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Assange and the Law of Diplomatic Relations

By Alison Duxbury



Introduction

On June 19, 2012, Julian Assange, the founder of WikiLeaks, walked into Ecuador's embassy in London and requested diplomatic asylum from the Ecuadorian government. Assange's aim in seeking asylum was to prevent the U.K. from extraditing him to Sweden, where he is wanted by the Prosecution

Authority for questioning in relation to allegations of sexual molestation and rape. The decision to seek asylum followed a protracted court battle in the U.K., ending with the decision of the U.K. Supreme Court in *Assange v. Swedish Prosecution Authority*,^[1] wherein the majority upheld the European Arrest Warrant issued pursuant to the Extradition Act 2003 (U.K.), seeking the arrest and surrender of Assange. While Assange's immediate concern was to prevent extradition to Sweden, it is reported that his underlying fear is extradition from Sweden to the United States on charges relating to the activities of WikiLeaks.

Nearly two months after Assange, an Australian national, entered the embassy, the Ecuadorian government announced that it would grant him asylum, citing concerns that if he was extradited to the United States, he could face trial by a military court, cruel and degrading treatment, and life imprisonment or capital punishment.^[2] In response, U.K. Foreign Secretary William Hague stated that the U.K. was "determined to carry out [its] legal obligation to see Julian Assange extradited to Sweden,"^[3] resulting in a diplomatic stand-off.

These events have excited much commentary amongst journalists and international lawyers alike. This *Insight* concentrates on the legal issues raised by the grant of asylum and Assange's continued residence in the Ecuadorian Embassy.

The Grant of Diplomatic Asylum

States have granted diplomatic asylum to individuals in a range of circumstances. Examples include the decision to allow Cardinal József Mindszenty to seek asylum in the

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U.S. embassy in Budapest following the Hungarian uprising in 1956, and the 1989 decision of the Papal Nuncio in Panama to allow President Manuel Noriega to seek refuge in the Apostolic Nunciature of the Holy See before he agreed to give himself up to U.S. forces. For international lawyers, perhaps the most well known example of diplomatic asylum involved the Peruvian leader of the American People's Revolutionary Alliance, Victor Raúl Haya de la Torre, who was granted refuge in the Colombian embassy in Lima in 1949. More recently, in April this year the United States granted Chinese dissident, Chen Guangcheng, asylum in the U.S. embassy in Beijing. Despite these examples, no legal right to seek diplomatic asylum exists; nor does customary international law require states to recognize a grant of asylum and allow safe passage out of their territory.

This conclusion is reinforced by the International Court of Justice ("ICJ") judgment in the *Asylum Case*. Following its grant of diplomatic asylum to Haya de la Torre, Colombia unsuccessfully argued two legal points: first, that it is for the country granting asylum to determine the nature of the offense for the purpose of asylum, and, secondly, that Peru was obliged to grant safe passage to Haya de la Torre out of the country.^[4] Even in a region where the recognition of asylum is generally favored,^[5] the Court could not find any relevant legal principle that it was for the country granting asylum to solely determine the nature of the offense due to the "uncertainty and contradiction," the "fluctuation and discrepancy in the exercise of diplomatic asylum."^[6] The Court also held that Peru was not legally bound to accede to Colombia's request to allow Haya de la Torre safe conduct out of Peru.^[7]

Since this case, members of the Organization of American States ("OAS") have concluded the Convention on Diplomatic Asylum—a treaty that facilitates the granting of asylum and departure to a foreign territory amongst state parties.^[8] No equivalent treaty exists between the U.K. and Ecuador—the issue of diplomatic asylum was deliberately not dealt with in the Vienna Convention on Diplomatic Relations.^[9] Consequently, the U.K. is under no obligation to recognize Ecuador's grant of asylum or to facilitate Assange's passage out of the embassy to Ecuador (or any other state).

The Inviolability of the Embassy

Questions remain as to Assange's legal options for travelling to Ecuador. While Assange remains in the embassy, he is protected from arrest by U.K. police. Article 22 of the Vienna Convention on Diplomatic Relations provides that 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."^[10] The inviolability of the embassy has a long history, having been "mentioned in diplomatic literature before Grotius."^[11] Widespread compliance with the rule can be traced to the tangible reciprocal benefits enjoyed by states under the law relating to diplomatic immunity.^[12] The prohibition on "any" infringement of the inviolability of the mission by the receiving state has been reinforced by the ICJ in the *Tehran Hostages Case* and the *Armed Activities on the Territory of the Congo Case*.^[13] Although Ecuador is arguably in violation of Article 41(3), which provides that the mission should not be used "in any manner incompatible with the functions of the mission," the grant of asylum would not justify entry by the U.K. police.^[14]

In 1987 the U.K. enacted the Diplomatic and Consular Premises Act, which provides that land will cease to be regarded as diplomatic or consular premises if "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 land."^[15] The

Secretary of State can withdraw consent only if satisfied that it would be “permissible under international law.”^[16] Although the U.K. initially threatened to enter the embassy to arrest Assange, citing this Act as authority, this threat was quickly withdrawn.^[17] It could not be argued that by housing Assange Ecuador has ceased to use the land for diplomatic purposes and thus that international law would allow the withdrawal of consent for the mission.

