHR, to establish what the Court's current view is on extradition of persons with mental illness in relation to Article 3 ECHR.

In the assessment of the legal standing of diplomatic assurances in extradition procedures, doctrines and some selected case law have constituted the primary source, as the concept of diplomatic assurances has evolved through inter-state relations and diplomatic practice. There is, prima facie, no law or convention pertaining to these assurances, and it could therefore be difficult applying the legal dogmatic method on the matter. The method used will instead focus on gathering information from a variety of scholars, describing and weighing different opinions and interests on the matter against the one of the ECtHR, trying to determine a legal value and a legal standing of the diplomatic assurances. Thus, by using description as a method,[17] the aim is to produce a productive and informative summary of the fundamentals of diplomatic assurances, subsequently analyzing the findings in relation to the case at hand.

The ECHR and the judicial decisions of the ECtHR primarily make up the material foundation of this thesis, accompanied by the *USA v. Assange* case law in the Magistrates' Court and the High Court of Justice. Since the legal definition and the legal value of diplomatic assurances are debated, several secondary sources will be used when examining the assurances provided in *USA v. Assange*.

[15] Ibid.
[16] Ibid. p. 21.
[17] Orford (2012), p. 609.

1.5 Perspective and Theory

This thesis has an international and critical perspective, as the aim is to study the material through a critical lens, assessing whether there are areas of the law within the scope of this thesis that could be considered problematic. A theoretical perspective based on the juxtaposition of human rights in relation to State sovereignty will be applied in the analysis, with the purpose of discussing the different interests and how they relate to each other in the specific situation of extraditing a person with mental illness.

1.6 Previous Research

The case of Assange has brought forward both legal and political material. The legal material has in the past primarily focused on the case in relation to freedom of speech, whereas the later material is more aimed at examining the extradition process of Assange. The former United Nations (UN) Special Rapporteur on Torture, Nils Melzer, recently released a book titled *The Trial of Julian Assange* in which he describes the treatment of Assange as psychological torture.[18] Melzer has also made several statements on the Assange case in addition to his written work.[19]

Article 3 ECHR is frequently discussed in the legal community, and numerous texts have been written on the matter. As for diplomatic assurances, a variety of scholars, e.g. Noll, Skoglund and Worster, have provided valuable insights into the legal debate on the topic. The complex intricacies of extradition and mental illness in relation to diplomatic assurances, on the other hand, have not been discussed extensively in the legal community.

[18] Melzer (2022), p. 70.
[19] See e.g., OHCHR (2019); BBC News (2019).

1.7 Disposition

Chapter 2 presents the background of *USA v. Assange,* and the Magistrates' Court's and the High Court's reasoning and ruling in the case. Chapter 3 provides the legal framework and practice of extradition processes of persons with mental illness, focusing on Article 3 ECHR together with relevant case law from the ECtHR. Chapter 4 examines the concept of diplomatic assurances and how these can affect human rights concerns in an extradition process. The presented results are subsequently examined, analyzed, and applied to the case of Assange in chapter 5.

2 USA v. Assange

2.1 Background

In April 2019, Assange was arrested by the Metropolitan Police to face US criminal charges.[20] During the *Wikileaks* founder's extradition proceedings, Assange has been detained at the Belmarsh prison in the UK, and the media has reported on a decline in his mental and physical health.[21] The former UN Special Rapporteur on Torture, Nils Melzer, has issued several statements criticizing the treatment of Assange, emphasizing that Assange has been subjected to psychological torture during the past years.[22] Arnell and Forrester, in response to the case of Assange, stressed the need for research on mental health disorders in relation to extradition, and called for cooperation between mental health professionals in the receiving and sending States, especially in cases where diplomatic assurances are provided.[23]

2.2 The Magistrates' Court

In 2020, the extradition process was taken to the Westminster Magistrates' Court in London. The Magistrates' Court deemed an extradition impossible due to being oppressive to Assange's mental health, as stated in Section 91 of the British *Extradition Act 2003*[24]. It was, according to Judge Baraitser, proven that Assange suffered from recurrent depressive disorder (sometimes with psychotic features), autism spectrum disorder, and Asperger syndrome, and that he would commit suicide if extradited.[25]

[20] Savage, Goldman, and Sullivan (2019).
[21] Yeginsu (2019).
[22] OHCHR (2019).
[23] Arnell and Forrester (2021), p. 79.
[24] *Extradition Act 2003*, c. 41.
[25] *United States Of America v Assange* [2021] EW (Westminster MagC) (04 January 2021), paras. 332-333, 362.

