THE CONCEPT OF DIPLOMATIC ASYLUM: STUDY IN THE LIGHT OF JULIAN ASSANGE'S CASE

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This dissertation is submitted in partial fulfillment of the degree of B.B.A., LL.B. (Hons)

College of Legal Studies
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DECLARATION

I declare that the dissertation entitled "**THE CONCEPT OF DIPLOMATIC ASYLUM: STUDY IN THE LIGHT OF JULIAN ASSANGE'S CASE**" is the outcome of my own work conducted under the supervision of Prof. PALLAVI ARRORA, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student

Date

CERTIFICATE

This is to certify that the research work entitled "**THE CONCEPT OF DIPLOMATIC ASYLUM: STUDY IN THE LIGHT OF JULIAN ASSANGE'S CASE**" is the work done by RASHIKA GUPTA under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature & Name of Supervisor

Designation

Date

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2. Julian Paul Assange v The Swedish Prosecution Authority UKSC 22 (2012)
3. Colombia v. Peru, ICJ Rep. 266, 284 (Nov. 20, 1950)
4. United States v Iran, ICJ Reports 3 (1980)

LIST OF ABBREVIATIONS

APRA	Alianza Popular Revolucionaria Americana
ATS	Australian Treaty Series
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
GA	General Assembly
ICJ	International Court of Justice
ILC	International Law Commission
OAS	Organization of American States
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
UK	United Kingdom
VCCR	Vienna Conventions on Consular Relations
VCDR	Vienna Conventions on Diplomatic Relations

INTRODUCTION

Julian Assange is an Australian computer programmer, publisher and journalist. He is known as the editor-in-chief of the website Wikileaks, which he co-founded in 2006. Wikileaks achieved particular prominence in 2010 when it published U.S. military and diplomatic documents leaked by Chelsea Manning. Assange has been under investigation in the United States since that time. In the same year, the Swedish Director of Public Prosecution opened an investigation into four sexual offences that Assange allegedly committed. In 2012, facing extradition to Sweden, he sought refuge at the Embassy of Ecuador in London and was granted political asylum by Ecuador.

On August 16, 2012 Julian Assange was granted asylum in the Ecuador embassy, London and the significance of the decision resulted in an occurrence that is rarely seen in Western states in modern times. Even though diplomatic asylum can be seen in practice as early as the fifteenth century when the idea of sending permanent diplomatic mission became customary, it is only in the Latin American states where it has been practiced frequently in the past century. However outside Latin America, the institution of diplomatic asylum is not recognized by many states. Nevertheless, there are several examples demonstrating that diplomatic asylum has not been entirely abandoned by Western states; including cases such as Chen Guangcheng in 2012, Klaas de Jonge in 1985, and several cases that occurred in East Germany before the fall of communism. Assange, as the latest case of diplomatic asylum, is still confined within the diplomatic premises as the British authorities are determined to extradite him to Sweden and it seems as no parties can agree how to resolve this diplomatic issue. The deadlock between Ecuador, United Kingdom and Sweden has caused major tensions between the involved parties; nonetheless, the question remains whether Assange will leave UK territory for Ecuador or if he will be extradited to Sweden.

What will be discussed in this thesis are certain documents and resolutions that could be applicable in the case of Assange and the question will be discussed whether Assange can derive his rights from current international conventions and resolutions to support his

claims of being political persecuted.[1] Another issue that appears in relation to the Assange case[2] is that diplomatic asylum is not recognized by United Kingdom and therefore lacks legitimacy under international law. The discussion on to what extent the institution of diplomatic asylum holds legitimacy in international law has been encompassed by the concept of sovereignty in relation to the inviolability of diplomatic premises as stated in the Vienna Conventions on Diplomatic and Consular Rights[3]. On the one hand, the Vienna Conventions on Diplomatic and Consular Relations strictly prohibits the territorial state to enter the diplomatic premises as this would violate the inviolability these premises possess under Article 22 (1) respectively 31(2) in the mentioned conventions.

On the other hand, the principle of sovereignty is not disputed in international law thus the territorial state holds an absolute right to determine the situation for any individual on their territory. If both parties recognized the legality of diplomatic asylum, there would not have been any problem posed in this particular case, however, what makes it interesting is the fact that both parties in this case have stated a right on their side, which will be explored at depth in a later chapter.[4] Hence, the controversy of the institution of diplomatic asylum creates a highly interesting topic to discuss as it has persisted for numerous centuries and the question is whether it will once more develop to become a customary practice. If so, it is important to establish the implications for such institution in international law in order to avoid confusion such as in the case of Assange.

[1] W. Neuman & M. Ayala, *Ecuador Grants Asylum to Assange, Defying Britain* (2012, August 16).
[2] Julian Paul Assange v Swedish Prosecution Authority UKSC 22 (2012).
[3] 1961
[4] Heijer den, M., *Diplomatic Asylum and the Assange Case*, Leiden Journal of International Law, 399-425, at 399 (2013).

RESEARCH METHODOLOGY

The type of research involved in this project is based on non-doctrinal legal research with analysis and possibility to observe the practical and legal issues connected to the diplomatic asylum granted in the case Julian Assange and extracting the preferred solution and recommendations for the concerns and conflicts. The Blue Book 19th Edition is followed for citations in the dissertation.

STATEMENT OF PROBLEM

Diplomatic Asylum is a particularly controversial subject in international law; even though the practice has persisted in one way or another the legitimacy of the concept is contentious. The main issue which my research will be dealing with is that diplomatic asylum not being recognized by United Kingdom and therefore lacks legitimacy under the international law explaining and discussing the case of Julian Assange. The research focuses on the case of Julian Assange abusing the process of prosecution and refusing to submit to legal process in Sweden and UK on charges of sexual assault. The research will take into consideration how Julian Assange was only being sought on the reasonable suspicion of having committed a crime. The conflict of laws of Sweden and the English laws have been given proper consideration, as in the case Julian was not charged in the English laws of being 'charged' nor was he being indicted in the Swedish sense.

The European Union issued an arrest warrant against Assange from November 2010 while he was staying in the Ecuador embassy of the UK. The dispute over his extradition had nothing to do with Wikileaks but rather only with the enforcement of the European arrest warrant in which he was charged with rape, sexual harassment and unlawful coercion against two Swedish women in Sweden. The main conflict is that if one gives any credibility to Assange or if one lacks faith in Swedish institutions one can quite right support Assange for choosing not to leave the Ecuador embassy and face UK and Sweden. The research deals in detail with the battle of Julian Assange against the extradition to Sweden from the Ecuadorean embassy in London.

The research focuses on the explanations and documents available insisting on the

legality of the diplomatic asylum that was granted to Julian Assange. For instance the detailed explanation as was given by the Ecuadorian Ministry of Foreign Affairs on 16 August 2012 for the granting of diplomatic asylum had no mention of the actual accusations against Assange. Many other such explanations have been seen into in order to assess the legality of the diplomatic asylum granted to Julian Assange under the international law.

A further discussion about why Ecuador granted Assange diplomatic asylum in consideration to the Ecuador's own Criminal Code into consideration; as there was an imminent threat of Assange being further deported to the United States where he would be politically persecuted and cruelly treated.

My research will include a detailed discussion on to what extent the institution of diplomatic asylum holds legitimacy under the international law which will be encompassed by the concept of sovereignty in relation to the inviolability of diplomatic premises as stated in the Vienna Convention on Diplomatic and Consular Rights.

ISSUES

Both the International Law Commission and the United Nations General Assembly have avoided inclusion of any legal provisions in their work due to the resistant of states to recognize diplomatic asylum in customary international law. Hence, there is no universal recognition of the practice in international law.[5] This has resulted in confusion in regards to how to deal with cases that concerns diplomatic asylum and additionally caused great tension between states that are involved in the issue. Often, misunderstandings emerge in relations between the states in whose embassy; where asylum has been granted ("the sending state") and the government of the territorial state ("the receiving state"). An attempt to clarify the contemporary international legal instruments will be made in this thesis in order to frame the core issues of diplomatic asylum and its legitimacy under international law. Furthermore, the Assange case has highlighted the issues commonly known as when two states are not in agreement over the said practice and hence this case

[5] Wouters, J., & Duquet, S., *The EU, EEAS and Union Delegations and International Diplomatic Law: New Horizons*, Leuven: Leuven Centre for Global Governance Studies, at 17 (2011).

will be taken into consideration as this can contribute to the understanding of the issues of diplomatic asylum.

The main issue which my research will be dealing with is that diplomatic asylum not being recognized by United Kingdom and therefore lacks legitimacy under the international law explaining and discussing the case of Julian Assange. The research focuses on the case of Julian Assange abusing the process of prosecution and refusing to submit to legal process in Sweden and UK on charges of sexual assault. The research will take into consideration how Julian Assange was only being sought on the reasonable suspicion of having committed a crime.

The main conflict is that if one gives any credibility to Assange or if one lacks faith in Swedish institutions one can quite right support Assange to choose not to leave the Ecuador embassy and face UK and Sweden. The research deals in detail the battle of Julian Assange against the extradition to Sweden from the Ecuadorean embassy in London.

The research focuses on the explanations and documents available insisting on the legality of the diplomatic asylum that was granted to Julian Assange. For instance the detailed explanation as was given by the Ecuadorian Ministry of Foreign Affairs on 16 August 2012 for the granting of diplomatic asylum had no mention of the actual accusations against Assange. Many other such explanations have been seen into in order to assess the legality of the diplomatic asylum granted to Julian Assange under the international law.

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My research will include a detailed discussion on to what extent the institution of diplomatic asylum holds legitimacy under the international law which will be

encompassed by the concept of sovereignty in relation to the inviolability of diplomatic premises as stated in the Vienna Convention on Diplomatic and Consular Rights.

RESEARCH OBJECTIVE

The objective of this dissertation is to provide a clear view and avoid the confusion on the matter of legitimacy of granting diplomatic asylum as seen in the case of Julian Assange, thus providing probable solutions and recommendations to the various problems that have been highlighted in the practice.

The type of research involved in this dissertation is based on the data available in the form of case studies and an analysis of such case studies in close connection to the concerns undertaken in this dissertation. The scheme of research provides every aspect and theory to be supported with a case instance. The aim of this study is to trace the historical development of the institution of diplomatic asylum and distinguish the implication of such institution in contemporary international law. Furthermore, by viewing the case of Julian Assange, it is possible to observe the practical and legal issues that are connected to diplomatic asylum and make predictions of future outcomes. The field that will be studied in this thesis is the status of diplomatic asylum in international law and the inherent consequences of such an institution with ambiguous principles. The legal and practical implications of the institution of diplomatic asylum reveal the difficulties that appear between states but it also uncovers the question of abuse of diplomatic immunities vis-à-vis protection of individuals on humanitarian grounds. Therefore, the focus will be put on how such an institution can persist as a practice when the ambiguous character of diplomatic asylum lacks a tangible position in general international law and furthermore the absence of shared recognition amongst states.

Previous research and findings in this area has demonstrated that the practice of diplomatic asylum has been inconsistent and although the institution has been recognized as a custom in Latin America, cases reveals the unpredictability in each situation. In regards to any guidelines concerning diplomatic asylum, this has often been avoided as states do not recognize it. International Court of Justice made important conclusions in

the Asylum case[6] concerning diplomatic asylum, however, that is the only time a case of diplomatic asylum has been brought to an international instance. Furthermore, in light of scarce contemporary studies relating to diplomatic asylum, this study further seeks to clarify whether future practice of diplomatic asylum has a prospect to gain legitimacy in international law by revising the current international treaties. Moreover, by viewing the present debate on diplomatic asylum amongst academic and legal scholars, it is possible to perceive the existing support and see whether there is an agreement on the practice of diplomatic asylum being legalized. Therefore, the research problem will be focused on the inconsistencies in the practice of diplomatic asylum and the overall problem that will be guiding this paper is; to what extent the inconsistencies of the institution of diplomatic asylum affect its current position in international law and the practice by other institutions.

RESEARCH QUESTIONS

The main three research question of my dissertation in order to understand the complexities involved in the case of Julian Assange regarding the institution of diplomatic asylum and the issues that have been emphasized on its practical inconsistencies due to the absence of being observed as an institution in international law; will be:

i. The terms of granting diplomatic asylum as under the international law in reference to the case of Julian Assange and the position of diplomatic asylum in relation to international law.

ii. How the situation of Julian Assange was effected by previous cases and findings under international law?

iii. How has the institution of diplomatic asylum persisted as a practice despite its ambiguous character?

[6] Colombian–Peruvian Asylum Case [Colombia v. Peru ICJ Rep. 266 (1950)], Judgment of Nov. 20, 1950

The scope of issues under consideration is wide as the fact that there is no universal recognition of the practice of granting diplomatic asylum in international law. The issues identified in this dissertation will cover the probable aspects of the concerns that occurred in the case of Julian Assange in order to frame the core issue of the dissertation being assessment of diplomatic asylum granted to Julian Assange and its legitimacy under international law. The issue of states being resistant to whether the institution of diplomatic asylum will once more develop to become a customary practice; will also be dealt with in this dissertation. The issues as faced in the case of Julian Assange; of two states not being in agreement over the practice of grating diplomatic asylum for the proper understanding of the issues of diplomatic asylum will also be discussed in detail.

DELIMITATIONS

Considering the controversial aspect of diplomatic asylum and especially in the case of Julian Assange I want to distinguish certain delimitations related to this paper. In the case of Assange I will only regard the aspects of the case that are specifically concerned with diplomatic asylum and therefore other issues such as whether the U.S. is actually pursuing to charge Assange for treason will not be dealt with. Furthermore, I will not be concerned with whether Assange actually committed the sexual offenses that the Swedish Prosecution had issued a European Arrest Warrant for. Moreover, in regards to the international human rights instruments, I will only consider the International Human Rights Law, United Nations Universal Declaration of Human Rights and the 1951 Refugee Convention even though other conventions may provide for similar provisions.

HYPOTHESIS

The probable body of the research as emphasized clears the understanding of the Ecuador's decision to grant diplomatic asylum to Julian Assange as being flawed as matter of law nonetheless, its embassy in London remains inviolable. It will include the manifold effects of granting diplomatic asylum by the different states; dealing with the inescapable facts that emerge in the implementation of grant of diplomatic asylum is examined closely in the case of Julian Assange.

The individual issues which make the institution of diplomatic asylum unsuccessful are also discussed. Also answering the question of what makes these grants troublesome.

The concept of inherent challenge faced by the countries in implementing the laws available through both the International Law Commission and the United Nations General Assembly are some of the major issues of this project.

The project will also be throwing light on the various contributing factors for the failure to protect the diplomatic immunity and its abuse. Lastly, dealing with the latest developments in this area explaining the countries being on the cross roads and ascertaining the future prospects and solution to these concerns.

SURVEY OF EXISTING LITERATURE

The survey which has been performed of the existing literature for this project is mentioned as follows.

1. David Harris, *Cases and Materials on International Law,* Seventh Edition
2. I A Shearer*, Starke's International Law,* Eleventh Edition

This book provided the insight on agents of international business, diplomatic envoys, consuls and other representatives.

3. K. C. Joshi, *International Law & Human Rights,* Third Edition (2006)

This book provided a basis concept of Diplomatic Asylum and different kinds of asylums with case examples.

4. M. P. Tandon and Dr. V. K. Anand, *International Law and Human Rights,* Allahabad Law Agency
5. Alison Duxbury, *Assange and the Law of Diplomatic Relations,* Indian American Times, Oct. 15, 2012

This article concentrates on the legal issues raised by the grant of asylum and Assange's continued residence in the Ecuadorian Embassy. It includes the grant of diplomatic asylum, the inviolability of the Embassy, how can the embassy be left and the legal or diplomatic settlement.

6. Dominic Casciani, *Q & A: Julian Assange and asylum,* BBC, Aug. 16, 2012

This article states that the Wikileaks founder Julian Assange, who faced extradition from UK to Sweden over rape and sexual assault allegation, was given asylum at the Ecuadorean embassy in London so what happened after, what did Julian want and who can claim asylum.