Although the U.K. could sever diplomatic relations with Ecuador and thus terminate the status of the embassy, Ecuador would be able to “entrust the custody of the premises of the mission . . . to a third state acceptable” to the UK.^[18] If this third state sought to include the Ecuadorian embassy as part of its own premises, inviolability could be maintained. Given the withdrawal of U.K. threats to enter the embassy, the U.K. seems unlikely to resort to such a measure.

How to Leave the Embassy?

Much discussion has considered the way in which Assange may circumvent the threat of arrest and leave the embassy premises to escape to Ecuador. Most options have obvious practical or legal problems.

One option is to leave using an embassy vehicle. The means of transport of a mission are “immune from search, requisition, attachment or execution” by virtue of Article 22(3) of the Vienna Convention. However, Assange would need to be able to walk from the embassy to a vehicle without leaving the embassy's premises. This does not appear to be physically possible. In any case, a mission's vehicle is immune from search, not inviolable.

Another touted option is for Assange to leave the embassy in the diplomatic bag, there being no limit to the size or weight of such bags. Article 27(3) of the Vienna Convention provides that “the diplomatic bag shall not be opened or detained,” but paragraph (4) states that diplomatic bags “may contain only diplomatic documents or articles intended for official use.”^[19] Would a breach of paragraph (4) by Ecuador justify the U.K. opening the bag in violation of paragraph (3)? According to the International Law Commission, even if a diplomatic bag is used for objects other than official correspondence or articles for diplomatic use, it must be protected as a diplomatic bag.^[20] However, it is unlikely that the U.K. would countenance the use of the diplomatic bag to smuggle a person. In 1984, a minister in the former Nigerian government was found in a crate at Stansted airport. U.K. officials opened the crate, but the action did not constitute a violation of Article 27(3) as the crate did not bear the appropriate markings as a diplomatic bag. Nevertheless, the U.K. Foreign Secretary stated that the overriding duty to preserve and protect human life might justify opening a diplomatic bag in appropriate circumstances.^[21]

Another suggestion is that Ecuador could appoint Assange as a diplomat to confer on him broad personal immunity from criminal process under Article 31(1). However, the Convention contains a general presumption that diplomatic staff are nationals of the sending state.^[22] It is possible for a non-national to be appointed a diplomat (provided that the receiving state consents to such appointments) and to receive immunity while in transit to a post,^[23] but this possibility appears to be rendered moot by Ecuadorian law, which requires its diplomats to be Ecuadorian by birth.^[24]

Ecuador might also consider accrediting Assange as their representative to an international

organization, but the immunity of representatives to international organizations tends to be more limited than that conferred on diplomats. For example, Article IV, Section 11 of the Convention on the Privileges and Immunities of the United Nations confers immunity from arrest while a state representative is “exercising their functions and during their journey to and from the place of meeting.” While on a mission as state representatives, individuals receive immunity only for acts performed “in their capacity as representatives.”^[25] Pursuant to international law, it is possible for Assange to be appointed as an Ecuadorian representative to an international organization and to receive the immunity conferred by provisions such as Article IV (depending on the organization). However, the credentials of state representatives to international organizations are subject to a process of approval, for example, through a credentials committee. Although this is usually a technical process, it is possible for credentials to be rejected.

Legal or Diplomatic Settlement?

Early news reports suggested that Assange’s legal team wanted to take the case to the ICJ, but as only states can bring contentious cases before the ICJ,^[26] this option is not viable. Neither Ecuador nor the U.K. has indicated a desire to submit a case to the Court pursuant to the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes.^[27] Australia could exercise its right of diplomatic protection and bring a case on behalf of its national against the U.K., but this is unlikely.