Many factors were considered in Judge Baraitser's decision, including the potential use of *Special Administrative Measures* (SAMs). SAMs is a package of restrictions that regulate a prisoner's access to information and human interaction in the American prison system. The restrictions include, but are not limited to, near-total social isolation, and prevention, or monitoring of, the prisoner's correspondence with family and attorneys.[26] The regime of restrictions has become more frequently used in cases of suspected terrorists in recent years.[27] According to Judge Baraitser, the possibility of Assange being subjected to SAMs and being detained at a super-maximum security prison (supermax prison) like *ADX Florence*, would cause Assange to commit suicide due the state of his mental health.[28]

2.3 The High Court of Justice

The US government appealed the Magistrates' Court's decision to the High Court of Justice (the High Court), which granted the appeal and delivered a decision on December 10, 2021.[29]

The Magistrates' Court's decision was appealed on five grounds, including that the discharge of Assange was made because of errors of law, and that the Judge was misled by evidence produced by the Assange team. Ground five also stated that the US now had provided diplomatic assurances regarding the treatment of Assange if he were to be extradited.[30] The assurances were issued in two diplomatic notes shortly after the Magistrates' Court's ruling.[31]

The High Court started examining grounds two and five. Ground number two affirmed the US government should have been allowed to produce assurances

[26] The Center for Constitutional Rights and the Allard K. Lowenstein International Human Rights Clinic (2017), pp. 4-5.
[27] Ibid.
[28] *United States Of America v Assange* [2021] EW (Westminster MagC) (04 January 2021), paras. 355-363.
[29] *Govt of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, DC.
[30] Ibid. para. 22.
[31] Ibid. paras. 30-31.

to the court before Judge Baraitser made her decision. Ground number five asserted that the US now had provided the UK with assurances, ascertaining Assange was not to be subjected to SAMs or detained at *ADX Florence*, unless he would do something post extradition making those restrictions necessary. Assange could also be transferred to Australia, if he wished to serve his sentence there in the case of a conviction.[32]

Interestingly, the High Court did not start by examining the evidence concerning Assange's mental health, but instead focused on assessing the provided diplomatic assurances, and whether these could meet Judge Baraitser's concerns.[33] The High Court clarified that diplomatic notes were not considered evidence, but confirmed that a State could provide assurances in cases like the one at hand.[34] The assurances that Assange would not be exposed to SAMs or detained at *ADX Florence* were deemed adequate, as the High Court found it "difficult to see why extradition should be refused on the basis that Mr Assange might in future act in a way which exposes him to conditions he is anxious to avoid."[35]

The diplomatic assurances were given substantial weight by the High Court, and it discussed the notion that either the High Court would reject the assurances, indicating they were not offered in good faith, or they would be accepted. The High Court was not eager to assume a situation where assurances were given in bad faith, and stressed the lengthy record of Anglo-American relations.[36] It also rejected Assange's arguments regarding alleged breaches of diplomatic assurances provided by the US in *Aswat v. the United Kingdom*[37], stating it showed "the need for a requested person to consider with care the precise terms of an offered assurance, but it does not show that

[32] Ibid. para. 22.
[33] *Govt of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, DC, para. 29 ff.
[34] Ibid. paras. 39-41.
[35] Ibid. para. 48.
[36] Ibid. para. 51.
[37] *Aswat v. the United Kingdom* (dec.), no. 62176/14, 6 January 2015.

the USA acted in breach of an assurance."[38] This statement is somewhat peculiar, as it is not the requested person who accepts or declines diplomatic assurances, but the ultimately the sending State.[39]

The High Court accepted the US government's diplomatic assurances as given in good faith, and ruled that an extradition of Assange could proceed. The assurances were found sufficient to eliminate the risk of an exacerbated mental state and an extradition was therefore not oppressive any longer.[40] The High Court did however not find Judge Baraitser erroneous in concluding an extradition oppressive to Assange's mental health.[41] Consequently, the extradition could have violated the *Extradition Act 2003*[42] as a standalone case – but provided the assurances, such a violation was no more.[43]

[38] *Govt of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, DC, para. 53.
[39] See e.g. UNHCR (2006), pp. 1-2, 9.
[40] *Govt of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, DC, para. 61.
[41] Ibid. para. 70.
[42] *Extradition Act 2003*, c. 41.
[43] *Govt of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, DC, paras. 59-62.