7. Donald Rotwell, *The International Law Dimensions of the Plight of Julian Assange,* Oct. 4 , 2012

This source gave the enhanced knowledge about the Sweden's extradition request, Assange's asylum claim, Vienna Convention on Diplomatic Relations, international law and asylum and Assange's legal options.

8. *Julian Assange: Ecuador grants Wikileaks founder asylum,* Aug. 16, 2012

This article states the legal obligations and how the ambassador was summoned by Sweden.

9. John T. Chisholm, *Chen Guangcheng and Julian Assange: The Normative Impact of International Incidents on Diplomatic Asylum Law,* The George Washington Law Review, 2014

This note argued on the two incidents of Julian Assange and Chen Guangcheng which were the examples from the Ecuador's embassy and the argument that these incidents demonstrate a norm that certain elements of diplomatic asylum practice are actually accepted components of international law. It also shows that the failure to recognize this norm undermines international legal practice more generally. This note also examines the implications of the norm generated by these incidents within the context of current foreign relations practice.

10. Kai Ambos, *Diplomatic Asylum for Julian Assange?;* Sep. 11, 2012

This article gives insight to the dispute of Julian Assange in relation to the enforcement of the European arrest warrant issued against him from November 2010 in which he was charged with rape, sexual harassment and unlawful coercion against two Swedish women in Sweden; and the fact that the dispute over his extradition had nothing to do with Wikileaks.

11. Linda-Marie Petersson, *Diplomatic Asylum: Julian Assange Case,* Jul. 15, 2013

This thesis pictures the evolving landscape of Diplomatic Asylum and provides a brief update on recent developments, trends and directions. It discusses certain documents and resolutions that could be applicable in the case of Assange and the question whether Assange could derive his tights from current international conventions and resolutions to be able to support his claims of being political persecutes.

12. Mariano Castillo, *Assange and diplomatic asylum: A primer;* Aug. 19, 2012

This story highlights Ecuador granting asylum to Assange, but UK not recognizing it; diplomatic asylum not being a right under the general international law and that this standoff could extend indefinitely.

13. Marko Milanovic, *The Sheer Awfulness of Julian Assange,* Dec. 1, 2012

This source provided the BBC interview of Julian Assange and comments on that interview explaining that how inconsiderate and uncivil Julian Assange is as a human being.

14. Press Association, *Ecuador grants Wikileaks founder Julian Assange political asylum,* The Guardian, Aug. 16, 2012
15. Rene Vark, *Diplomatic Asylum: Theory, Practice and the Case of Julian Assange,* Sisekaitseakadeemia Toimetised (2012)

This article first studies the nature and forms of asylum, then also examines the legality of diplomatic asylum under international law and state practice of providing diplomatic asylum and finally analyses the case of Julian Assange.

16. *Wikileaks' Julian Assange: Full interview,* BBC, Dec. 1, 2012

This source provided the video of the 10 minutes interview of Julian Assange with BBC about his battle against the extradition to Sweden from the Ecuadorean embassy in London.

INTRODUCTION TO DIPLOMATIC ASYLUM

Diplomatic asylum refers to the protection of an individual by a diplomatic mission and the individuals can be either a national of the receiving (or territorial) state, the sending (or extraterritorial) state or of a third state.[7] Moreover, diplomatic asylum refers to a refuge "granted to a political offender or a person qualifying as a political persecuted in a diplomatic or consular mission."[8] The key difference between territorial asylum and diplomatic asylum has been argued to be, as stressed by the ICJ in the Asylum case; "a decision to grant diplomatic asylum involves derogation from the sovereignty of [the] State in which asylum is sought. This is because the grant of such asylum 'withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State."[9]

Three major forms of non-territorial asylum are, firstly; diplomatic asylum is granted on diplomatic premises, secondly; consular asylum granted on consular premises, and lastly; maritime asylum that is granted on vessels in foreign waters. However, maritime asylum will be disregarded in this thesis. The institution of diplomatic asylum lacks legal grounds in general international law and few states recognize such institution. However, in Latin America it has become a recognized regional custom and frequently individuals who have been granted diplomatic asylum have been allowed safe passage out of the territorial state where diplomatic asylum has been granted. This has further been codified in regional treaties in Latin America and individuals seeking asylum must have political reasons as opposed to fugitives classified as common criminals in order for the state to grant asylum.[10]

[7] Aust A., *Handbook of International Law*, Cambridge: Cambridge University Press, at 187(2005).
[8] Kleiner J., *Diplomatic Practice: Between Tradition and Innovation*, Singapore: World Scientific Publishing Co. Pte. Ltd., at 167 (2001).
[9] Jeffery A., *Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights*, South African Journal on Human Rights, 10-30, at 12 (1985).
[10] Heijer, *supra* note 4.

HISTORICAL DEVELOPMENT OF DIPLOMATIC ASYLUM

This chapter will review the development of diplomatic asylum in a historical context. Starting with early accounts on territorial asylum and moving towards the advancement of political asylum, the history of diplomatic asylum reveals a concept that has played an important part in relations between states. However, as it became widely abused by diplomatic missions, the institution of diplomatic practice turned out to be more of a problem for states and today several states reject it altogether. Even so, the institution of diplomatic asylum appears to have survived centuries as a practice, albeit in an erratic manner.

EARLY HISTORY OF ASYLUM

The practice of diplomatic asylum has developed quite erratically throughout the centuries and the custom today has changed since the practice in the fifteenth century when it was not unusual for embassies to grant asylum in the premises. The custom to grant asylum can be traced back to Christian practice of churches providing protection to fugitives in 313 A.D. and the tradition has developed throughout the centuries influenced mainly by religious views, superstition or positive law.[11]

In ancient Greece a form of territorial asylum was practiced and temples offered sanctuary to fugitives who sought shelter for various reasons; runaway slaves, common criminals, foreigners seeking protection from its own state's authority. The fall of the Roman Empire induced Christian churches in Europe to once again play an important role for fugitives seeking shelter and ecclesiastical laws on asylum were established.[12]

Furthermore, the protection offered based on territorial asylum did not include political offenders but exclusively concerned common criminals. This was in view of the fact that

[11] Fruchterman R. L., *Asylum: Theory and Practice*, JAG Journal, at 170 (1962).
[12] Islam R. & Bhuiyan J. H., *An Introduction to International Refugee Law*, The Hague: Martinus Nijhoff, at 135 (2013).

committing an offense involving disobedience against the authorities was in extension an offense to the gods and such insults was severely punished.[13]

However as the importance of the nation-state grew, the position religion and superstition once had, gradually weakened. Instead, the basis of asylum shifted to the sovereignty of a city or a state. Additionally, as the national authorities claimed the absolute right in regards to the control of the territory, the right of asylum became restricted.[14] The divine character of such asylum was no longer recognized but instead viewed as "an institution created by man and, therefore, within the competence of the state for regulation or even abolition."[15] Nonetheless, political offenses were still recognized as severe and therefore asylum based on political grounds was seldom granted. One exception can be traced to the republic of Italian lords where political asylum was generally granted in nearby cities and in exchange the refugee would often offer its services. This however had more to do the fact that Italy was itself divided in numerous cities and republics, consequently resulting in conflicts and turmoil.[16]

In the seventeenth century the institution of asylum again gained international ground, correspondingly the concept of extradition developed to be a widespread practice. The idea of a fugitive holding the right to seek asylum had long prevailed, however, the notion was replaced by the right of a state to either grant asylum within its territory or to deny such right and expel the subject.[17] Extradition of common criminals was no longer challenged as it had become common practice; hence the emphasis had now changed from disregarding common criminals entitled the right to asylum to instead consider political fugitives as having the possibility to apply for asylum.[18]

[13] Sinha S. P., *Asylum and International Law*, The Hague: Martinus Nijhoff, at 208 (1971).
[14] *Ibid*.
[15] Sinha, *supra* note 13
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

POLITICAL ASYLUM

There was an important change in the eighteenth century in regards to the offense of an individual seeking asylum. As mentioned before, political offenders were not considered to be entitled the grant of asylum as disobedience against national authority was unacceptable. Nonetheless, the idea of the institution of asylum only applying to ordinary criminals was now extended to individuals committing political offences. This change in view was among other a result of jurists who themselves had been persecuted and had to seek refuge elsewhere and hence declared that asylum also belonged to individuals oppressed for religious and political intolerance.[19] The problem however was to determine what constituted a political offence and in the absence of such definition caused conflict. The outcome of the controversy did not lead to a definition of political offence, instead; international instruments stated what the term did not include. Even in the twentieth century such definition was not made and instead, international treaties rather defined what political offences did not mean, for instance; Article 1 in the 1975 Additional Protocol to the 1957 European Convention on Extradition[20] specifically specifies crimes against humanity and war crimes to be excluded from the classification of political offences.[21]

Moreover, resulting from the French Revolution in 1789, the idea of rejecting political asylum was considered as an offense to humanity and this response led to the creation of a political asylum as a juridical principle as it was regarded to be the duty of the state to aid the oppressed. It is therefore claimed that the practice of political asylum was established by; "circumstances, by principles of morality, and by a rule of positive law".[22] Across many countries, the practice to exclude political crimes from extradition treaties emerged and in the establishing of the bilateral treaties countries such as France clarified its intentions to exclude the possibility to extradite individuals who committed political crimes.[23] Nonetheless, the new practice of extradition was not necessarily respected at all

[19] *Id.*
[20] Council of Europe, Treaty Series 86, concluded Oct. 15, 1975.
[21] Islam & Bhuiyan, *supra* note 12, at 136.
[22] Sinha, *supra* note 13.
[23] Islam & Bhuiyan, *supra* note 12, at 136.

times as there were restrictions and subjective interpretations of the treaty that applied whenever the government deemed it necessary. This was especially true in the case of extradition treaties concerning political fugitives, bearing in mind that the political order was at all times a priority over the humanitarian need.

Even though the principle of not extraditing political offenders was acknowledged, the practice would demonstrate the limitation it posed as states instead of requesting extradition would demand other measures to apply to the political fugitive such as expulsion, restriction of activities and so forth. Furthermore, in the nineteenth century distinctions between political and common crimes were made in declarations, laws and treaties.[24] On the other hand, despite the fact that there has been a claim of political asylum becoming a principle of international law, the difficulties defining the true meaning of a political offence still applies. In contemporary international law the concept of political asylum is considered, such as in the 1951 Geneva Refugee Convention.[25] Moreover, it is stated in relation to the Convention that the emphasis of the definition of "refugee" in Article 1 is "on the protection of persons from political or other forms of persecution".[26]

[24] Sinha, *supra* note 13.
[25] Islam & Bhuiyan, *supra* note 12, at 137.
[26] 189 UNTS 137/ ATS 5 (1954).

DIPLOMATIC ASYLUM BEFORE ITS DECLINE

The art of diplomacy stretches far back in history and sending temporary diplomatic missions was a common practice between states. However, it was not until the fifteenth and sixteenth century diplomatic missions were established permanently abroad. During the period when states sent temporary missions, the ambassador enjoyed at all times personal inviolability. The ambassadors were considered to be under the protection of gods and therefore an assault to the ambassador was in extension an assault to the gods.[27] However, the personal inviolability enjoyed by ambassadors was not considered to be sufficient when the ambassadors functioned as a permanent mission. Therefore, other privileges were dispensed for the permanent mission and these included for instance exemption from jurisdiction of criminal and civil kind, inviolability of residences and so forth.[28] For the fugitive, the permanent embassies then came to be a new form of sanctuary to seek refuge in, in view of the fact that the rise of sovereignty subsequently undermined other sacred places. Consequently, diplomatic asylum has come to be seen as a consequence of the immunity that was attributed to the permanent mission.[29] Similarly to political asylum, the crime committed would decide whether the offender was entitled asylum within the premises. Common crimes as a basis to grant asylum were accepted however, in regards to political offences the diplomatic missions were reluctant to grant asylum and it was not until the nineteenth century that states would consider political offenders.

As already mentioned diplomatic asylum gained recognition in the fifteenth century and in the centuries to come it was ensured of continuous acknowledgment, and the basis for this recognition rested significantly on legal intellectuals and their writings on the law of nations.[30] Several scholars asserted the inviolability of diplomatic asylum and rarely would scholars question the legality of this concept.[31] Furthermore, Hugo Grotius, who in favor of diplomatic asylum, proclaimed the legitimacy of the institution in the perspective

[27] Sinha, *supra* note 14.
[28] *Id.*
[29] *Id.*
[30] For instance, Alberico Gentili (1552-1608) and Francisco Suarez (1548-1617)
[31] Charles Pasquali, Legatus at Rouen (1598), who questioned its applicability and claimed it to be inappropriate for diplomatic missions.

of diplomatic premises being inviolable in the context of ex-territoriality. Grotius proposed the fiction of as a means to describe the conflicting nature of diplomatic asylum in relation to the character of sovereignty. The sovereignty of the territorial state is in fiction extended to the ambassador representing its state and hence the receiving state cannot exercise its authority over such representation.[32] As ex-territoriality gained acceptance, it was acknowledged that the local authority did not have the right to enter the diplomatic premises. One of the few to oppose this thesis was Cornelis van Bynkershoek who proclaimed that the immunities enjoyed by ambassadors were merely functional and therefore they were not in any position to offer asylum to fugitives.[33] Nevertheless, diplomatic asylum became a fundamental part of the art of diplomacy until the nineteenth century when the legitimacy of diplomatic asylum was questioned.[34]

In contrast to modern periods, inviolability of diplomatic premises was not always respected, indicating that the local authority would in any case enter the premises if diplomatic asylum granted was seen as unlawful.[35] European ambassadors had been successful at this time to extend the inviolability that was intended for diplomatic premises to their own homes as well as any individuals taking refuge in their mission.[36] This was commonly known as *franchise du quartier* and was applied by embassies in cities such as Venice, Madrid, Frankfurt am Main where the inviolability enjoyed by the embassy was extended to the adjacent areas. Consequently, comparable rights applied to the neighboring area, for instance similar taxation regulation applied as well as the possibility to hinder the local authorities to arrest persecuted individuals.[37] Considering that the establishment of diplomatic asylum can be observed together with the development of the inviolability of diplomatic missions in Europe, it is also with this inviolability that causes the skepticism of the legitimacy of diplomatic asylum.[38] Indeed, abuse of the practice was common and consequently individuals for various reasons

[32] Heijer, *supra* note 4, at 402.
[33] *Ibid.*
[34] Sinha, *supra* note 13.
[35] Prakash S., *Diplomatic Asylum*, In R. Wolfrum, The Max Planck Encyclopedia of Public International Law, online edition [www.mpepil.com]: Oxford University Press, at 1 (2008).
[36] Rossitto A. M., *Diplomatic Asylum in the United States and Latin America: A Comparative Analysis*, Brooklyn J. International Law, at 112 (1987).
[37] Heijer, *supra* note 4, at 402.
[38] Sinha, *supra* note 13.

would seek refuge within the inviolable premises. It would happen that the ambassador ascertained particular buildings for offenders in return for money and as a result earning a high return on investment. Therefore, it compelled the states to limit the *franchise du quartier* and eventually it was renounced altogether in the late seventeenth century.[39]

In the end of eighteenth century the practice of diplomatic asylum had started to decline. There are not many cases that have been documented that relates specifically to diplomatic asylum. Even so, cases which have been documented also demonstrate the local authorities' reluctance towards the institution of diplomatic asylum; hence, cases have been documented revealing fugitives who have not been able to escape local authorities. In 1747 a case relating to diplomatic asylum took place in Stockholm where a Russian citizen, Springer, was convicted as an accomplice in a crime of high treason. Springer escaped prison and disguised as an English courier he was invited to the hotel of the English ambassador, Colonel Guideckens. As Guideckens refused to surrender Springer, the Swedish authorities surrounded the hotel with troops and later followed Colonel's carriage in an attempt to catch the fugitive. The fugitive was at last given to the authorities; however, not much later the British government demanded redress and without receiving it Guideckens left Sweden. The response of the Swedish government was to order its ambassador to leave London causing the diplomatic relations to halter between the two countries.[40] In this example, even if states began to question the legitimacy of diplomatic asylum, the consequence on the relations still existed.