Although international legal principles regulate the actions of the Ecuadorian and U.K. governments in the dispute concerning the grant of asylum to Julian Assange, the dispute is more likely to be resolved through political negotiations rather than by legal principles. This position is reinforced by resolutions of the OAS and Union of South American Nations affirming Article 22 of the Vienna Convention and the inviolability of a diplomatic mission, while calling on the U.K. and Ecuador to amicably settle the dispute.^[28]

About the Author:

Alison Duxbury, an ASIL member, is Associate Professor at Melbourne Law School, The University of Melbourne.

Endnotes:

[1] [2012] UKSC 22.

[2] News Release of the Foreign Affairs, Trade and Integration Ministry, Statement of the Government of the Republic of Ecuador on the Asylum Request of Julian Assange (June 19, 2012), available at <http://www.mmrree.gob.ec/eng/2012/com042.asp>.

[3] Foreign Secretary Statement on Ecuadorian Government’s Decision to Offer Political Asylum to Julian Assange (Aug. 16, 2012), available at <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=800710782>.

[4] Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 270, 277, 279 (Nov. 20), available at <http://www.icj-cij.org/docket/files/7/1849.pdf>.

[5] *Id.* 286.

[6] *Id.* 277.

[7] *Id.* 279.

[8] Organization of American States Convention on Diplomatic Asylum art. IV, Mar. 28, 1954, OAS Treaty Series No. 18, *available at* <http://www.oas.org/juridico/english/treaties/a-46.html>.

[9] See Draft Articles on Diplomatic Intercourse and Immunities with Commentaries, [1958] 2 Y.B. Int'l L. Comm'n 104, § III, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_1_1958.pdf ("The question of asylum is not dealt with in the draft but . . . there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them.").

[10] Vienna Convention on Diplomatic Relations art. 22(1), Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf [hereinafter Vienna Convention on Diplomatic Relations].

[11] Eileen Denza, Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations 136, 147(2008).

[12] Rosalyn Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 Am. J. Int'l L. 641 (1985).

[13] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 32 (May 24); Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 168, 278 (Dec. 19).

[14] Higgins, *supra* note 12, at 646.

[15] Diplomatic and Consular Premises Act, 1987 (U.K.), c. 46, § 1(3) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1987/46>.

[16] *Id.* § 1(4).

[17] See, e.g., Damien Pearse, *Julian Assange Can be Arrested in Ecuador Embassy, UK Warns*, Guardian (Aug. 16, 2012), *available at* <http://www.guardian.co.uk/media/2012/aug/16/julian-assange-ecuador-embassy-asylum>; Girish Gupta & Eduardo Garcia, *Ecuador Says Britain Withdraws Threat to Raid Embassy in Assange Standoff*, Reuters.com (Aug. 25, 2012), *available at* <http://www.reuters.com/article/2012/08/25/us-wikileaks-assange-ecuador-idUSBRE8700EX20120825>. The U.K. maintains that it never made a threat to enter the embassy; see, e.g., Extradition Proceedings Against Julian Assange, Written Statement to UK Parliament by UK Foreign Secretary William Hague (Sept. 3, 2012), *available at* <http://www.fc.gov.uk/en/news/latest-news/?view=PressS&id=806149882>.

[18] Vienna Convention on Diplomatic Relations, *supra* note 10, art. 45(b).

[19] *Id.* art. 27(3) & (4).

[20] Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by the Diplomatic Courier, [1989] 2 Y.B. Int'l L. Comm'n 17, *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_5_1989.pdf.

[21] See Denza, *supra* note 11, at 243.

[22] Vienna Convention on Diplomatic Relations, *supra* note 10, art. 8(1).

[23] *Id.* art. 8(3) & art. 40.

[24] Organic Law Amending the Foreign Service Law, Article 82(1).

[25] Convention on the Privileges and Immunities of the United Nations art. IV, § 11, Feb. 13, 1946, 1 U.N.T.S. 15, *available at* <http://www.un.org/en/ethics/pdf/convention.pdf>.

[26] Statute of the International Court of Justice art. 34(1), July 26, 1945, 3 Bevans 1179, *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

[27] Optional Protocol Concerning the Compulsory Settlement of Disputes [to the Vienna Convention on Diplomatic Relations], Apr. 18, 1961, 500 U.N.T.S. 241 (entered into force Apr. 24, 1964), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961_disputes.pdf.

[28] OAS Press Release, Resolution of the Twenty-Seventh Meeting of Consultation of Ministers of Foreign Affairs (Aug. 24, 2012), *available at*

http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-67; Declaración de Guayaquil en Respaldo a la República del Ecuador, El Consejo de Ministros y Ministras de Relaciones Exteriores de UNASUR (Aug. 19, 2012), *available at* <http://www.contexto.org/pdfs/UNASURdeclassang1.pdf>.