3 Legal Framework and Practice – The ECHR

3.1 Applicability

According to Article 1 ECHR, the Convention applies to all persons under the contracting State's jurisdiction. In *Soering v. the United Kingdom*, the ECtHR extended the ECHR's jurisdiction, establishing that the Convention has an extraterritorial effect.[44] This means that when Contracting States remove persons to Non-contracting States, the removing State has to ensure the person's human rights are upheld also in the receiving State.

In this thesis, which focuses on *USA v. Assange*, it is worth noting that the United Kingdom has a dualistic approach to international law,[45] resulting in a need for treaties and conventions to be incorporated into British domestic law for them to have an effect. The British parliament incorporated the ECHR through the *Human Rights Act*[46] in 1998.

3.2 Article 3 ECHR

One of the most fundamental human rights established in the ECHR is the prohibition of torture in Article 3, which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[47] The right is absolute and contains the principle of *non-refoulement,* preventing States from transferring or removing persons to another State if those persons risk enduring torture or inhuman treatment in the receiving State.[48] Dworkin

[44] *Soering v. the United Kingdom,* no. 14038/88, A161, paras. 88, 91.
[45] Fatima (2019), p. 488.
[46] *Human Rights Act 1998*, c. 42.
[47] Article 3, *The European Convention on Human Rights*, as amended by Protocols Nos. 11, 14 and 15, 4 November 1950, Rome.
[48] De Weck (2017), pp. 8-9.

describes absolute legal rights as that the only reason not to protect those rights, is if it would be impossible to do so.[49]

According to the ECtHR, both the physical and the psychological effects of treatment are relevant when assessing whether it constitutes a violation of Article 3. In *Ireland v. the United Kingdom*, the ECtHR considered the interrogation techniques in question as degrading since they "arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[50] Sometimes the ECtHR has referred to degradation in the terms of fear, anguish *or* inferiority.[51] In *Keenan v. the United Kingdom*, the ECtHR found an applicant's mental illness capable of making their specific treatment or punishment violate Article 3, even if the applicant was unable to specify or show any negative impact stemming from the treatment.[52] *Bensaid v. the United Kingdom* also confirmed that a schizophrenic person's risk of relapse into hallucinations and self-harm could fall within the scope of Article 3.[53]

When examining the minimum threshold of what would constitute a violation of Article 3, the ECtHR conducts a relative assessment in each individual case, as circumstances and applicants can differ greatly.[54] In cases concerning extradition and Article 3, Mavronicola highlights the challenges of examining whether prospective ill-treatment could be at hand, since the Court must conduct an examination of what actions could transpire if an extradition is granted, prior to an extradition taking place.[55]

Palmer argues that the consideration of proportionality between e.g. State and individual interests has no place in determining whether a case violates

[49] Dworkin (1975), p. 1069.
[50] *Ireland v. the United Kingdom*, no. 5310/71, A25, 18 January 1978, para. 167.
[51] *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III, para. 52.
[52] *Keenan v. the United Kingdom,* no. 27229/95, ECHR 2001-III, paras. 113, 116.
[53] *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2001-I, para. 37.
[54] Webster (2018), pp. 27-28.
[55] Mavronicola (2021), p. 161.

Article 3.[56] The ECtHR seems to agree: in *Saadi v. Italy*[57], the applicant being deemed a threat to national security was not important to the Court in its assessment of prospective ill-treatment, as it found such an approach incompatible with the absolute nature of Article 3.[58] The notion of Article 3 being applicable despite the type of conduct of the requested person was also discussed in e.g. *Ahmed v. Austria*[59], *Chahal v. the United Kingdom*[60] and *Aswat v. the United Kingdom*[61].