In the nineteenth century the practice of diplomatic asylum had drastically changed. Moore acknowledged that diplomatic asylum had by this time disappeared and only seldom was diplomatic asylum granted.[41] For instance, in the nineteenth century the British ambassadors were instructed not to grant asylum unless it concerned individuals in danger or if it was complying with local custom. As recommended by British Foreign Secretary to his Minister in Haiti, 1896; "the practice of harboring political refugees is an objectionable one and should be resorted to only from motives of humanity in cases of

[39] *Ibid.*
[40] Moore, J. B. (1906). A digest of International Law, Vol. 2. Washington: G.P.O., at 766.
[41] *Ibid.*

instant or imminent personal peril",[42] implying the grant of diplomatic asylum as an alternative only in extraordinary circumstances. Moreover, the United States affirmed by 1897 that it did not conform to the practice of diplomatic asylum; however, the position on temporary refuge would still depend on the circumstances.[43]

Moore is referring to this demise as a result of how states viewed the character of the offense committed by the fugitive. Common criminals were no longer seen as entitled to asylum while political offences had come to be accepted as a basis for an asylum request. Examples of diplomatic asylum granted on the basis of political offences can be seen in Spain during 1840s when the Chargé d'Affaires of Denmark frequently granted refuge to Spanish revolutionaries as well as during the Spanish Civil War of 1936-39 when many sought refuge in Latin American and European embassies.[44] Nonetheless, only occasionally can cases of diplomatic asylum be found in the nineteenth and twentieth century and the recognized status it once enjoyed within the international community is these days to a greater extent ambiguous.

On the other hand, as the practice gradually declined in Europe, in Latin America it was on the contrary increasingly followed. This is related to the political instability as a consequence of civil wars and revolution, inclining states to act on humanitarian ground bearing in mind the political circumstances. In mid-twentieth century some scholars viewed diplomatic asylum as a practice only practiced in "the 'backward' countries of the Near and Far East and of Latin America" which suggested that "it is a practice followed only in relation to states who are not fully civilized in the Western sense of the term".[45] Nonetheless, diplomatic asylum in Latin America is understood as a regional custom and as understood by the Assange case it is still recognized today. There are several regional conventions that relate to or mention diplomatic asylum which will be discussed in a subsequent chapter.

[42] Zimmermann A, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, New York: Oxford University Press, at 1430 ed. (2011).
[43] Heijer, *supra* note 4, at 402.
[44] Id, at 403.
[45] Morgenstern, F. (1948)

DEVELOPMENT OF LEGAL STATUS OF DIPLOMATIC ASYLUM

This chapter will be dealing with the development of legal status of diplomatic asylum in accordance with the case of Julian Assange. These impacts and developments will be dealt in consideration of case studies of some particular asylum cases which are necessary to be taken into consideration under the research.

Diplomatic asylum, according to which the countries grant asylum within the walls of their own embassies abroad, is not recognized widely in international law. The International Court of Justice had rejected the practice of diplomatic asylum decades ago also outside Latin America there is no treaty which accepts the right to grant diplomatic asylum. But infringing the legal international authorities the countries accept the individuals having a high profile into their embassies.

In relation to the Assange case, what is being profoundly questioned is the legitimacy of the granting of asylum in international law as well as whether Assange in fact has the right to enjoy the status as persecuted. This chapter will therefore focus on primary sources connected to diplomatic asylum in addition to conventions and resolutions that will clarify the right to grant asylum, to seek asylum and the right to obtain asylum. Despite the fact that during the twentieth century cases that specifically deal with diplomatic asylum are not very common especially in comparison to the many instances in the fifteenth and sixteenth century, nonetheless there are cases that are of interest. The only case that has been dealt with in the context of international law is the Asylum case[46] where the International Court of Justice (ICJ) recognized the implications the institution of diplomatic asylum has on sovereignty. The subjective right to diplomatic asylum does not however exist in contemporary international law and the granting of this type of asylum is therefore a matter of great controversy.

[46] Colombian–Peruvian Asylum Case (Colombia v. Peru), supra note 6.

THE RIGHT TO GRANT ASYLUM

When discussing the right to grant asylum, the notion inevitably leads to the concept of territorial asylum. The right of a state to grant asylum is well established in international law deriving from the principle of sovereignty assuring the state to have an absolute control over its territory and thus over its population.[47] In this regard, territorial asylum is regarded as a general principle of international law and several international instruments verify such claim. For instance, the Universal Declaration on Human Rights (UDHR) confirms this is in Article 14 (1); "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

Furthermore, the UN General Assembly further recognized this in the 1967 Declaration of Territorial Asylum[48] stating in Article 1 (1); "Asylum granted by a State, in the exercise of its sovereignty…shall be respected by all other States" and include in Article 1(3) that "it shall rest with the State granting asylum to evaluate the grounds for the grant of asylum." Accordingly, the right to grant asylum is only conditional to extradition treaties and other overruling principles of international law.[49]

[47] Boed R., *The State of the Right of Asylum in International Law*, Duke Journal of Comparative & International Law, 1-33, at 3 (1994).
[48] UN General Assembly, *Declaration on Territorial Asylum*, , A/RES/2312(XXII) (Dec. 14 1967).
[49] Heijer, *supra* note 4.

DIPLOMATIC ASYLUM AND SOVEREIGNTY

Territorial asylum can be argued to stem from the principle of territorial sovereignty granting the state a right to either grant asylum or extradite an individual from its territory.[50] Ex-territoriality is considered to derogate from the sovereignty of the state where asylum is sought. In this respect, even though inviolability of diplomatic premises holds in international law, when the receiving state does not recognize the grant of diplomatic asylum given by sending state the derogation of sovereignty is a fact. The act of granting exterritorial asylum has therefore been expressed by the ICJ in the Asylum case as following;

"In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case"[51]

This suggests that the territorial state where the grant is made is not bound by the decision of the sending state due to its sovereign rights. It does however imply that if the territorial state does not object to such grant, the grant is legal. On the other hand, if the territorial state opposes the grant, it is viewed as derogation from sovereignty. Furthermore, it is noted that if the receiving state disagrees and demands the sending state to hand over the refugee, the grant is viewed as unlawful under international law.[52] As pointed out by the ICJ in the Asylum case; "The safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals".[53] Yet, there are other factors to take into consideration such as the grant of diplomatic asylum as being subject to the idea of humanitarian grounds.

[50] *Ibid*.
[51] Ibid.
[52] Colombian–Peruvian Asylum Case (Colombia v. Peru), *supra* note 6, at 274.
[53] *Ibid*, at 119.

DIPLOMATIC ASYLUM ON HUMANITARIAN GROUNDS

Basing diplomatic asylum on humanitarian grounds has in some cases been accepted as a legitimate cause for granting asylum to a fugitive in an embassy. It has also been argued that under general international law the institution of diplomatic asylum can be considered as praxis of humanitarianism instead of as a legal right. It has further been noted that the practice commonly is applied during time of war and conflict, where the life of the individual is under immediate danger.[54] This has been accepted by many states provided that the individual seeking asylum is facing an immediate danger such as death or when a state fails to provide security for example in case of mob violence.[55] Furthermore, this practice has been observed by the United States and European states; offering temporary refuge in exceptional circumstances of humanitarian reasons in their embassies which under normal conditions would be highly opposed.[56] In addition, it was stated by the ICJ in the Asylum case that "asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population"[57], however, the ICJ also observed the implications of such action as a risk of being viewed as an intervention in the local affairs of receiving state.[58] Heijer links the passage below from the Asylum case in relation to the justification of humanitarian providing a basis for the grant of diplomatic asylum;

"In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents."[59]

[54] Roberts I., *Satow's Diplomatic Practice*, New York: Oxford University Press, at 110 (2009).
[55] Sinha, *supra* note 13.
[56] Roberts, *supra* note 54, at 110.
[57] Colombian–Peruvian Asylum Case (Colombia v. Peru), *supra* note 6, at 282-284.
[58] Zimmerman, *supra* note 42, at 1430.
[59] Heijer, *supra* note 4.

Nonetheless, it is further noted that such statement should be considered carefully as it might be taken out of context. As the extract suggests, ICJ would then agree with that asylum may be granted on "manifestly extra-legal character" even if it is in conflict with the objection of the territorial state. However, it is observed that the ICJ when making this statement reflected on the 1928 Havana Convention on Asylum and the issue of defining a political offender. It thus concluded that the aim of Article 2 (2) of the Convention was "to exclude protection against the regular application of the laws and ordinary prosecutions of the receiving state"; hence, a general application of such statement is uncertain.[60]

VIENNA CONVENTIONS ON DIPLOMATIC AND CONSULAR RELATIONS

With regard to the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Conventions on Consular Relations (VCCR) there are inadequate references to diplomatic asylum. In the preparation of the Conventions the issue was discussed as it was brought up by Columbia in an attempt to include "right of asylum" as topic in the draft resolution.[61] In 1949, International Law Committee (ILC) had selected "Diplomatic intercourse and immunities" as one of its topic to be considered codified in international law. ILC did not see the need to deal with it immediately and the topic had not been selected as a priority topic. However, during the discussions in the seventh session of the General Assembly (GA) the topic of "Diplomatic intercourse and immunities" was recommended by its Sixth Committee to be considered as a priority topic.

Although the International Law Commission had sought to review attempts of codifying diplomatic privileges and immunities in international law it had not seen the topic to be an acute matter to deal with. In relation to the matter on diplomatic intercourse it was thus raised by Columbia to consider diplomatic asylum as it was considered to be "manifestly connected with diplomatic immunities".[62] Brazil supported Colombia in its attempt to give attention to the matter as it was certain that ILC would consider it as a

[60] Heijer, supra note 4, at 411.
[61] Brandon M., *Diplomatic Intercourse and Immunities as a Priority Topic for Codification by the International Law Commission*, International and Comparative Law Quarterly Vol. 2, at 261 (1953).
[62] *Ibid.*

part of diplomatic intercourse and immunities.[63] However, not many states considered diplomatic asylum to relate to the aforementioned topic as an integral part but rather understood is it as two separate subjects to manage. As a result the proposal put forward by Colombia was eventually defeated by 24 votes to 17, with 10 abstentions.[64] Nevertheless, in the commentary of Article 40 in the ILC draft resolution on "Diplomatic intercourse and immunities", it was as a result noted that asylum would not be dealt with in the draft but ILC still emphasizes that treaties conducted between states are valid.[65]

In 1974, Australia requested to include the topic of "Diplomatic asylum" in the agenda of the twenty-ninth session of the General Assembly. Through the Sixth Committee, the GA adopted the resolution 3321 (XXIX) on the "Question of Diplomatic Asylum". 25 states forwarded their view on this issue, however, the Secretary-General concluded in his report[66] that only seven states considered an international convention on the subject of diplomatic asylum to be advisable. Even though by the resolution 3497 (XXX) of December 15, 1975; the General Assembly decided to discuss the issue at a later session, which on the other hand, never occurred. The comment by the ILC in previous dealings with the topic on diplomatic asylum was also taken into account; the fact that it was not necessary for the ILC to consider the topic due to the lack of interest amongst the member states.

As previously mentioned, the Vienna Conventions on Diplomatic and Consular Relations does not per se encompass any articles directly referring to diplomatic asylum. As previously depicted both the ILC and UN General Assembly did not see any reason for diplomatic asylum to be included as a function or similar of diplomatic missions. Especially considering the views of several member states considered in the Secretary-General report.[67] Moreover, a provision regarding diplomatic asylum was intentionally supposed to be part of both Conventions, however, they were disregarded by the General

[63] See U.N.Doc. A/C.6/SR.315
[64] Brandon, *supra* note 61, at 262.
[65] *Draft Articles on Diplomatic Intercourse and Immunities*, Yearbook of the International Law Commission Vol. II, 89-105, at 104 (1958).
[66] UN General Assembly, *Question of Diplomatic Asylum*, Report of the Secretary-General, A/10139 (Part I), available at: http://www.refworld.org/docid/3ae68bee0.html (Sep. 2 1975).
[67] *Ibid.*

Assembly grounded on the argument that the topic of asylum was not intended to be included at all.[68] However, a reference is made in relation to diplomatic asylum, although not explicitly, in Article 41 (3) VCDR and Article 5 (m) VCCR. The latter, Article 5(m) in VCCR was added later as there was no such provision in the VCCR previously.

In Article 41 (3) in the VCDR, an indication is made on behalf of the states practicing diplomatic asylum, in particular Latin American states. Article 41 (3) states that;

"The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State."

The reference to "special agreements" suggests that diplomatic asylum as a function of the diplomatic missions is permitted on the condition that both state parties agree on such understanding.[69] Denza, notes that the sections "other rules of general international law" and "special agreements in force between the sending and receiving states" was aimed to deal with diplomatic asylum at diplomatic premises. Thus, the Article 41 stating that "premises of the mission must not be used in any manner incompatible with the functions of the mission" subsequently could be waived in the situation where diplomatic asylum is legitimate under international law.[70] Article 5 (m) VCCR states;

"Performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State."

Heijer notes that the provision can be considered not only to allow agreements on consular asylum but also accepting asylum as a consular function as long as it does not

[68] Heijer, *supra* note 4.
[69] James M., & Langley H., *Modern Diplomatic Law*, Manchester: Manchester University Press, at 43 (1968).
[70] Denza E., *Diplomatic Law*, Commentary on the Vienna Convention on Diplomatic Relations, Oxford: Oxford University Press, at 471 (2008).

conflict with the local law or go against the demand of the receiving state; that is, that the grant of asylum is accepted by receiving and sending state.[71] Nonetheless, the grant of asylum at diplomatic or consular premises without any "special agreements" can be seen as a violation of Article 41 (3) VCDR or 55 (2) VCCR. These articles recognize that any activity performed on the premises that are viewed as incompatible with the functions of diplomatic missions or incompatible in such manner that it violates with the laws of the receiving state are prohibited. Thus, the abovementioned articles may therefore prohibit asylum if receiving state find the activity incompatible in the realm of the Conventions. Furthermore, the refusal of sending state to hand over the refugee might be regarded as abuse of diplomatic privileges and immunities. On the other hand, the sending state enjoys the protection from the receiving state entering the premises laid down in Article 22 (1) VCDR and Article 31 (2) VCCR. The former article states;

"The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."

This clause clearly states that the receiving state may not under any circumstances enter the premises without the consent of the head of the mission. Hence, if the sending state grants asylum on its premises, the receiving state has no right to enter the building and cannot turn to other sources to amend such right. The inviolability of diplomatic premises is therefore a compelling instrument for the sending state when receiving state does not approve of the grant of asylum. In regards to Article 31 (2) VCCR, the clause is more specific when it states that;

"The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action."

[71] *supra* note 4.

When considering the article in comparison to Article 22 (1), it is evident it is more constrained and does not allow for the absolute inviolability stated in VCDR. It states that the receiving state does not have the liberty to enter the "consular premises which is used exclusively for the purpose of the work of the consular post", implying that the receiving state does retain the right to enter the premises if there is suspicion that the building is used for other means that are outside the functions of the consular mission.[72]

Nonetheless, Heijer concludes that there is a possibility for the receiving state to enter diplomatic premises when considering the general principles of treaty law. If the grant of asylum obstructs the laws of the territorial state, it is viewed to be a fundamental breach of the VCDR and VCCR; hence, the receiving state is no longer obligated to fulfill the obligations set out in the Conventions in relation to the sending state. The receiving state would thus be able to enter the premises without breaching international law.[73] However, in the Tehran Hostages case[74] ICJ states;

"The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."[75]

The statement makes clear that abuse of immunities and privileges can be expected as diplomatic law is viewed as an independent institution and the ICJ further proposes two means to at disposal to counter such abuse. The first which is considered is declaring the mission, whether diplomatic or consular, *persona non grata*, hence the grant of asylum is subsequently ended.[76] However, the state has to consider that the diplomatic relations with state in question will be broken off, resulting in severe tension between the two states. Heijer mentioned a third option, that is; if the premise is used solely for the purpose to protect refugees, the receiving state can withdraw diplomatic status from the

[72] *supra* note 4.
[73] *Ibid.*
[74] ICJ 24 May 1980, United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980.
[75] *Ibid.*
[76] *supra* note 4.

premises in question. In regards to Article 1 (i) VCDR, if the building is used primarily for sheltering refugees, the building cannot be considered as "premises of the mission" as stated in the Article.[77]

INTERNATIONAL HUMAN RIGHTS LAW

When viewing other possible treaties that could hold as a basis for the individual seeking asylum in an embassy of a sending state, it is difficult to enforce such claim. Considering human rights law, the grant would be based on the violation of the individual's human rights, however, the difficulty is to assure the right to seek asylum of an individual. Violations of human rights according to international human rights law rests on, for example, whether the individual is in danger of being tortured or doubts of the individual receiving a fair trial.[78] Furthermore, the sending state has to consider whether the human rights violations committed in the receiving state are specified in international human rights law, and if so, consider if it holds a right to interfere.[79]

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR) states in Article 14, paragraph 1; "everyone has the right to seek and to enjoy in other countries asylum from persecution", however, this is viewed as applicable in the context to territorial asylum making it problematic to argue for it in exterritorial circumstances. In fact, in the process of drafting the UDHR, Bolivia and Uruguay recommended Article 14 to include asylum in diplomatic premises. This was not supported and ultimately withdrawn and the Russian delegate observed that such amendment would imply interference in domestic affairs and understood as "misuse of the principle of extra-territoriality". Another issue related to Article 14 is the intent of the clause as it does not presume any moral or legal obligation to grant asylum and is rather designed to confirm the respect of the practice.[80] On the other hand, it has been argued that the Article assures the individual of its procedural

[77] *Id.*
[78] Riveles S., *Diplomatic Asylum as a Human Right: The Case of the Durban Six*, Human Rights Quarterly, Vol. 11, 139-159, at 152 (1989).
[79] *Ibid*, at 153.
[80] Rossitto, *supra* note 36, at 127.

right and the processes linked to the right to seek asylum.[81] Initially, Article 14 in UDHR had been formulated as "everyone had the right to seek and be granted, in other countries asylum from persecution".[82] However, hesitation from the British Delegation was raised as it was argued that Article 14 could possibly "lead to persecution by encouraging State to take action against an undesirable minority and then to invite it to make use of the right of asylum".[83] Subsequently, Saudi Arabia suggested the removal of "be granted" and after extensive discussion Article 14 was altered.[84]

The nature of UDHR is that it is essentially a declaration that is not legally binding; however, several rights listed in the declaration have been laid out in conventions that are binding upon the contracting state. Another issue posed in relation to diplomatic asylum is the nature of the Declaration and other general human rights treaties, as they do consider everyone to be entitled to protection; even those who have committed serious crimes that are excluded in relation to political offenses.[85] Moreover, Article 14 can also be seen in the 1951 Refugee Convention, in particular Article 33 concerning non-refoulement, adding certain legal substance to the procedural right in Article 14, however, only in cases that concerns individuals falling within the scope of the Refugee Convention.[86] Nonetheless a similar problem arises as with 1951 Refugee Convention when distinguishing territorial asylum and diplomatic asylum.

[81] Gammeltoft-Hansen T. & Gammeltoft-Hansen H., *The Right to Seek – Revisited*, On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU, European Journal of Migration and Law, Vol. 10, 439-459, at 441(2008).
[82] Emphasis added
[83] García-Mora M. R., *The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights*, Virginia Law Review, Vol. 37, No. 7, 927-965, at 951 (1951).
[84] See, Official Records of the Third Session of the General Assembly, Part I, Third Committee, 331-344 (1948).
[85] Heijer, *supra* note 4, at 421.
[86] Gammeltoft-Hansen, *supra* note 81, at 441; Lambert, H., *Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue*, The International and Comparative Law Quarterly, Vol. 48, No. 3, 515-544, p. 522 (1999).

1951 REFUGEE CONVENTION

Individuals seeking refuge and are granted asylum within a foreign embassy are not covered fully by the definition of a 'refugee' provided in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (1951 Refugee Convention).

In contrast to territorial asylum when an individual is seeking asylum within the borders of a state, the state in question has, prima facie, a right to either accept the refugee or expel the refugee by extradition or deportation.

On the other hand, a state does not possess such a prima facie right when it is sheltering a fugitive within its embassies abroad. Instead it can only refer to the immunities it holds in relation to the diplomatic premises stated in the Vienna Conventions.[87]

Nonetheless, when considering the individuals seeking diplomatic asylum, the states in any case will more often accept the subjects who are political offenders, as previously stated.

The question is whether they have the right to enjoy refugee status. Considering Article 1 (A) (2);

"The term "refugee" shall apply to any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable to or, owing to such fear, unwilling to return to it."

Depending on what kind of crime the individual seeking asylum has committed, it cannot be within the ambit of Article 1 (F) which considers for instance war crimes, human rights violations, and non-political crimes to apply to the refugee.

[87] Zimmermann, *supra* note 42, at 1426.

Another issue that concerns the 1951 Refugee Convention in relation to diplomatic asylum is what nationality the individual have. As previously mentioned, it is not uncommon for individuals from third countries seeking diplomatic asylum, as in the case of Assange.

Nonetheless, what has to be considered with the 1951 Refugee Convention is that it was established on the ground of helping persons who have fled their own countries in the case they are not able to protect themselves from their own state.[88]

It is further noted by Heijer that "refugee definition accordingly stipulates that only persons outside their country of origin can be refugees and only if the country of origin fails in its protective duties."

[88] Heijer, *supra* note 4, at 420.

REGIONAL AGREEMENTS IN LATIN AMERICA

Although diplomatic asylum has not been recognized as a principle of international customary law and is lacking legitimacy in the context of international law, the regional development of the occurrence in Latin America did as opposed to in Europe flourish during the nineteenth century. However, what is problematical is the consistency of the practice in this region and the ICJ acknowledged in the Asylum case that the practice of diplomatic asylum in Latin America had been irregular and conflicting in relation to the rule of law.[89]

As already mentioned in this paper, the political instability that has been present in several Latin American countries has consequently led to nations frequently granting asylum to political offenders who are in need of a safe place.[90]

The basis for granting diplomatic asylum is linked to humanitarian reasons and is accepted when individuals face immediate danger, however, when the danger has passed the grant of asylum ceases. Considering the common use of the practice, five treaties were concluded on this topic and several through the Organization of American States (OAS), although not all Latin American states are part of them.

The most relevant treaties concluded that will be discussed in this part are; the 1928 Havana Convention on Asylum[91] Havana Convention), the 1933 Convention on Political Asylum[92] (the Montevideo Convention), and the 1954 Convention on Diplomatic Asylum at Caracas[93] (the Caracas Convention).

In regards to the Havana Convention, states are obliged to adhere to the grant of asylum at diplomatic premises when granted to political offenders. The grant can be made on

[89] Evans A. E., *The Columbian-Peruvian Asylum Case: The Practice of Diplomatic Asylum*, The American Political Science Review Vol. 46 , 142-157, at 151 (1952).
[90] Rossitto, *supra* note 36, at 115
[91] *Convention on Asylum*, (adopted 20 February 1928, entered into force 21 May 1929), available at: http://www.refworld.org/docid/3ae6b37923.html
[92] Organization of American States, *Convention on Political Asylum*, (adopted 26 December 1933, entered into force 28 March 1935), available at: http://www.refworld.org/docid/4f3d180a2.html
[93] Organization of American States, *Convention on Diplomatic Asylum*, (adopted 28 March 1954, entered into force 29 December 1954), OAS, Treaty Series, No. 18, available at: http://www.refworld.org/docid/3ae6b3823c.html

humanitarian grounds, state practice or based on the laws of the territorial state.[94] When a grant of asylum is concluded, the receiving state can only ask that the refugee leaves the territory immediately and the sending state then requests that the refugee is assured safe conduct when leaving the territory. Additionally, if receiving state does not require the refugee to leave the territory, the sending state does not hold the right to demand safe conduct.[95]

The Montevideo Convention refers to diplomatic asylum in relation to the receiving state and its legal commitments. It further clarifies matters that were unclear in the Havana Conventions, in particular the classification of a common criminal and the Convention obliges the sending state in Article 1 that the individual granted asylum at "legations, warships, military camps, or airships to those accused of common offenses" must be "surrendered as soon as requested by the local government."[96] Article 2 further provides that "the judgment of political delinquency concerns the State which offers asylum", implying that the sending state determines whether the offense is of political or criminal nature.

The Caracas Convention on the other hand specifically states in Article 2 that "every state has the right to grant asylum", however not the obligation to grant asylum, and it is further more complete than the previous conventions in regards to agreements and state practice.

Moreover, the Convention further holds in Articles 1 and 3 that only political offenders have a right to diplomatic asylum. Similarly to the Montevideo Convention it holds in Article 4 that; "it shall rest with the State granting Asylum to determine the nature of the offense or the motives for the persecution".[97] This provision can be viewed as exceptional in international law considering the derogation of territorial sovereignty and such infringement is rarely accepted by sovereign states.

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[94] Värk R., *Diplomatic Asylum: Theory, Practice and the Case of Julian Assange*, Proceedings of the Estonian Academy of Security Sciences 11, 240-257, 246 (2012).
[95] *Id.*
[96] Convention on Political Asylum, *supra* note 92
[97] Convention on Diplomatic Asylum, *supra* note 93

The question of safe conduct typically surfaces as a problem when dealing with a refugee at diplomatic premises.

The Caracas Convention provides with another exceptional derogation of territorial sovereignty as it is stated that if an individual has been granted diplomatic asylum, it is the responsibility of the receiving state to grant safe conduct.[98]

What should be noted in relation to all of the above stated Conventions is that the grant of asylum should only be determined in urgent circumstances and the time of asylum should be restricted to when the individual is not in danger any longer.[99] As already stated in regards to the Caracas Convention, the state has a right but not an obligation to grant asylum and therefore has the right to refuse a request for asylum.

[98] Kleiner, *supra* note 8, at 174.
[99] Heijer, *supra* note 4, 406

CASE OF JULIAN ASSANGE

Julian Assange became well-known in the circles of international law when he entered the embassy of Ecuador in London, United Kingdom, in June 2012 to apply for diplomatic asylum. His intention was to avoid an extradition to Sweden seeing that there had been a European Arrest Warrant (EAW) issued in Assange's name. Assange is suspected to have committed sexual offences against two women in Sweden and therefore the Swedish Prosecution has issued a warrant in order to question him in relation to the allegations. However, it does not seem as Assange will leave the embassy for some time as both the British and Swedish authorities have not been able to reach a conclusion with the Ecuador nor Assange. As it was recently discovered, the whistleblower Edward Snowden leaked sensitive material on the matter of the national security of United States. The last few weeks, Snowden has applied for asylum in several different countries. However, his situation is a bit different considering that it does not seem as he is on diplomatic or consular premises and applying for diplomatic asylum. Moreover, the situation is also different because Snowden is an American citizen who also has been charged with espionage by the U.S. opposed to Assange who believes he has well-founded fear that the United States will come after him if he is extradited to Sweden. Furthermore, as Assange is an Australian citizen, it will be difficult for the U.S. government to charge him with espionage, which will be discussed briefly below.

In this chapter, Assange's claim to diplomatic asylum will be assessed on the basis of what has been considered in the previous chapters; especially in relation to the legality of such claim as well as the legitimacy of the grant of asylum. To begin with, the legal processes that have been involved in this case will be reviewed as this will reveal the positions of UK and Sweden on this matter. Moreover, by viewing the basis of Ecuador's claim to have a right to grant asylum will further broaden the context which this claim is stated in. As discussed in the section relating to the 1951 Refugee Convention, the international conventions set out will clarify whether Assange enjoys the rights that are considered within these conventions based on his fears of being persecuted. Furthermore, by viewing the cases presented in the previous chapters, a comparison will be made to see the similarities and possibly a future solution to a case that appears to be in a deadlock.

The ongoing legal tussle over the Wikileaks founder and Australian citizen, Julian Assange, is nearing its second anniversary, yet there appears to be no immediate prospect for a speedy resolution of his situation. Assange is currently residing in the Ecuadorian Embassy in London following Ecuador's decision on 16 August 2012 to grant him diplomatic (political) asylum. Assange claims that he remains in fear of being eventually extradited to the United States to face various charges associated with the publication by Wikileaks of US diplomatic cables.[100] There has been speculation that Assange may be subject to charges of espionage, which could carry the death penalty upon conviction. However to date there is nothing on the public record to suggest the US has commenced legal proceedings against Assange and his extradition to the US has not been sought. The US Ambassador to Australia has publicly stated that the US is not seeking Assange's extradition.[101]

ASSANGE VS. SWEDISH PROSECUTION AUTHORITY

Assange originally became embroiled in these current legal proceedings when the Swedish Prosecution Authority sought extradition via a European Arrest Warrant on 2 December 2010 at a time when Assange was resident in the UK. The warrant was issued not in relation to charges formally brought against Assange, but in relation to his further questioning in relation to matters that were alleged to have taken place in Stockholm in August 2010. The accusations related to sexual molestation in one case, and rape. Following the issue of the European Arrest Warrant, Assange was taken into custody in London but was soon released under strict conditions. This was followed by a protracted legal process involving a series of appeals against his extradition. Ultimately, the UK Supreme Court on 30 May 2012 dismissed Assange's appeal against his extradition in a finding that upheld the legitimacy of the Swedish European Arrest Warrant, and Britain's obligations under European and international law to extradite Assange.[102] further attempt

[100] Michael Ratner, *Julian Assange is right to fear US extradition*, The Guardian (2 August 2012) available at http://www.guardian.co.uk/commentisfree/2012/aug/02/julian-assange-right-fear-prosecution
[101] Mark Baker, *US denies Assange 'secret warrant'*, The Sydney Morning Herald (1 June 2012) available at http://www.smh.com.au/opinion/political-news/us-denies-assange-secret-warrant-20120531-1zkug.html
[102] Assange v The Swedish Prosecution Authority UKSC 22(2012) (Judgment given on 30 May 2012).

by Assange's legal team to overturn the Supreme Court's decision was dismissed on 14 June 2012.[103]

The Swedish Prosecution issued an arrest warrant for Assange in September 2010 and. Assange made an attempt to resist by first going to the Swedish Svea Court of Appeal and Supreme Court of Sweden. As the warrant was upheld by both instances, an application for extradition to the United Kingdom was made by the Swedish authorities since Assange by then had resided in London for some two months. Sweden then issued an EAW and the warrant set out four offences that Assange was accused of; unlawful coercion, two cases of sexual molestation and rape. Assange appealed to the High Court of the United Kingdom; however, they upheld the extradition warrant and when Assange finally went to the Supreme Court, the appeal was dismissed. The argument put forward by Assange to the High Court was that the EAW was not valid as it had not been issued by a "judicial authority" according the UK's 2003 Extradition Act. However, the majority of the judges found the Extradition Act as ambiguous and eventually the EAW was ruled to be upheld. As Assange no longer could escape the extradition, he instead went to the embassy of Ecuador 19 June 2012 where he was granted temporary refuge until August 16 when Ecuador decided to grant Assange political asylum.[104]

That Ecuador granted Assange asylum was not well-received by the UK nor the Swedish authorities. The Swedish government issued an official statement at the time Ecuador granted Assange's request for asylum stating that Ecuador is preventing "the Swedish judicial process and European judicial cooperation from taking its course."[105] The British authorities responded with placing police around-the-clock in case Assange made an attempt to leave the premises. This has caused large amount of costs for the police and has in turn caused reactions from the local community as it has been revealed that the

[103] Julian Assange v Swedish Prosecution Authority (14 June 2012) available at http://www.supremecourt.gov.uk/news/julian-assange-vswedish- prosecution-authority.html

[104] *Chronology - Events concerning Julian Assange in chronological order* From Åklagarmyndigheten: http://www.aklagare.se/In-English/Media/The-Assange-Matter/The-Assange-Matter/ (2012).