3.2.1 Aswat v. the United Kingdom

The applicant complained to the Court that his awaited extradition to the United States would be in breach of Article 3 ECHR, because of his mental illness and the prison conditions in the USA.[62] Aswat was at the time of the hearing held in a psychiatric hospital in the UK, since he suffered from paranoid schizophrenia.[63] The illness presented itself as auditory hallucinations, thought disorder, and delusions of reference among other things.[64] According to Aswat, an extradition would exacerbate his condition and lead to a significant deterioration of his health, especially if he were to be placed at the supermax prison *ADX Florence,* which in some cases applied a highly restrictive regime with extended periods of social isolation.[65]

The ECtHR considered three factors when discussing the compatibility of an applicant's health with his or her detention – the medical condition of the applicant, the adequacy of medical care provided in detention, and the advisability of maintaining the detention considering the applicant's health.[66] When examining the medical care provided, the Court noted a lack of detailed

[56] Palmer (2006), p. 451.
[57] *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008-II.
[58] Ibid. para. 140.
[59] *Ahmed v. Austria,* no. 25964/94, ECHR 1996-VI, para. 38.
[60] *Chahal v. the United Kingdom* [GC], no. 22414/93, ECHR 1996-V, paras. 73-74.
[61] *Aswat v. the United Kingdom*, no. 17299/12, 9 September 2013, para. 49.
[62] Ibid. para. 3.
[63] Ibid. para. 19.
[64] Ibid. para. 51.
[65] Ibid. para. 56.
[66] Ibid. para. 50.

information provided by the US government. No indication had been given regarding where and how the applicant would be placed pre-, and post-trial, and it was also uncertain for how long the applicant would be detained pre-trial.[67] The court accepted that medical services could be available to the applicant, but was unable to assess the conditions of detention and the medical services provided, due to the lack of evidence put forward by the US government.[68]

The Court concluded that an extradition of Aswat would violate Article 3 based on the severity of his mental state. The applicant had no social base in the USA, and there was no guarantee that he wouldn't be placed at *ADX Florence* which could result in a significant deterioration of his mental illness. Such a deterioration would be able to reach the Article 3 threshold.[69]

Approximately a year after the Court's ruling, the case of *Aswat* was presented to the ECtHR once more. The US government had this time provided diplomatic assurances regarding the treatment of Aswat in the case of extradition[70], including information about the process of transport, place of detention, and an option of transfer to a hospital if emergency care would prove necessary.[71] The assurances also provided information on treating clinicians, available medications, and where Aswat would be housed during trial.[72] The Court was, in light of the diplomatic assurances, satisfied its concerns regarding Aswat's mental condition had been met by the USA, as the US authorities had "clearly and judiciously considered the severity of the applicant's mental health problems".[73]

[67] Ibid. para. 52.
[68] Ibid. para. 52.
[69] Ibid. para. 57.
[70] *Aswat v. the United Kingdom* (dec.), no. 62176/14, 6 January 2015, paras. 9-11, 18-19.
[71] Ibid. para. 18.
[72] Ibid. paras. 18-20.
[73] Ibid. para. 31.

In contrast to *Aswat,* the first, third and fifth applicants in *Babar Ahmad and Others v. the United Kingdom*[74], were diagnosed with different mental health problems not deemed severe enough by the Court to prevent extradition. The first applicant suffered from post-traumatic stress disorder, while the fifth applicant experienced recurrent depression and moderate to severe mental breakdowns while being held in the UK. The third applicant was diagnosed with Asperger syndrome, mild recurrent depression, and obsessive-compulsive disorder (OCD) in combination with anxiety.[75] The ECtHR noted that these mental health issues had not prevented the applicants from being held at high-security prisons in the UK and found the mental health services available at *ADX Florence* sufficient to not violate Article 3 if the applicants were extradited.[76]

3.2.2 Savran v. Denmark

The case of *Savran*, like *Aswat*, concerned the removal of a person suffering from paranoid schizophrenia.[77] The applicant was to be removed from Denmark to Turkey due to criminal activity. The ECtHR started its discussion by emphasizing the rights of States to control their territories and to expel aliens,[78] and continued stating that the threshold of Article 3 was very high and encompassed "very exceptional circumstances"[79] – a criterion established in *D. v. the United Kingdom*[80], and confirmed in *N. v. the United Kingdom*[81]. Furthermore, the Court entered a discussion on applicable criteria regarding "very exceptional circumstances", which were expanded on in *Paposhvili v. Belgium:*

[74] *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.
[75] Ibid. para. 193.
[76] Ibid. para. 224.
[77] *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021, para. 3.
[78] Ibid. para. 124.
[79] Ibid. paras. 126-127.
[80] *D. v. the United Kingdom*, no. 30240/96, ECHR 1997-III, para. 54.
[81] *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008-III, paras. 42-44.

> *refer to situations involving the removal of a seriously ill person in which* ***substantial grounds*** *have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,* ***of being exposed to a serious, rapid and irreversible decline*** *in his state of health* ***resulting in intense suffering or to a significant reduction in life expectancy.***[82] [emphasis added]

Prior to *Paposhvili*, the Court was viewed as having a "deathbed requirement" due to its ruling in *D. v. the United Kingdom.*[83] Only persons on the verge of death due to illness were within the scope of Article 3 according to the Court. In *Paposhvili*, the Court recognized the severity of that requirement, and that many persons who were seriously ill could not enjoy the same protection of their Article 3 rights as those close to dying.[84] However, as is shown in the *Paposhvili* criteria, the Court still emphasized that the threshold was high and the case law on the matter restrictive.[85]

In *Savran*, the Court found it not shown that the applicant would be exposed to a "serious, rapid and irreversible decline" if removed to Turkey.[86] The applicant's potential decline in health could lead to aggressive behavior, but such developments were not viewed as resulting in suffering for the applicant himself, but rather for other persons potentially experiencing the aggressions.[87] The Court admitted that the examination of a potential breach of Article 3 included some speculation,[88] but ultimately concluded *Savran* not reaching the threshold of a violation of Article 3.[89] It emphasized the

[82] *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016, para. 183 [emphasis added].
[83] Khan (2019), pp. 227-228.
[84] *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016, para. 181.
[85] *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021, para. 127.
[86] Ibid. para. 143.
[87] Ibid. para. 143.
[88] Ibid. para. 146.
[89] Ibid. para. 147.

threshold was to remain high in cases like *Savran* and *Paposhvili.*[90] Interestingly, the Court eventually decided the removal of *Savran* to be in breach of Article 8, as they regarded mental health a crucial part of private life.[91]

Judge Serghides criticized the Court's decision in a partly concurring and partly dissenting opinion, stating that the *Paposhvili* test was too restrictive and that the restrictiveness of the application did not rhyme well with the fundamental character of Article 3.[92] The Judge also stressed the principle of *in dubio in favorem pro jure/libertate/persona*, meaning if doubt remained whether the threshold of Article 3 was reached or not, the decision favorable of the right was to be chosen.[93]

[90] Ibid. para. 147.
[91] Ibid. para. 202.
[92] *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021, partly concurring and partly dissenting opinion of Judge Serghides, para. 16.
[93] Ibid. para. 41.

4 Diplomatic Assurances

4.1 What Are Diplomatic Assurances?

According to the United Nations High Commissioner for Refugees (UNHCR), diplomatic assurances are often used in extradition proceedings as a way for States to guarantee the extradited person's human rights are upheld and that the receiving State acts in accordance with its obligations under international law.[94] Assurances are commonly used in cases involving the death penalty, and when concerns arise regarding fairness of trial.[95]

Diplomatic assurances can take many forms, and no standardized formula has been established in international relations practice. Although usually written, a diplomatic assurance can also be verbal.[96] The significant difference between sufficient assurances and non-sufficient assurances, according to Skoglund, is whether they merely repeat universal human rights obligations, or if they bring something else to the table.[97] One could for example question whether the assurances provide a system of third-party monitoring, or if there is a plan regarding the treatment of the extradited person on his or her return.[98]

The question of whether diplomatic assurances have legal value is debated among scholars. The assurances could possibly be categorized as a form of soft law instrument, constituting an obligation that is not entirely binding, but also not entirely political.[99] UN officials have criticized the usage of diplomatic assurances, arguing that assurances do not provide sufficient protection against human rights violations,[100] whereas Noll has classified diplomatic assurances as binding treaties under international law, falling