[105] Jörle, A. (2012, August 20). *On the Julian Assange case*. From Sveriges Utrikesdepartement: http://blogg.ud.se/blog/2012/08/18/on-the-julian-assange-case/

period from June 2012 to May 2013 amounted to £3.8m.[106] Tensions have strained the relations between UK and Ecuador as they have different positions. For instance has Ecuador accused UK for violating Assange's human rights for not granting him safe conduct from the territory?[107] Ecuador's Foreign Minister Ricardo Patino has further accused UK to violate the human rights by not allowing Assange to be out in the sun. On the other hand, UK cannot see any solution as Ecuador maintains its position that Assange is still entitled asylum since the situation has not changed. The diplomatic standoff has still not ended and there has not been any progress in finding a viable solution.[108] However, as will be discussed below is what options the parties have under international law and whether there can be a diplomatic settlement on this issue.

ECUADOR AND THE RIGHT TO GRANT ASYLUM

Assange entered the Ecuador embassy in June 2012 and requested asylum. The embassy stated then on the website for the embassy in London that Ecuador had an obligation as a signatory to the UDHR to review the asylum application. The question whether Ecuador has right to grant diplomatic asylum is a subject that is often debated and has been debated in other cases prior to this. However, in order to determine such right it is important to consider existing treaties and findings in previous cases. As determined by the ICJ in the Asylum case, a distinction must be made between diplomatic asylum and territorial asylum seeing that diplomatic asylum opposed to territorial asylum "withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State."[109] Further it states that; "such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."[110] This implies that the territorial right, that the sovereign state holds, must be distinguished from the rights held by the sending state.

[106] Siddique, H. (2013, July 15). *Julian Assange stakeout at Ecuadorean embassy costs Met police £3.8m*. From The Guardian: http://www.guardian.co.uk/media/2013/jul/10/julian-assange-ecuadorian-embassy-police-cost
[107] Valencia, A. (2013, May 28). *Ecuador says UK violating human rights of WikiLeaks' Assange*. From Reuters
[108] Pitas, C., & Addison, S. (2013, June 17). *UK says 'no progress' in Assange talks with Ecuador*. From Reuters.
[109] Colombian–Peruvian Asylum Case (Colombia v. Peru), *supra* note 6, at 274.
[110] *Ibid.*

In the case of Ecuador such derogation is evident considering that UK has not recognized the right of Ecuador to shelter Assange from the local authority and UK's decision to extradite him. In the statement made by Ecuador announcing the grant of diplomatic asylum to Assange, it is claimed that Assange is facing political persecution by the U.S. and it is also suggested that in the case of Assange the extradition to U.S. could lead after a sentence to death penalty.[111] It states as a reason for granting asylum on basis that Assange could face death penalty and if not could possibly be facing human rights violations.

Another aspect to consider is the Conventions in Latin America that Ecuador adheres to, namely; the Havana Convention, Montevideo Convention and the Caracas Convention. As already considered in previous chapter is that these Conventions state that diplomatic asylum may only be granted in circumstances where the individual is in immediate danger and subsequently terminate the grant when such danger is no longer valid. Furthermore are political offenders considered and common criminals are not eligible for such grant, and in the case of Assange this might be ambiguous. Considering that there is an EAW issued that comprise serious allegations of sexual molestation, he must be considered as a criminal in this sense, consequently not eligible for diplomatic grant. In the Asylum case it was concluded by the ICJ that Haya de la Torre, even though he might be considered as a political offender, that he could not use asylum as a mean to avoid the Peruvian laws. In the Assange case similar tendencies can be noted as he is avoiding an extradition to a state where he is accused of serious allegations.

The UK foreign secretary Hague stated that UK has no obligation to recognize the grant of diplomatic asylum considering that UK is not part of any international instruments that oversees the practice of diplomatic asylum. In relation to VCDR and VCCR, the reference on "special agreements" that is made, that allows Latin American countries to follow the practice of diplomatic asylum concerns only states that have entered an agreement with each other. Hence, as it is only Ecuador that is a party of such treaties,

[111] *Statement of the Government of the Republic of Ecuador on the Asylum Request of Julian Assange*. (2012, August 16). From Embassy of Ecuador, London: http://www.ecuadorembassyuk.org.uk/news/text-of-statement-of-ricardo-patino-foreign-minister-of-ecuador-on-julian-assange%C2%B4s-asylum-application

UK has not obligation towards Ecuador. Moreover, what has been considered in relation to the chapter on the historical development of diplomatic asylum; it can be acknowledged that the institution of diplomatic asylum has lost any legitimacy it once possessed in international law and therefore lacks the recognition and common practice that is required to be considered part of customary international law.

Ecuador has further claimed to base the grant of asylum on humanitarian grounds.[112] As already discussed, outside Latin America, the practice of diplomatic asylum is highly disregarded. However, the only exception when it is considered somewhat acceptable is to base the grant on humanitarian grounds. States, including United States, Germany and France has granted temporary refuge at diplomatic premises when individuals have been in immediate danger.[113] Nevertheless, it is questioned whether humanitarian grounds can be considered as a legitimate reason for the state granting asylum, to not hand over the refugee to the territorial state.[114] Heijer has concluded that states might favor diplomatic asylum as an alternative, considering the fact that several states today has the option to grant temporary refuge when individuals are perceived to be in circumstances that threatens their life.[115] Furthermore, what has been stated in previous section is that the practice of diplomatic asylum should be viewed as an instrument of humanitarianism rather as a legal right. Moreover, the ICJ stated in the Asylum case that "asylum may be granted on humanitarian grounds in order to protect political offender" even though this needs to be considered within the context it was stated, bearing in mind that in Latin America guiding principles do exist. The main issue however, is the conflict it creates in relation to territorial sovereignty. If diplomatic asylum is accepted as a humanitarian instrument to interfere in domestic affairs, the issue what such grounds is based on surface. If there are no principles guiding such an exception, it will be difficult for states to agree on what constitutes humanitarian reasons.[116] In the case of Ecuador this is

[112] Park, E.-J. (2013, June 26). *Ecuadorian foreign minister talks about Assange*, Snowden. From Korea Joongang Daily: http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=2973661
[113] Satow, E. (1917). *A Guide to Diplomatic Practice*. Cambridge: Cambridge University Press, at 297.
[114] Heijer, *supra* note 4, at 409.
[115] *Ibid.*
[116] *Ibid*., at 411.

evident as it is considered that grant of asylum is based on humanitarian grounds, however, this is not accepted by UK or Sweden.

UK AND ITS RIGHT TO TERMINATE ECUADOR'S GRANT

Even though UK does not recognize diplomatic asylum, especially not in the case of Assange, Ecuador still has the possibility to refuse the surrender of Assange to the British authorities. Ecuador derives such possibility from Article 22 (1) under the VDDR that explicitly prohibits the receiving state to enter premises without the permission of the head of mission. This makes it almost impossible for UK to enter the building with the intention to arrest Assange and extradite him to Sweden. If on the other hand, Assange would have resided at a consular premise, it would be less difficult for UK to enter the building as Article 22 (1) VCCR is more specific and only prohibits the receiving state to enter where the actual consular work is performed. However, UK did threaten Ecuador to enter the premises days before the asylum was granted by the President of Ecuador. According to the President, Ecuador received a written threat that UK could assault the embassy if Assange was not handed over.[117] Ecuador published the, what was perceived by them as, threat;

"You need to be aware that there is a legal base in U.K., the Diplomatic and Consular Premises Act 1987 that would allow us to take actions in order to arrest Mr. Assange in the current premises of the embassy. We sincerely hope that we do not reach that point, but if you are not capable of resolving this matter of Mr. Assange's presence in your premises, this is an open option for us."[118]

UK on the other hand stated that the letter was intended to clarify British regulations; specifically the Diplomatic and Consular Premises Act that was ratified in 1987. The Act stipulates that diplomatic or consular premises will be terminated in case "a State ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post; or (b) the Secretary of State withdraws his acceptance or consent in relation to the

[117] Solano, G. (2012, August 15). *Assange Embassy Controversy*: Britain Threatens To Raid Ecuador's Embassy Over Asylum Issue. From Huffington Post: http://www.huffingtonpost.com/2012/08/15/assange-embassy-ecuador-britain_n_1786104.html
[118] Heijer, *supra* note 4, at 415.

land."[119] Nonetheless, UK withdrew its threat quickly. It should however be considered whether UK indeed holds the right to enter building in this particularly case in relation to the Act. In view of the fact that the premise is at the same time used for diplomatic purposes constituting within the diplomatic functions, the legation would still be protected by Article 22 VCDR. Therefore it cannot be understood as that the Ecuador embassy had ceased its diplomatic functions by allowing Assange to reside there and hence such conclusion would not be acknowledged in international law.[120] Furthermore, Article 41 (3) VCDR prohibits the diplomatic premises to be used for activities that do not fall within the diplomatic functions. However, even if such abuse is occurring, there is nothing stated in the VCDR that the inviolability is terminated.[121]

As identified in the previous chapter, UK could in accordance with the options mentioned by the ICJ in the Tehran Hostages case; to declare the diplomatic staff persona non grata and break off diplomatic relations with Ecuador. Nonetheless, Article 45 (a) VCDR could be interpreted as that although diplomatic relation ceases, the inviolability of the premises including staff still holds until sending state confirms that mission is closed.[122] ICJ also identified in this case that "the rules of diplomatic and consular law constitutes a self-contained regime which foresees the possible abuse of diplomatic privileges."[123] Thus, such action would be very drastic especially taken into consideration that it is only one refugee Ecuador holds within its premises. The consequences are likely to be more severe than negotiating to reach a solution.

[119] Diplomatic and Consular Premises Act, 1987 (U.K.), c. 46, § 1(3) (U.K.).
[120] Duxbury, A. (2012). *Assange and the Law of Diplomatic Relations*. ASIL Insights, Vol. 16, available at: http://www.asil.org/insights121011.cfm.
[121] Heijer, *supra* note 4, at 415.
[122] *Ibid*, at 415.
[123] *Ibid*., at 414.

ASSANGE AND HIS CLAIM IN INTERNATIONAL LAW

Julian Assange is an Australian citizen and founder of the controversial whistleblower organization Wikileaks. Since 2006 the organization states to have "sought to expose corrupt and oppressive regimes throughout the world", and Wikileaks has been both praised and criticized for this.[124] However, what Wikileaks always will be recognized for are the numerous classified documents, including the Afghanistan and Iraq "War Logs" and the diplomatic cables that were stolen from the U.S. government and released worldwide. Considering that Assange is the front figure of the organization, he has believed to be the most wanted by the U.S. government and believes to have a well-founded fear of being persecuted.

When Assange applied for asylum at the embassy of Ecuador, he "based his petition on the fear of an eventual political persecution of which he may be a victim in a third State, which can use his extradition to the Swedish Kingdom to obtain in turn the ulterior extradition to such country."[125] The third state being the United States however, the fear concerns also to be surrendered by the British and Australian authorities.[126] Assange has also suggested when requesting for asylum that the U.S. Department of Justice has prepared a sealed indictment against him, which possibly conceals a formal request for extraditing Assange, this was again claimed earlier this year.[127] When Ecuador released its statement 16 August 2013 declaring to have granted Assange asylum, they stated some 15 international instruments that endorse their grant of asylum as several instruments oblige the state to provide or asylum to individuals who are persecuted for political reasons.

Not to take into consideration all the conventions and declarations that were mention, nonetheless, in regards to Assange it is interesting to look at the UDHR and the 1951 Refugee Convention. Both of these documents assume the relation with territorial

[124] Fenster, M. (2012). *Disclosure's Effects: WikiLeaks and Transparency*. Iowa Law Review.
[125] Ibid.
[126] Heijer, *supra* note 4, at 418.
[127] Grim, R. (2013, May 6). *Julian Assange Attorney Says Sealed Indictment 'More Likely Than Not'*. From Huffington Post: http://www.huffingtonpost.com/2013/06/05/julian-assange-attorney-indictment_n_3386793.html

asylum; hence the difficulty to distinguish a right in international appears. Nonetheless, as Article 14 UDHR provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution", it can be viewed from a universal perspective and thus granting the right for Assange to seek asylum. However, as discussed earlier, there is no inherent right for the individual to be granted asylum; implying that an individual enjoys the right to seek asylum but the state holds the definitive judgment whether the individual will be granted asylum. The exterritorial character of the asylum holds that the individual will not find in contemporary international law the right to be granted asylum.[128]

When taking into consideration the 1951 Refugee Convention and the right of Assange to enjoy the rights specified in the Convention. Moreover, Ecuador claimed that United Kingdom had an obligation under the Convention to respect the decision made by Ecuador to grant asylum. Thus, claiming United Kingdom to be required to allow Assange safe conduct out of the country.[129] The problem in the Assange case is that since he has been suspected of serious sexual allegations, it is difficult to see that the Refugee Convention would then accept Assange as a refugee with a well-founded fear of being persecuted. Article 1 (A) (2) of the Refugee Convention defines refugee as, amongst others, being persecuted for political reasons. However, the difficulty can especially be drawn from Article 1 (F) (b) that anyone who has committed a serious non-political crime is purposely excluded to enjoy the rights of the Convention. Therefore, as there is a warrant issued, it is not likely that Assange can rely on the Refugee Convention. Another issue that needs to be addressed is the fact that the Refugee Convention relates to individuals who seek protection from their own state, however, in the case of Assange, he is not as such fleeing from Australia.[130]

Moreover, in the case of Assange, it has further caused uncertainty on his status considering that he as an Australian citizen has sought refuge in the embassy of Ecuador in UK. This is however not uncommon and there are previous cases that has handled

[128] Heijer, *supra* note 4, 419.
[129] *Ibid*., at 420.
[130] *Ibid.*

asylum requests concerning individuals that are not citizens of the territorial state. The Japanese Consulate in Shenyang, China, had a North Korean family of five who entered their premises in 2002. However, the family was not able to move very far as the Chinese military police detained the individuals when entering the premises and thus violating the inviolability of the consulate. The Japanese government insisted on the release of the family on basis of violation by the military police, yet the Chinese government claimed the police had been invited to enter the premises. Nevertheless, the Chinese government permitted the North Korean family to leave China after two weeks and the reasoning behind this is ascribes as an approach to discharge tensions that had occurred with Japan in connection the case.[131] This case further demonstrates the difficulties when the territorial state enters without being clearly approved by the sending state. As previously discussed, UK stated that under the Diplomatic and Consular Act of 1987, it had a right to enter the premises of Ecuador if it deemed it necessary. However, this would most likely result in severe consequences for UK in terms of the relations with Ecuador.

What had up until this point been a fairly typical extradition matter, albeit one involving a high profile individual, took a spectacular turn on 19June when Assange walked into the Ecuadorian Embassy in London and sought diplomatic asylum.[132] Eventually, after nearly two months of deliberation, Ecuador announced on 16 August that Assange would be granted diplomatic asylum.[133] However, this has not been the end of the matter as the UK has indicated that it does not recognize Ecuador's granting of asylum. The result is that if Assange were to leave the protection of the Ecuadorian Embassy he is liable to arrest and extradition to Sweden. The London Metropolitan Police remain outside the Ecuadorian Embassy in London ready to arrest Assange if he were to leave.