[94] UNHCR (2006), p. 2.
[95] Ibid. p. 2.
[96] Salerno (2017), p. 457.
[97] Skoglund (2008), p. 334.
[98] Ibid. p. 334.
[99] Guzman and Meyer (2010), p. 172.
[100] Nowak (2005), p. 687; OHCHR (2005).

within the scope of the Vienna Convention on the Law of Treaties (VCLT).[101] Worster also argues that diplomatic assurances can be viewed as legally binding, but that their legality can tend to not be tested due to diplomacy and States' disinclination to bring a possible violation to a legal dispute settlement.[102]

Several non-governmental organizations (NGOs) monitoring human rights have criticized the usage of assurances in removal cases. Amnesty International has called them "a dangerous and unreliable mechanism"[103], and Human Rights Watch has stated that relying on assurances is "useless"[104]. Several scholars are also critical of the reliability of assurances. Hawkins concluded in her study of selected cases regarding US renditions of foreign prisoners that "unverified diplomatic assurances from countries known to torture prisoners do almost nothing to reduce the risk of torture"[105]. Skoglund suggested the protection provided by assurances to be unreliable, and did not recommend relying on assurances to follow the principle of non-refoulement.[106] Manfred Nowak, former UN Special Rapporteur on Torture, described diplomatic assurances as "nothing but an attempt by European and other States to circumvent their obligation to respect the principle of *non-refoulement*."[107] Johnston also deems monitoring the applicant's conditions after transfer ineffective, as torture is not "easy to detect."[108]

[101] Noll (2006), pp. 113-114; *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, vol. 1155, p. 331 (1969).
[102] Worster (2012), p. 346.
[103] Amnesty International (2017), p. 1.
[104] Prasow (2011).
[105] Hawkins (2006), p. 268.
[106] Skoglund (2008), p. 362.
[107] Nowak (2005), p. 687.
[108] Johnston (2011), p. 23; as cited in Volou (2015), p. 52.

4.2 The ECtHR's View on Diplomatic Assurances

The ECtHR has examined the concept of diplomatic assurances on multiple occasions,[109] and the Court has been described as having a pragmatic approach to the assessment of assurances.[110] In *Harkins and Edwards v. the United Kingdom*, the Court underlined the principle of good faith as the standard presumption when assessing assurances coming from a requesting State with a history of respecting human rights, democracy, and the rule of law, and which had sustained a long-term extradition arrangement with the sending State.[111] However, the Court has clarified that the presumption of good faith does not eradicate the need for an assessment of the provided assurances in whether they, in the applicant's concrete situation, provide a sufficient shield against torture or other ill-treatment.[112] In *Chahal v. the United Kingdom*, the Court stated that systematic ill-treatment in the receiving State could weaken the assurance's dependability.[113] In cases of diplomatic assurances provided by the USA, the ECtHR has judged those assurances as reliable and given in good faith,[114] also in cases of alleged terrorism.[115]

Othman (Abu Qatada) v. the United Kingdom generated discussion on diplomatic assurances in 2012, when a Jordanian national was to be removed from the UK to Jordan.[116] Several human rights NGOs reported widespread

[109] See e.g. *Chahal v. the United Kingdom* [GC], no. 22414/93, ECHR 1996-V; *Babar Ahmad and Others v. the United Kingdom* (partial dec.), nos. 24027/07, 11949/08 and 36742/08, 6 July 2010; *Al-Moayad v. Germany* (dec.), no. 35865/03, 20 February 2007; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012-I.
[110] See e.g. Salerno (2017), p. 464.
[111] *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012, paras. 85-86, 91.
[112] *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008-II, para. 148.
[113] *Chahal v. the United Kingdom* [GC], no. 22414/93, ECHR 1996-V, paras. 104-105.
[114] *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012, paras. 85-86, 91; *Rrapo v. Albania*, no. 58555/10, 25 September 2012, paras. 72-73.
[115] *Al-Moayad v. Germany*, no. 35865/03, 20 February 2007, paras. 66, 68-69, 71; *Babar Ahmad and Others v. the United Kingdom* (partial dec.), nos. 24027/07, 11949/08 and 36742/08, 26 July 2010, paras. 104-110.
[116] *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, 9 May 2012.

torture in Jordan[117], and the applicant argued his removal would violate Article 3.[118] The ECtHR stated that just because an assurance came from a State where ill-treatment is frequent, did not automatically render it ineffective.[119] Only in rare circumstances were assurances weightless due to the situation in the receiving State.[120] Subsequently, the Court summarized a catalog of criteria to consider when assessing diplomatic assurances. The criteria included whether the assurances had been disclosed to the Court, the specificness of the assurances, the entity or person that had issued the assurances, if the local authorities likely would obey the assurances, if the treatment was legal in the receiving State, if the assurances were provided by a contracting State, the bilateral relationship of the requesting and sending States, whether compliance with the assurances could be monitored objectively, if an effective system of protection against torture was upheld in the receiving State, whether the applicant in the past had endured ill-treatment in the receiving State, and if domestic courts of the contracting State had assessed the reliability of the assurances.[121]

Scholars have since *Othman* argued whether the ECtHR's acceptance of Jordanian assurances has weakened Article 3 and the principle of non-refoulement.[122] In contrast to *Chahal*[123], the Court found the provided assurances sufficient despite systematic ill-treatment in the receiving State. The Court also held a different view than, for example, former UN Special Rapporteur on Torture, Theo van Boven, who stated in a report to the UN General Assembly that diplomatic assurances were not to be applied in cases of systematic torture in the requesting State.[124]

[117] Ibid. paras. 32-39.
[118] Ibid. para. 3.
[119] Ibid. para. 187.
[120] Ibid. para. 188.
[121] Ibid. para. 189.
[122] Michaelsen (2012), p. 764; De Weck (2017), p. 422.
[123] *Chahal v. the United Kingdom* [GC], no. 22414/93, ECHR 1996-V, paras. 104-105.
[124] Van Boven (2004), para. 37.

5 Analysis and Conclusion

5.1 Extraditing Assange – a Violation of Article 3 ECHR?

Initially, could the extradition of Assange potentially fulfill the *Paposhvili* threshold test, resulting in a violation of Article 3? It remains unclear. According to the expert witnesses in the Magistrates' Court, Assange suffers from clinical depression, autism spectrum disorder, and Asperger syndrome. Without diplomatic assurances, the Court could possibly find the threshold of a violation of Article 3 reached, with special emphasis on the risk of Assange committing suicide. The demand for a "serious, rapid, and irreversible decline" leading to "intense suffering" could be fulfilled in the situation of Assange being placed in solitary confinement and/or under SAMs, and, as in *Aswat*, without family or social contacts in the USA. The risk of suicide could, depending on the gravity of the risk, naturally lead to a "significant reduction in life expectancy" as stated in *Paposhvili*, although this criterion in relation to the risk of suicide has not been evaluated by the ECtHR. It is also vital, in this instance, to consider that the applicant must produce "substantial grounds" showing a potential violation of Article 3, which is a high demand.

However, as shown in *Babar Ahmad*, the third applicant suffering from Asperger syndrome, depression and OCD did not manage to show a violation of Article 3 if extradited to the US and thus incarcerated at *ADX Florence*. The potential suicide risk of applicant three was not examined by the Court, as it viewed the health care at *ADX Florence* sufficient. In this respect, an extradition of Assange, even including exposure to SAMs and detention at *ADX Florence*, could potentially render a non-violation of Article 3, despite the risk of suicide. Nonetheless, *Aswat* brought up the factor of extradition resulting in a "significant deterioration of the applicant's mental illness". Such a deterioration would according to the Court be able to reach the Article 3 threshold. Does that criterion establish a lower threshold than the *Paposhvili* test? Perhaps it could, but it is significant to note that the applicant was in this

case detained at a psychiatric hospital, which Assange has not been during his detention at the Belmarsh prison.