Ecuador's decision to grant Assange diplomatic asylum resulted in speculation as to whether Assange will eventually be able to find his way from London to Ecuador. This speculation has arisen because Assange is now effectively under Ecuador's protection, and just as in the case of persons who are granted asylum because their claims to refugee

[131] Kleiner, *supra* note 8, at 171.
[132] Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 150
[133] 500 United Nations Treaty Series 95

status are recognized under the Refugee Convention,[134] there is something of an expectation that Ecuador will seek to transfer him to its territory. However, there is every indication that Assange will remain in the Ecuadorian Embassy for many months until such time as some resolution is reached over his situation.

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Provided Assange remains in the Ecuadorian Embassy, he enjoys certain protections under international law. The 1961 Vienna Convention on Diplomatic Relations[135] provides under Article 22 that diplomatic premises such as an embassy are 'inviolable'. As such, the embassy cannot be entered by the British authorities, including the Metropolitan Police, without consent. The inviolability of embassies is one of the central bases upon which diplomatic relations is conducted and host governments – that is those states which host foreign embassies within their territory – which have ignored this international law obligation have been held accountable by the International Court of Justice.[136]

As the Assange matter reached a pivotal point in mid-August, Ecuador revealed that Britain had threatened to rely upon its Diplomatic and Consular Premises Act 1987 and revoke the Ecuadorian Embassy's diplomatic protection so as to enter and seize Assange.[137] This threat was extraordinary and without modern precedence and it was unsurprising that the Ecuadorian Government responded with such fury to Britain's theat. That Britain made such a threat shows how seriously the Assange affair is being considered and its potential to have much broader ramifications for international relations.

[134] United States Diplomatic and Consular Staff in Tehran Case (United States v Iran) ICJ Reports 3 (1980)
[135] Embassy of Ecuador (London), "*Ecuador Shock at Threats from British Government*" (August 15, 2012) available at http://www.ecuadorembassyuk.org.uk/news/ecuador-shock-at-threats-from-british-government
[136] "*Julian Assange: Hague says Britain is obliged to extradite Wikileaks founder*" The Guardian (27 September 2012) available at http://www.guardian.co.uk/media/2012/sep/27/assange-hague-ecuador-extradition-legal
[137] *Supra* note 6.

INTRENATIONAL LAW AND ASYLUM

British Foreign Secretary William Hague has now downplayed any suggestion that the Ecuadorian Embassy will be raided, and emphasized Britain will act consistently with international law. Nevertheless, Hague and the British government have made it clear that they have a legal obligation to Sweden to extradite Assange and that they will continue to seek his arrest for breach of his bail conditions.[138] Assange is therefore not only a wanted man in Sweden, but he is also a fugitive in the United Kingdom and would be subject to arrest as soon as he was to leave the Ecuadorian Embassy. This is an important point, and goes to the heart as to why Britain has also indicated that it does not respect Ecuador's decision. While international law and diplomatic practice acknowledges the right of a state to grant asylum on political grounds, asylum claims for fugitives seeking to flee the police or court proceedings are much less well accepted. The International Court of Justice has previously stated in its 1950 decision in the Asylum case involving Colombia and Peru that:

In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can only occur if, in the guise of justice, arbitrary action is substituted for the rule of law.[139]

While there has been a tendency amongst Latin American countries to grant asylum in these cases, this has not been the practice in the West and is a major point of legal distinction between Ecuador and Britain. Even if the Latin American practice was accepted more broadly, the International Court makes clear in the Asylum Case that granting asylum would only be acceptable in cases where the rule of law was not being applied. This is not the case with Assange, where he has had every opportunity to avail himself of the British legal system and contest his extradition before the highest court in the United Kingdom.

[138] ABC News "*Ecuador proposed Assange extradition alternative*" ABC News Online (22 September 2012) available at http://www.abc.net.au/news/
[139] Embassy of the United States (Budapest, Hungary) "*Personal Reminiscences about 1956 and Cardinal Mindszenty*" available at http://hungary.usembassy.gov/reminiscence.html.

ASSANGE'S LEAGL OPTIONS

What legal options then does Assange have to avoid extradition to Sweden? Ecuador has made clear that it would have no objection to the Swedish Prosecutor travelling to London to interview Assange. However, this proposal has been rejected on a number of occasions over the past two years. Recently, it has been suggested that Assange could be relocated from the Ecuadorian Embassy in London to its Embassy in Sweden, after which Assange could be questioned.[140] However this would require significant concessions on the part of both the UK and Sweden which at present appear unlikely.

Unless then there was a sudden change in position from either Britain or Sweden, there is every likelihood that this standoff will continue for some considerable time. Persons granted asylums have been known to live in Embassies for lengthy periods until their situation has been resolved. Cardinal Mindszenty enjoyed the diplomatic protection of the US Embassy in Budapest for 15 years; between 1956-1971-until the Pope was able to broker a resolution.[141] Notwithstanding denials by the US, these legal twists and turns including Assange's asylum claim continue to be assessed against whether ultimately the US will seek Assange's extradition. Ecuadorian President Rafael Correa indicated Assange was granted asylum because his extradition to a third country was not guaranteed.[142] Even if US extradition was sought, whether it be from Sweden, the UK or even Australia, a series of legal processes would need to be followed within which Assange would enjoy multiple legal protections. These include the extradition exception of 'political offences', which would extend to espionage.[143] Extradition can also be blocked if a conviction could result in the death penalty.[144] Notwithstanding Assange's stated fear that his onward extradition from Sweden to the United States is inevitable, this is by no means the case.

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[140] "*Britain 'will not enter Ecuador embassy to seize Assange'*" The Guardian (August 26, 2012) available at http://www.guardian.co.uk/world/2012/aug/26/assange-ecuador-embassy-safe

[141] Torsten Stein "Extradition" Max Planck Encyclopedia of Public International Law,
Ibid.

[143] Agiza v Sweden, 24 May 2005, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003; HRC Communication No. 1416/2005: Sweden: CCPCR/C/88?D/1416/2005

[144] United States of American – Sweden Convention on Extradition 142 UNTS 7231; Article V of which includes an exception for a political offence, and Article VIII of which requires assurances the death penalty will not be applied.

Suggestions that an extra-judicial process would occur in which Assange was effectively rendered by Sweden to the US without reference to any legal process fail to take into account that for such an act to occur Sweden would be acting contrary to its own laws and international human rights obligations. Sweden has adopted extra-judicial processes in the past and critics point to its December 2001 summary expulsion and rendition to Egypt of Mohammed El Zari and Ahmed Agiza where they suffered torture. Both the United Nations Human Rights Committee and the Committee against Torture reviewed Sweden's conduct which was found to be in violation of international law. Nevertheless, any suggestion that Assange would be subject to onward extradition to the United States via a process under which his legal rights under Swedish law, including the Sweden-US Extradition Treaty, were effectively ignored, remains difficult to comprehend given the international profile the case of Julian Assange has attracted.

The Assange case has so far taken a number of unexpected turns. The only way forward to a settlement of the current standoff would appear to be a political solution. Yet, there is no immediate prospect of such a resolution occurring.

DISCUSSION

The following chapter will cover the various policies and rules developed to complement such existence of diplomatic asylum in the contemporary international law and assessing the legality of the diplomatic asylum granted to Julian Assange.

Seeing as diplomatic asylum has not been an important concept in the twentieth century it is still a controversial phenomenon that has persisted since states started with the practice to send permanent diplomatic missions to other states in the fifteenth century. Today diplomatic asylum is a present and a greatly controversial topic especially subsequent to the Assange case but an even more recent case comes to mind; the Snowden case. Even though the Snowden case has not been discussed in this thesis, it is still noteworthy that his situation together with Assange has gained much attention in media giving rise to the possibility that the institution of diplomatic asylum may be increasingly practiced in the future. With the intention to broaden the understanding of what role diplomatic asylum has today, this thesis has included a case study on Julian Assange and his situation. As already mentioned it is difficult to predict when Assange will be able to leave the embassy of Ecuador, nonetheless, the situation has caused severe tension particularly between the relations of Ecuador and UK. Looking at the issue of the Assange case there are several aspects to consider such as political expediency, recognition and legality of Assange residing in the embassy under international law as well as whether he will be granted safe conduct in order to leave UK territory.

In the last part of the thesis, a discussion will be based on the previous findings as well as there will be an attempt to answer the research questions and research problem. Beginning with the question; "How has the institution of diplomatic asylum persisted as a practice despite its ambiguous character?" There cannot be a direct answer to this question because the historical development of the institution of diplomatic asylum has presented itself to be somewhat complex. Starting as a frequently practiced custom in the fifteenth century along with the establishment of temporary diplomatic mission, it has during the last century developed to be a debatable notion. Nonetheless, one has to consider the intention of using such a controversial practice by states. In view of the fact

that the institution of asylum can be found as a part of the Christian practice already in 313 A.D., the idea of sheltering fugitives has for a long time been part human history. However, as the notion of sovereignty, developed into one of the fundamental elements of the nation-state, the idea of sheltering fugitives still persisted but the new sanctuary became the state and as well as diplomatic missions abroad turned into sanctuaries. It is on the other hand evident why diplomatic asylum became disliked; indeed the abuse of the diplomatic privileges was widespread and for instance sheltering fugitives for money was not uncommon.

Even if the majority of states do not recognize the practice of diplomatic asylum, it is on the contrary evidently practiced under another concept; "temporary refuge". The U.S., though denying the institution of diplomatic asylum has fairly often granted asylum within the premises of its foreign embassies. Most recently, as discussed above, the Chinese civil rights activist Chen Guangcheng in 2012 was granted diplomatic asylum in the US embassy in Beijing. Thus, the institution has persisted to exist over five centuries, demonstrating the need for such practice. When discussing diplomatic asylum in terms of territorial sovereignty and the state's exclusive right to exercise its power demonstrates individuals' position in relation to the state; if the state wanted to protect the subject it would, otherwise it would extradite or expel the subject. Moreover, as sovereignty became an implicit principle, the "right of asylum" for individuals altered to the right of the state to grant asylum or expel the individual. This notion is essential yet today, nonetheless, states were able to transfer the principle of sovereignty to its permanent diplomatic missions abroad. This I argue is the core of the answer to the first research question; that the conflict that appears in the context of ex-territoriality between the sovereignty of the territorial state and the sovereignty of the sending state will always exist as long as the sending state has inviolable claim to premises within the territorial state. Thus I expect that diplomatic asylum will persist as there is a conflict between two established rights in international law.

As to the second research question; "What is the position of diplomatic asylum in relation to international law in terms of granting asylum," we have to consider the different legal instruments that has been discussed in this thesis. As aforementioned, Grotius created the

fiction of ex-territoriality as an approach to defend diplomatic immunities and thus exempting diplomatic officials from jurisdiction of the receiving state. The justification was based on the logic that the diplomatic premises are part of the sending state and therefore in extension outside the territorial state. The grant of asylum was therefore considered as legitimate under international law in the viewpoint of the premises being territory of sending state. The fiction of ex-territoriality has lost its credibility as it faced criticism in later centuries for not being in accordance with the functions of the diplomatic officials. Furthermore, the immunity enjoyed by diplomats was argued to "assure the performance of their diplomatic function in all security and without interference" and diplomatic asylum was hence an abuse of the diplomatic functions when sheltering refugees and interfering with the local jurisdiction.[145] From the viewpoint of general international law, the grant of diplomatic asylum can be considered to be an abuse of the diplomatic privileges and functions. Nonetheless, the grant of diplomatic asylum can still be protected within the context of international law. It is possible to argue that the sending state granting asylum derives its legal rights foremost from Article 22 (1) VCDR, however not the right to grant asylum but the possibility to protect the individual in a case when the receiving state has not recognized the grant. Moreover, it is not surprising that the cases that concern diplomatic asylum not often take place in consular premises, considering that the inviolability is more restrained in the case of the VCCR. Article 31 (2) does hinder the receiving state to enter the building when used exclusively for consular work, however, if the receiving state suspects that it is used, for instance, to shelter refugees, it does maintain the right to enter the premises.

Another view that can be considered in terms of the position of diplomatic asylum in relation to international law is to base the grant of asylum on humanitarian reasons. Some have argued for a codification of diplomatic asylum in international law as a means to protect human rights and the safety of individuals in immediate danger. To be precise, that diplomatic asylum should rather be considered within the context of humanitarian practice rather than the legal sphere. In view of diplomatic asylum lacking recognition in customary international law, states who has granted asylum considers the humanitarian

[145] Sinha, *supra* note 13, at 207.

factors in an asylum request. This is true in the cases depicted in previous chapter and it appears to be the only alternative for states to justify such grant. Another attempt to develop law on diplomatic asylum, that has not been mentioned in this thesis is the Resolution "L'asile en droit international public" adopted by Institut de Droit International in its Bath session 1950, which recognizes the legality of exterritorial asylum in circumstances of humanitarian causes.[146] It further considers political reasons for granting asylum to be within the responsibility of the state and the "granting of asylum as the accomplishment of States' 'humanitarian duties'".[147] However, it cannot be seen to have codified such law but rather developing it. Nonetheless, even if states attempt to codify such law it will most likely counter reluctance as it would be difficult to determine what diplomatic asylum entails.

What can be determined in case of diplomatic asylum is that it is universally accepted that it can only apply to political offenders. When discussing a definition of a political offence there is not a general meaning that applies. In the Asylum case it was argued by Colombia that it is the right of the sending state to determine if the offense is of political or criminal nature. However, ICJ determined that there cannot be a unilateral decision of the sending state considering that it would imply a derogation of the sovereignty of the territorial state. Relating political offense in terms of extradition, as it is not part of customary international law a universal meaning has not yet developed. Furthermore, such definitions is generally not included in the treaties, consequently interpretations have been made as understood by the writers and courts that implement these treaties.[148] Nonetheless, Sinha has noted three main tendencies in relation to the interpretations and the understanding of a political crime is derived first of all from; if the act is related to an organized political activity, next; if the act is preformed based on political characteristics, or lastly; if non-extradition is vindicated on the belief of preventing political persecution.[149]

It has been argued that diplomatic privileges and immunities cannot be based on the

[146] Heijer, *supra* note 11, at 118.
[147] UN International Law Commission (ILC), Report on the expulsion of aliens, 2006, A/CN.4/565, at 122.
[148] Sinha, *supra* note 13, at 173.
[149] *Ibid.*

theory of ex-territoriality but instead as "the necessity of freedom and security in discharging the diplomatic function". Further it has been recognized that diplomatic asylum is not a necessity of the diplomatic function and hence cannot be acknowledged as a diplomatic privilege.[150] Therefore, viewing the grant of diplomatic asylum in relation to international law it can be concluded that such grant can in some cases be recognized in terms of humanitarianism in the case of political offenders, however, as it is commonly considered that granting diplomatic asylum is outside the functions of the mission it lacks the applicable laws to defend such grant. Nonetheless, the refugee can nonetheless be protected by the inviolability of the diplomatic premises as long as the sending state allows it.

The third question that relates to Assange; "To what extent can international law, including previous cases and findings, affect the situation for Julian Assange?" it is of importance to consider how the situation has been dealt with. At the moment UK and Ecuador cannot reach an agreement on how to solve the situation. On one hand, as UK does not recognize diplomatic asylum and has not recognized the grant of asylum provided by Ecuador. Considering that UK is not part of any international instruments recognizing diplomatic asylum they have the right to oppose such grant. On the other hand, Ecuador can protect Assange as long as he resides within the premises of the embassy under Article 22 (1) VCDR. This predicament can only be solved through the options posited by the ICJ in the Tehran Hostages case, that UK either declares the staff persona non grata or break off the diplomatic relations altogether. Moreover, it can be assumed that if UK enters the premises to arrest Assange without the consent of Ecuador, that diplomatic relations will be under a lot of pressure. Thus, the best solution to the quandary is to reach a solution through diplomatic negotiations.