5.2 The Role of Diplomatic Assurances

The crucial role played by diplomatic assurances in cases of removal has become unequivocally apparent during the research of this thesis. It seems no matter the gravity of the requested person's illness, an adequate set of diplomatic assurances can satisfy the human rights concerns of a court and pave the way for extradition. The assurances, in other words, have some legal value to the courts. State sovereignty, and upholding a presumption of good faith, appears to be of absolute concern in these situations as shown in the Court's statements in e.g. *Savran* and *Othman*. The ECtHR's approach to diplomatic assurances is interesting. In light of conclusions by Skoglund and Hawkins, the presence of assurances does not reduce the risk of ill-treatment. Worster also debates potential violations of assurances risk not being brought to light – a plausible conclusion, as it could potentially be legally implicating for the sending State, and in breach of diplomatic etiquette. This is problematic, as it could undermine the legal protection for the extradited individual. However, States require an efficient and secure system for prosecuting those individuals who have committed crimes. An overly cautious approach to diplomatic assurances could bring an unsatisfied and ineffective domestic legal criminal system, and interfere with the principle of State sovereignty.

Keeping the above in mind, it appears unlikely that the case of Assange would constitute a violation of Article 3. The restrictive *Paposhvili* test in combination with the ECtHR's approach to diplomatic assurances, as shown in *Othman*, certainly provides a beneficial legal platform for States looking to remove or receive persons of interest. Assurances from the USA have consistently been perceived as sufficient and provided in good faith. Nonetheless, an interesting aspect of *USA v. Assange* is the conditional nature of the provided assurances. The US stated that Assange won't be detained at

ADX Florence or subjected to SAMs, unless he would do something in the future to render those regimes necessary. The *Othman* criteria do not consider conditional assurances, making the ECtHR's view on the matter as of yet unclear. However, it appears difficult to find conditional diplomatic assurances, regarding the prevention of ill-treatment or torture, in compliance with the unconditional and fundamental nature of Article 3. Either the requesting State provides unconditional assurances, ensuring no violation of Article 3 would be of concern, or the assurances are simply insufficient. As Judge Serghides stated in his partly concurring and partly dissenting opinion on *Savran* – the principle of *in dubio in favorem pro jure/libertate/persona*, should be applied when assessing Article 3 rights. This mindset could very well be suitable in cases of conditional assurances, to uphold the protection of human rights and the ECHR as Europe's most fundamental safety net against ill-treatment.

Furthermore, no substantial monitoring mechanisms appear to be provided in the assurances regarding Assange. This will perhaps not be a problem, as the USA's human rights record, according to the ECtHR in e.g., *Babar Ahmad*, is a positive one. *Othman* also supports the High Court's conclusions, as the ECtHR pointed to the duration of bilateral cooperation between the sending and receiving States, and how that could positively impact the value of the provided assurances in the case at hand.

Consequently, a relevant question to discuss is whether diplomatic assurances are appropriate in cases containing concerns for a violation of Article 3 due to the applicant's mental illness. There is not much research on this topic. As mentioned in passage 2.1 of this thesis, Arnell and Forrester have called for increased cooperation between mental health professionals in receiving and sending States. Until such a fine-tuned instrument of cooperation is in place, is it suitable to extradite persons suffering from severe mental illness, despite diplomatic assurances being provided? This question remains unclear, but it could possibly be problematic from a human rights standpoint.

5.3 Conclusion

State sovereignty plays an important role in the power struggle between upholding fundamental and absolute human rights, like Article 3 ECHR, in juxtaposition to the power of States looking to persecute individuals that have committed crimes. The case of Assange is no exception to this power struggle.

Whether an extradition of Assange would constitute a violation of Article 3 or not, is unclear. Assessing the ECtHR's case law from the last few years, in particular *Aswat, Paposhvili,* and *Savran*, it seems rather unlikely that a violation would be found. This conclusion is made even stronger considering the diplomatic assurances provided by the USA, and the ECtHR's pragmatic approach to such assurances, especially after *Othman*. However, considering the ambiguity of potential suicide risk in relation to the *Paposhvili* criterion of "significant reduction in life expectancy", the Court could reach a different conclusion, finding a violation of Article 3 after all.

The concept of diplomatic assurances is, and will probably continue to be, debated, and there is a division among scholars regarding whether to classify assurances as legally binding or as a quasi-binding soft law instrument. The lack of incentives to bring alleged breaches of assurances to court is also problematic from a human rights perspective. The assurances provided in *USA v. Assange* would nonetheless probably be seen by the ECtHR as given in good faith, especially considering the UK's and the USA's long history of diplomatic relations.

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