As to the claims of Assange, in view of the fact that he can be considered as a "common" criminal in international law due to the EAW, it is difficult for him to claim rights under the 1951 Refugee Convention. Moreover, as considered in the Asylum case by the ICJ, he cannot request diplomatic asylum in order to avoid going to Sweden to confront the sexual allegations. Therefore, the claim to diplomatic asylum can in his case be viewed as

[150] Sinha, *supra* note 13, at 209.

not fully legitimate. It has also been questioned why Assange did not choose to view other European legal possibilities, such as turning to the European Court of Human Rights (ECtHR). On the other hand, such claim could only be done when extradited to Sweden which he might consider as an extensive risk to take or it has been suggested that Assange is suspicious that ECtHR is in favor of the U.S.[151] Thus, as a respond to the third question, it can be stated that even if he has well-founded fear of being persecuted by the U.S., it is difficult to find a claim to diplomatic asylum in international law in terms of political and humanitarian reasons since he has not provided with a specific proof of persecution. Moreover, it is likely that if he would claim to have rights under international human rights law, it is most likely he will not be able to enjoy such rights due to the EAW as several instruments explicitly exclude non-political crimes. Furthermore, as ICJ stated in the Asylum case, that Haya de la Torre should apply for diplomatic asylum for the reason to avoid the Peruvian laws. Similar to Haya de la Torre, Assange cannot opt for diplomatic asylum in order to avoid the EAW issued by the Swedish Prosecution. He claims that if he is extradited to Sweden, the chance is that Sweden will extradite him to the U.S.; however, he has not yet provided concrete proof. Therefore, similar finding as in the Asylum case could be ruled in Assange's situation.

Lastly, a few concluding thoughts on the Assange case. Considering that there have been several cases of diplomatic asylum the past decades, this case has reached much controversy. In part because of Assange being such a controversial figure himself but also the fact that in other cases, it has been a case explicitly relating to the sending and receiving state. In this case however, even though it concerns primarily Assange, Ecuador and UK but the fairly tacit roles of Sweden and U.S. have taken an important part in the sense that it has prevented a solution to be reached. The question remains when he will leave the embassy and in that case how. As in the case of Mindszenty, he resided in the embassy for 15 years and it is not absolutely impossible that Assange is in a similar situation.

The research problem was formulated as following; "To what extent the inconsistencies of the institution of diplomatic asylum affect its current position in international law and

[151] Heijer, *supra* note 4, at 419.

the practice of such institution." As the thesis has demonstrated, such inconsistencies are present even in Latin America where several conventions guide the practice. As stated by ICJ in the Asylum case, there is no uniform or consistent character of the practice of diplomatic asylum.[152] Nonetheless, it has also be demonstrated that even though states are reluctant to accept the institution of diplomatic asylum, the practice is still used in circumstances that are threatening to the life of individuals, such as in cases when the territorial state cannot provide for the security of their citizens or in cases when persons flee from mob-violence. This has been confirmed by states such as U.S., Germany, and the Netherlands amongst others. It can therefore be argued that the inconsistencies of diplomatic asylum are even more present outside Latin America since there are no stated guidelines when diplomatic asylum is applicable. Even though it might be accepted to use diplomatic asylum in exceptional circumstances, it is nowhere stated what such circumstances cover. Hence, confusion in such situations is likely to surface when the receiving state does not agree on the grant of asylum.

Considering that the ICJ judgment on the *Asylum case* was prepared some 60 years ago, it is still applicable today. This I argue demonstrates that there has not been any further development in the institution of diplomatic asylum and it even though it is practiced; states are greatly reluctant to recognize the practice. I further claim that the consequences of this results in deadlock situations such as in the case of Assange, where both states claim their sovereign right. On the other hand, it is difficult to see that states will recognize diplomatic asylum since it would entail responsibilities that might fall out of the functions of the diplomatic mission. As shown in the section regarding practical difficulties, it restrains the mission on its diplomatic work which states evidently want to avoid.

Nonetheless, the inconsistencies of the practice has resulted in diplomatic asylum not being part of customary international law, however, it is instead justified in the sphere of humanitarianism. Moreover, if the receiving state does not acknowledge the grant of asylum it will derive its sovereign territorial rights, claiming that the sending state should

[152] Briggs, H. W. (1951). *The Colombian-Peruvian Asylum Case and Proof of Customary International Law*. The American Journal of International Law, Vol. 45, 728-731, at 731.

not intervene in the domestic affairs. On the other hand, the sending state upon granting asylum will then protect the refugee under the provision on inviolability in VCDR or VCCR. This is similar to the situation of Assange and thus resulting in a deadlock between the two states. However, both states derive their rights from international law. Therefore, even though diplomatic asylum *per se* is not recognized in general international law, the practice yet involves international law, though in an ambiguous sense.

In conclusion, even though the institution of diplomatic asylum lacks legitimate ground in international law, states have not dismissed the practice altogether. Considering that several states grant diplomatic asylum in situations where individuals' life are threatened, demonstrates that the practice will persist in exceptional circumstances. The Assange case however reveals the several implications that appear in such situations and that if diplomatic relations are to be intact it is important for states to take into consideration both the benefits and disadvantages of the practice of diplomatic asylum.. In regards to future predictions in the Assange case, it is difficult to foresee because the inconsistencies of the practice show that every case has to be considered separately. If Ecuador and UK do not reach an agreement regarding Assange's future, it might result in him staying there for 15 years as in the case of Cardinal Mindszenty.

CURRENT PRACTICE OF DIPLOMATIC ASYLUM

As already mentioned, the contemporary practice of diplomatic asylum is almost non-existent outside Latin America. Considering the history of diplomatic asylum in Europe as previously discussed, it can be noted that the practice has in principal disappeared. In contrast, in Latin America the practice of diplomatic asylum has flourished and several regional treaties have been conducted to regulate the practice. Porcino divides the current practices of nations in three subcategories; (1) non-recognition, (2) partial acceptance and (3) full recognition.[153] States typically reject the practice, such as Japan who rejects the practice completely. However, for instance Germany grant temporary refuge (zeitweilige Zuflucht) when an individual faces immediate danger to his or her life. In other cases, as France, does not recognize the practice of diplomatic asylum with the exemption of the embassies in Latin America.[154]

Below the policies of United Kingdom, United States and subsequently an overall view of the position of Latin American countries on diplomatic asylum will be viewed with the intention to depict the perception of diplomatic asylum in these countries.

[153] Porcino, P. (1976). *Toward Codification of Diplomatic Asylum*. N.Y.U. Journal of International Law and Politics, 435-456, at 438.
[154] Kleiner, *supra* note 8, at 168.

PRACTICE OF THE UNITED KINGDOM

Viewing the history of United Kingdom and diplomatic asylum, in the few cases in nineteenth century when refugees were granted asylum in diplomatic premises, the grounds of such claim has at all times rested on humanitarian grounds. UK has also claimed to follow regional practices when granting asylum to political refugees in the Latin American countries. In 1870 it was noted that "the practice of granting an asylum to political refugees was considered to be highly objectionable" and further argued that such grant should only be made with extreme caution and in consideration of local authority.[155] Moreover, in 1914, it was instructed by the Foreign Office in the United Kingdom;

"The practice of harboring political refugees, although past experience has shown it may be necessary to resort to it on very exceptional occasions, is in itself highly objectionable as having a tendency to comprise His Majesty's Diplomatic Agents and involve them in disagreeable discussions. This practice should therefore only be adopted in cases of instant or imminent peril when the dictates of humanity urgently demand."[156]

The abovementioned statements are only examples of what the British Foreign Office has implied in regards to diplomatic asylum being a practice to be taken into consideration with considerable caution. In the twentieth century, the United Kingdom has similarly considered the practice of diplomatic asylum with great caution. In context of Ecuador granting Assange diplomatic asylum, the Foreign Secretary of the United Kingdom duly noted that "the UK does not accept the principle of diplomatic asylum" nor is it "a party to any legal instruments which require us to recognize the grant of diplomatic asylum by a foreign embassy in this country."[157]

[155] Sinha, *supra* note 13, at 213.
[156] *Ibid.,* at 214.
[157] Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange. (2012, August 16)

PRACTICE OF THE UNITED STATES

Observing that the United States claim to reject the concept altogether, there are several cases that demonstrates a different behavior. During the nineteenth century the several opinions were taken on diplomatic asylum, for instance, it was to be expected when there were revolutions however if an individual sought asylum in U.S. premises it was advised to be considered with great caution. This was due to the consequences that might appear in connection to the grant of asylum that U.S. was keen to avoid. In instances when receiving state objects to such grant, the asylum should be terminated immediately.[158] Moreover, it has stated that there is no legal basis and is not considered to be a practice to follow and has further stated about the practice of diplomatic asylum, that it; "is an annoyance and embarrassment, probably, to the ministers whose legations are thus used, but certainly to the Governments of those ministers, and, as facilitating and encouraging chronic conspiracy and rebellion, it is wrong to the Government and to the people where it is practiced".[159]

It is exceptional for a country to state their position on diplomatic asylum; however, the U.S. has in some instances declared their policy. On the website of the U.S. embassy in United Kingdom following is stated; "The United States does not grant asylum in its diplomatic premises abroad. Under US law, the United States grants asylum only to aliens who are physically present in the United States".[160] Similarly, in 1980, the Deputy Legal Adviser of the Department of State, William T. Lake, prepared a statement on U.S. policy in regards to diplomatic asylum. It was pointed out that such requests must be declined and U.S. missions can only offer temporary refuge depending on the humanitarian circumstances or when an individual is in immediate danger. It was further noted that the policy adheres to the functions of diplomats under international law.[161]

It has been claimed that U.S. has observed the policy consistently; nonetheless, there are

[158] Sinha, *supra* note 13, at 214.
[159] *Ibid*, at 215.
[160] Kleiner, *supra* note 8, at 169.
[161] Nash, M. L. (1981). *Contemporary Practice of the United States Relating to International Law*. The American Journal of International Law, Vol. 75, 142-147.

cases where U.S. practice has been restricted.[162] In 1956 Cardinal Joszef Mindszenty[163] was offered shelter at the U.S. embassy in Budapest, after the Soviet Union invaded Hungary. As the invasion was considered as an exceptional circumstance in accordance with U.S. policy, the embassy granted the Cardinal asylum. However, what had not been expected was that he was not able to leave for 15 years, creating tension on the relations with the Soviets.[164] It was not until the Pope himself declared him a 'victory of history' that the Hungarian government finally let him leave the country.[165] Nevertheless, the case demonstrates an example of the U.S. being not entirely resistant in its grant of asylum at diplomatic premises.

PRACTICE OF THE LATIN AMERICAN REGION

Similarly to the position of the United States, the Latin American countries grant diplomatic asylum on humanitarian grounds. On the contrary to U.S. position however, several Latin American countries have acknowledged the practice thus treaties on the matter do exist. Although the practice exists and has been implemented frequently, the practice itself has been somewhat inconsistent. This was also confirmed by the ICJ on the Asylum case; ICJ stated that;

"The facts brought to the knowledge of the Court disclose so much uncertainty and contra-diction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence."[166]

[162] Kleiner, *supra* note 8, at 170; Rossitto, *supra* note 36, at 118.
[163] Hungarian prelate and Cardinal of the Roman Catholic Church who had been charged with treason when he functioned as the Roman Catholic leader of Hungary, that at the time was controlled by Soviet Union. Rossitto, *supra* note 36, at 120.
[164] Rossitto, *supra* note 36, at 119.
[165] Heijer, *supra* note 4, at 404.
[166] Colombian–Peruvian Asylum Case (Colombia v. Peru), *supra* note 6, at 277.

The practice itself has been created in the midst of revolutions and disorder, prompting governments to grant asylum to political offenders being part of revolutionary actions. Nonetheless, the practice has been abused, causing states to be more cautious when granting asylum.[167] However, the erratic practice has also caused to a certain extent disagreements between the states themselves. An example taking place in 1980 in Havana, Cuba, illustrates the unpredictable use but also the tensions that are created between the states. It happened that six Cubans crashed into the embassy of Peru with a truck.[168] Peru refused to return the fugitives, causing the Cuban government to withdraw its security forces and stated that; "if anyone unhappy with the struggle for Socialism was welcome to enter the Peruvian embassy."[169] As a way for the Cuban President Fidel Castro to embarrass Peru, he possibly did not expect that the Peruvian embassy would fill up by one hundred per hour the following day and the embassy reached its capacity sheltering 10,800 persons.[170] In the beginning Castro accepted a safe conduct of the individuals leaving Cuba without any consequences; however, he was extremely embarrassed by the fact that Cubans wanted to leave the country.[171] The case clearly demonstrates the liberal stance of some Latin American countries opposed to the practice of Western countries. Furthermore, it reveals the tensions that frequently occur in cases like these. The political instability that are experienced by many of the Latin American states, has resulted in a liberal diplomatic asylum policy even though the grants supposedly are based on humanitarian grounds.

[167] Rossitto, *supra* note 36, at 130.
[168] Kleiner, *supra* note 8, at 175.
[169] Rossitto, *supra* note 36, at 132.
[170] *Ibid*, at 133.
[171] Rossitto states that; "Castro summoned one million Cubans into the streets of Havana to display their loyalty to his twenty-one year old regime. Castro himself led the first group of marchers. At the appointed hour, this group swept past the Peruvian Embassy, taunting and jeering the refugees. Castro obviously needed a massive show of public support to counteract the embarrassment of the refugees' exodus.", Rossitto, *supra* note 36, at 134.

PRACTICAL DIFFICULTIES

States must take into consideration the consequences that emerge when granting asylum at diplomatic premises. Historically, such consequences in relation to diplomatic asylum are common. One of the outcomes is the aspect of dealing with large numbers of individuals seeking asylum. Like in the example previously mentioned with the 10,800 Cubans seeking asylum at the Peruvian embassy in 1980. In these cases, not only will the embassy have difficulties providing for a place to sleep but also it is problematic to provide for food and water. Another case, in 1990, depicted similar problems after between 4000-6000 Albanians entered the embassies in Tirana after violent anti-government demonstrations. Several European countries, including Italy, Czechoslovakia, Greece, France, Hungary, Poland and Federal Republic of Germany sheltered hundreds of Albanians. In the case of Germany, more than 3000 individuals entered the premises to request asylum. When the refugees had left the embassies, the premises had to be closed down due to the damage that had been caused by sheltering large amounts of individuals.[172] It has therefore been argued that if states abide by the practice of diplomatic asylum, the embassies might be exploited as a sanctuary which in the end would interfere with the functions of the diplomatic missions.

Other consequences associated with diplomatic asylum are the tensions that appear in the relations between the receiving and sending state. Bearing in mind that the grant of asylum at a diplomatic premise is viewed as an exterritorial act, in extension this implies a derogation of sovereignty of the territorial state. Therefore, it is not very unexpected that the territorial state often rejects such grants. Seeing that the diplomatic mission has been granted stay in the receiving state implies that both states want to establish and continue to shape good relations. On the other hand, when granting asylum it rather implies the opposite and thus tensions frequently strain the relations.[173] Several cases have demonstrated such tensions; however, usually diplomatic tools are used to overcome the conflict.

[172] Kleiner, *supra* note 8, at 176.
[173] Morgenstern, *supra* note 12, at 261.

Considering the Mindszenty case mentioned previously, the fact that he was in the premises of the United States for 15 years made already tense relations, between the U.S. and the Soviet Union, even worse. In some cases the territorial state will accept what can be viewed as interference in domestic affairs and in such cases the situation has normally been dealt with by diplomatic means. The incident of 2012 when Chen Guangcheng sought and was granted asylum at a United States embassy in China caused strains in the relations between the states. Nonetheless, through diplomatic means, Guangcheng could safely leave the country without any impediment from China. In those particular cases the government needs to think of the effects that might occur if safe conduct out of the territory was refused. In the Guangcheng case, China had to outweigh the possibility of bad international publicity in relation to the escape of Guangcheng counter to the U.S. interfering in national affairs.[174]

[174] Heijer, *supra* note 4, at 400.

CASE STUDIES

This chapter will be dealing with the various Case Studies in detail, in order to enhance the understanding of the research and the various impacts and developments posed by diplomatic asylum on international law and other states with a practical view. These case studies will cover the legal aspects of granting diplomatic asylum under the heads of Asylum case, etc.

Diplomatic asylum, according to which the countries grant asylum within the walls of their own embassies abroad, and it is not recognized widely in international law. The International Court of Justice had rejected the practice of diplomatic asylum decades ago also outside Latin America there is no treaty which accepts the right to grant diplomatic asylum. But infringing the legal international authorities the countries accept the individuals having a high profile into their embassies.

CHEN GUANGCHENG

Blind political dissident Chen Guangcheng drew the ire of the Chinese Communist Party through his opposition to forced abortions and sterilizations that were used in his region to enforce China's one child policy.

Chen lost his sight as a child, but eventually emerged as a leader of an activist movement that opposed forced abortions and sterilizations in Shandong province as part of China's one-child policy.[175] Regarded as a self-taught lawyer, Chen challenged the regional policy— which ostensibly violated national rules—by filing a lawsuit on behalf of women in Shandong in 2005.[176] The lawsuit led local officials to place Chen under house arrest, but he ultimately managed to escape this first confinement.[177] Subsequently captured, he was formally imprisoned for the crime of "damaging property and organizing a mob to disturb traffic."[178]

[175] Beech, *supra* note 1, at 115.
[176] *Id.*
[177] Fish, *supra* note 2.
[178] *Id.*

Following his release from prison in 2010, local officials again placed Chen under house arrest where Chinese and international activists made repeated attempts to visit him.[179] The activists, as well as Chen and his family, were routinely beaten by local thugs guarding the house.[180] During his time under house arrest, Chen became a "rallying point" for the activist community and his plight drew international attention when a CNN film crew followed actor Christian Bale's attempt to visit him.[181]

Chen escaped house arrest for a second time on April 22, 2012 and made his way to Beijing with the assistance of a Chinese dissident network.[182] He was eventually able to enter the U.S. embassy in Beijing after receiving help from American officials who led presumed Chinese security vehicles on a car chase through city streets.[183] He remained in the U.S. embassy for six days before leaving under his own volition to be treated at a local hospital for an injury suffered during his escape.[184] Before Chen left the embassy for the hospital, U.S. Ambassador Gary Locke asked him if he was ready to leave and he replied, in Chinese, "Let's go."[185]

Eventually, American and Chinese officials negotiated for Chen and his family to be placed on a plane to the United States for him to pursue formal legal studies.[186] A popular Chinese online news portal commented that both the United States and China acted in a "rational and pragmatic" way in handling the crisis.[187] Information about Chen, however,

[179] *Id.*
[180] *Id*.; Jane Perlez & Andrew Jacobs, *A Car Chase*, Secret Talks, and Second Thoughts, N.Y. TIMES, May 3, 2012, at A1.
[181] Fish, *supra* note 2.
[182] Perlez & Jacobs, *supra* note 120, at A1.
[183] *Id.*
[184] U.S. Dep't of State, Background Briefing with Senior State Department Officials on Chen Guangcheng (May 2, 2012), http://www.stategov/p/eap/rls/rm/2012/05/182850htm [hereinafter U.S. Dep't of State, Background Briefing]
[185] *Id*. Later, there was significant controversy about whether Chen actually left the embassy for the hospital under his own volition or if he felt pressured to leave by the U.S. government. *In re*. Mark Landler, Jane Perlez & Steven Lee Myers, Dissident's Plea for Protection Deepens a Crisis, N.Y. TIMES, May 4, 2012, at A1. Although he previously declared a desire to stay in the country during this episode, Chen's continued fear for his safety prompted an "abrupt reversal and plea for protection from the United States." *Id.*
[186] Josh Chin & Laura Kusisto, *Blind Activist Starts New Life in U.S*., WALL ST. J., May 21, 2012, at A11; China and America: A Sigh of Relief, *supra* note 16, at 45.
[187] China and America, *supra* note 16, at 45.

cannot be found on most major Chinese websites because his name has been blocked by the government.[188]

Official U.S. government statements indicated that Chen was temporarily allowed into the American embassy for medical treatment.[189] During his stay in the embassy, Chen purportedly indicated on a continual basis that his stay in the embassy was only temporary.[190] The Chinese government asked for a formal apology, but the U.S. government indicated that its action was "extraordinary" and it did not anticipate repeating it.[191] The United States believes it acted lawfully by accepting Chen into its embassy.[192]

THE COLOMBIAN-PERUVIAN ASYLUM CASE[193]

The most important case in relation to diplomatic asylum and in point of fact the only case that has been brought up in the context of international law in the twentieth century is the Asylum case. This case was brought to the ICJ by Colombia and Peru after a disagreement on Colombia granting diplomatic asylum to a political offender sought by Peru. The subject, Victor Raúl Haya de la Torre, had been a leader of the Alianza Popular Revolucionaria Americana (APRA) since 1924 and regularly in the center of political instability prevailing in Peru at the time. However, it was not until 1948 APRA was allegedly involved in an unsuccessful coup d'état against the Peruvian government. APRA was charged with causing an uprising and subsequently banned from taking part of any political activity. The government further declared that the leader Haya de la Torre and associates would be "tried for complicity in the affair".[194] However, not until three months after being charged by the Peruvian government, Haya de la Torre sought diplomatic asylum at the Colombian embassy. The ambassador granted the claim for asylum and subsequently requested safe conduct from the territory, however, this was denied by Peru.

[188] Fish, *supra* note 2.
[189] U.S. Dep't of State, Background Briefing, *supra* note 124.
[190] *Id*.
[191] *Id*.
[192] *Id*.
[193] *Supra* note 6
[194] Evans, *supra* note 123, at 148.

When the case was brought up by the two parties in the ICJ, Colombia asked the Court to clarify following;

(1) "That the granting state is competence to qualify the offense" and;

(2) "That the territorial state must give guarantees for the refugee's safe departure from the country."[195]

The most significant conclusion of the ICJ is the one that distinguishes territorial and diplomatic asylum and also one of the core issues of diplomatic asylum that the; "decision to grant diplomatic asylum involves a derogation from the sovereignty of that State."[196] Thus it is derogation from one of the inherent rights of a sovereign state. This is also related to the difficulty to determine which state has authority to decide upon the nature of the crime and the ICJ stated in the Asylum case after examining if such right exists in customary international law that; "the principle of international law does not recognize any rule of unilateral or definitive qualification by the State granting diplomatic asylum".[197] Therefore, the first question asked by Colombia was not upheld as each case of diplomatic asylum had to be considered separately. This was in view of the fact that the state granting asylum consequently withdraws the individual from the laws of the territorial state and thus; "such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."[198] Moreover, in regards to the second question; it was provided by the ICJ that the Havana Convention was binding on both parties and the Convention holds that Peru in this case should respect the grant of asylum.[199] Nonetheless, ICJ noted that since Haya de la Torre did not enter the legation until three months after the accusations, ICJ found that Colombia had not regarded the clause stating that diplomatic asylum should only be granted in urgent situations. It was further observed that the Conventions in Latin America had been

[195] Porcino, *supra* note 57, at 443.
[196] Colombian–Peruvian Asylum Case (Colombia v. Peru), supra note 6, at 275.
[197] *Ibid*., at 274.
[198] Jeffery, *supra* note 19, at 151.
[199] Essen, *supra* note 135, at 184.

construed in such way not to be abused and therefore ICJ held that Haya de la Torre could not "use asylum as a means to avoid the regular application of Peruvian laws."[200]

CHRISTOPHER SPRINGLER CASE[201]

In 1747 a case relating to diplomatic asylum took place in Stockholm where a Russian citizen, Springer, was convicted as an accomplice in a crime of high treason. Springer escaped prison and disguised as an English courier he was invited to the hotel of the English ambassador, Colonel Guideckens. As Guideckens refused to surrender Springer, the Swedish authorities surrounded the hotel with troops and later followed Colonel's carriage in an attempt to catch the fugitive. The fugitive was at last given to the authorities; however, not much later the British government demanded redress and without receiving it Guideckens left Sweden. The response of the Swedish government was to order its ambassador to leave London causing the diplomatic relations to halter between the two countries.[202] In this example, even if states began to question the legitimacy of diplomatic asylum, the consequence on the relations still existed.

[200] Heijer, *supra* note 4, at 407.
[201] *Supra* note 66.
[202] Moore, *supra* note 40.

RECOMMENDATIONS AND CONCLUSION

The UN WGAD Assange decision has been met with general ridicule from British officials, legal academics and the press. This piece seeks to bring some balance to the coverage on this decision, which consistently fails to outline the arguments which persuaded the Working Group.

The central argument of Assange's lawyers' proceeds on the basis that his confinement in the Ecuadorian embassy 'cannot … be characterized as volitional'.[203] He is not free to leave, because he is protecting himself from the violation of other human rights: 'the only way for Mr. Assange to enjoy his right to asylum was to be in detention'.[204] If Assange were to leave he would be arrested in the UK and extradited pursuant to a European Arrest Warrant (EAW) issued by Sweden. Consequently, he would expose himself to the risk of a 'well-founded fear of persecution' was he to be extradited to the US from Sweden.[205]

The source submits that Mr. Assange was deprived of his liberty against his will and his liberty had been severely restricted, against his volition. An individual cannot be compelled to renounce an inalienable right, nor can they be required to expose themselves to the risk of significant harm. Mr. Assange's exit from the Ecuadorian Embassy would require him to renounce his right to asylum and expose himself to the very persecution and risk of physical and mental mistreatment that his grant of asylum was intended to address. His continued presence in the Embassy cannot, therefore, be characterized as 'volitional'.[206]

Assange's lawyers moves on to the failure of the Swedish authorities to pursue their investigation through less restrictive means. Simply put, the Swedish authorities have 'not established a prima facie case' and have refused 'unreasonably and disproportionately' to 'question him through alternative means offered under the process of mutual assistance' (para 13). Furthermore, they argue that Assange has been deprived

[203] Para 13
[204] Para 11
[205] Para 12
[206] Para 13

of the opportunity to know the case against him, to provide a statement regarding the charges against him, and thus to defend himself against the charges. This combination of factors thus also bears upon the principle of Audi alterum partem and the presumption of innocence. The cumulative result of all of these conditions, and the failure to guarantee non-refoulement to the US; have resulted in a situation in which, on Assange's argument, he has in effect been arbitrarily detained. The argument on arbitrariness rests on a claim of disproportionality:

'any hypothetical investigative inconveniences regarding the interview of Mr. Assange by video link or in the Embassy pale into insignificance when compared to the grave risk that refoulement poses to Mr. Assange's physical and mental integrity'[207]

In essence, the UN WGAD had to decide two questions. Firstly, whether there was a 'deprivation of liberty' as opposed to a 'restriction of liberty'. Secondly, assuming the answer to the first question is in the affirmative, whether that deprivation of liberty was 'arbitrary'.

In response to the first question, the UN WGAD clearly accepted the argument that Assange's conditions are not volitional, or self-imposed. The weakness of the UN WGAD decision is that it fails to address this point directly and clearly. Its justification was based instead on 'substantial failure' of the authorities 'to exercise due diligence' in the 'performance of criminal administration' (para 98). Inter alia, it castigated the authorities for failing to weigh up Assange's rights to non-refoulment and asylum which should be been 'given fuller consideration … instead of being subjected to a sweeping judgment as either merely hypothetical or irrelevant' (para 98). The discussion doesn't however either explicitly endorse the argument that Assange's residence in the Embassy 'cannot be characterized as volitional', or directly refute the dissenting argument that Assange's position is one of 'self-confinement'. This is the weakness in the report which all critics have exploited. On this, there are a few points worth making.

The line between a 'restriction of liberty' and 'deprivation of liberty' is finely drawn in

[207] Para 18

human rights jurisprudence 'as a matter of degree or intensity, but not one of nature or substance' (Guzzardi). As counterintuitive as it may seem, liberty deprivation doesn't consist only in the easily recognizable conditions of state detention, where individuals are detained through the direct actions of the State against their will. The conceptual grounds for describing Assange's conditions as a form of deprivation of liberty are arguable. This doesn't only relate to the length of time that Assange has remained in the Ecuadorian Embassy. Simply put, liberty must be capable of being realized in actuality. Where the exercise of such liberty would have coercive results, such as further deprivations of liberty or putting other rights at risk, this cannot be described as liberty in practice.

There is precedent for such an approach in previous UN WGAD decisions. These demonstrate that the UN WGAD subjects states to a test of higher scrutiny where the negation of other rights would follow from the exercise of the subject's liberty. To argue that Assange has been 'self-confined', as is the case in the dissent, is to argue that he has chosen his conditions of residence in the Ecuadorian Embassy by his free will without any coercive factors leading to this decision. But such an assertion would be to ignore the conditions which resulted in his decision to seek asylum in the Ecuadorian Embassy in the first place, and in his decision to remain there. He is not free to leave of his own will. Assange fears ultimate extradition from Sweden to the USA on the grounds of his involvement in Wikileaks. This is arguably a 'well founded' fear, given the sentencing and treatment of Chelsea Manning in the USA, and the decision of Edward Snowden to take up asylum in Russia.

On the second question, the UN WGAD was persuaded that the confinement is disproportionate and thus arbitrary. In other words, it agrees that there could have been another way. Before issuing a EAW, the Swedish authorities could have followed the normal practice of interviewing Assange in a British police interview room. After Assange took residence in the Ecuadorian Embassy they could have relied on 'mutual assistance' protocols and questioned Assange by video link (which he offered). He could have been provided the chance to respond to the allegations against him, or been provided with an assurance related to his recoupment to the US.

The UK and Sweden currently justify their position on the basis of the EAW procedure. Two UK Supreme Court justices considered this EAW invalid under UK law because they were issued by a prosecutor and not a judge, and one dissenting Swedish Supreme Court judge considered it disproportionate in the circumstances. Moreover, due to general political concern in the UK and pursuant to parliamentary debate, the EAW conditions have been tightened since the initial Assange decision. Despite the impact these safeguards might have to his confinement, the UK government argues that they do not apply retrospectively to Assange. There is still no charge against Mr. Assange, and he does not have the full case against him. He has, under international, European, and domestic law, the right to be presumed innocent until proven guilty. He has offered to respond to the process in other ways, and has offered to co-operate fully if he had a further guarantee of non-refoulment.

Whether or not you believe Mr. Assange is guilty of a sexual offence, whether or not you think he is a self-publicist deliberately resisting arrest, the fact remains that the authorities could use less restrictive means without compromising the initial investigation into the allegations regarding his sexual conduct in Sweden. Were the current UK safeguards on the EAW to be applied to Mr. Assange retrospectively, in particular the question of 'judicial authority' and 'proportionality', it is arguable that the existing EAW would be invalidated and the conditions resulting in Mr. Assange's continued confinement would shift. Moreover, it is arguable that 10 months on, the Swedish Supreme Court view may well move closer to the dissenting judgment of Justice Svante Johansson, that the conditions of the investigation are now disproportionate. According to the Guardian:

"the split decision suggests that the supreme court's position on proportionality is not set in stone, according to Anne Ramberg, the head of Sweden's Bar Association. "The reasoning of the court indicates that it may take a different view with the passing of further time…" she said."

Certainly, the Former Legal Counsel to the United Nations and Legal Adviser to the Swedish Ministry of Foreign Affairs, Hans Corell, have stated that he "does not understand why the prosecutor had not questioned Julian Assange during all the years he

has been at the Ecuadorian Embassy".

Reasonable minds may differ on many of these issues, and may be clouded by our particular position on the integrity of Assange himself. But human rights are not meant to favour the popular amongst us; they are meant to favour us all.[208]

[208] Liora Lazarus, *The United Nations Working Group on Arbitrary Detention decision on Assange: 'ridiculous'or 'justifiable'?*; February 9, 2016

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