Diplomatic asylum: Theory, Practice and the Case of Julian Assange

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Introduction

People have sought refuge in diplomatic missions for centuries, but this practice has always been and still remains controversial. By providing sanctuary from the authorities of the territorial State, the protective State interferes to some extent in internal matters of that other State. It leads to a clash between sovereigns, between their opinions and understandings. But States continue to help those seeking refuge, believing that a particular individual is persecuted for political reasons or faces an imminent threat to his/her life and safety. For these reasons, in August 2012, Ecuador decided to give diplomatic asylum in its embassy in the United Kingdom to the founder, spokesman and editor-in-chief of WikiLeaks, Julian Assange. This controversial step resulted in a standoff, but not merely between these two States, but between larger factions, i.e. States which recognise or reject the right to grant diplomatic asylum. International law, including diplomatic law, is rather inconclusive on diplomatic asylum and leads sometimes to strange outcomes.

The article first studies the nature and forms of asylum, then examines the legality of diplomatic asylum under international law and state practice of providing diplomatic asylum and finally analyses the case of Julian Assange.
1. Nature and Forms of Asylum

Asylum is basically a sanctuary offered by one State to an individual seeking refuge from another State.\(^1\) Such individuals have typically committed political offences (at least in the eyes of the State granting asylum) and wish to escape persecution. For a long time, international law has distinguished between two forms of asylum – territorial (provided in the territory of the protective State) and extraterritorial or more commonly diplomatic (provided in other places under the control of the protective State, usually in diplomatic missions) asylum.

The concept of asylum in international law involves three elements. Firstly, the State admits the individual seeking refuge to its territory or other places under its control. Secondly, the State is prepared to provide a long-lasting sanctuary, i.e. its more than mere temporary refuge. Thirdly, it involves a degree of active protection, i.e. the State authorities are taking appropriate steps to ensure actual protection of the particular individual. Hence, the granting of asylum is not an instantaneous act which terminates with the admission of an individual at a given moment, but continues as long as protection is provided.\(^2\)

The right of States to grant territorial asylum is rarely challenged, although the actual granting of territorial asylum can cause resentment and political tensions between States. Conversely, diplomatic asylum has always been surrounded by vagueness, inconsistency and controversy – a few States clearly recognise diplomatic asylum, some States neither recognise nor actively oppose the concept, certain States are prepared to selectively grant diplomatic asylum under exceptional circumstances (whatever these may be in a specific case) etc. Before examining the legality and practice of diplomatic asylum, it is necessary to understand the nature of territorial and extraterritorial asylum, and how they differ from one another.

1.1. Territorial Asylum

This refers traditionally to the right of States to grant asylum to aliens in their territory in order to protect these individuals from other States where they committed an offence and which therefore want to prosecute them. Logically, this right has been associated with the right of States to refuse extradition of indi-

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1 A still widely cited explanation of asylum was provided in 1950 by the Institute of International Law which defined asylum as “the protection which a State grants on its territory, or in some other place under the control of certain of its organs, to a person who comes to seek it”. Institut de Droit International, “L’asile en droit international public (à l’exclusion de l’asile neutre)”, 43-II Annuaire de l’Institut de Droit International (1950), p 375.

viduals present in their territory. This form of asylum presupposes that the individual is actually present in the territory of the State granting asylum, i.e. the individual has managed to leave the State which wants to exercise jurisdiction over that individual for alleged offences. Although it is possible that the individual seeks and the State grants asylum before the individual has reached the territory of that State, there are no guarantees that territorial asylum becomes a reality in such cases, e.g. the present host State does not allow the individual to travel to the State granting asylum.

The International Court of Justice has explained in Asylum case that the granting of territorial asylum is “normal exercise of the territorial sovereignty” because the “refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.” The right to grant territorial asylum can be derived also from the fundamental principle that the State has an exclusive right to exercise jurisdiction over individuals present in its territory (excluding individuals having jurisdictional immunity, e.g. diplomatic agents). The United Nations General Assembly has affirmed that the granting of asylum is a peaceful and humanitarian act, a normal exercise of state sovereignty, and that it should be respected by all other states.

According to international law, the granting of territorial asylum is a right, not an obligation of States. Equally, it is not a subjective right of individuals, although the Universal Declaration of Human Rights claims that “everyone has the right to seek and to enjoy in other countries asylum from persecution”. However, this right is not confirmed in subsequent human rights treaties such as the International Covenant on Civil and Political Rights (1966) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) or its protocols, although they include the right to leave any country, including individual’s own country.

4 It is still debated whether individuals have a legal right to apply for territorial asylum at diplomatic missions and States have a corresponding legal obligation to grant “humanitarian visas”. See, for example, Noll, G., “Seeking Asylum at Embassies: A Right to Entry under International Law?”, 17 International Journal of Refugee Law (2005) 542–573.
5 Asylum (Colombia v Peru), Judgment, ICJ Reports (1950) 226, p 274.
7 But States may find themselves in situations where individuals have a de facto right to asylum. Namely, even if the State does not wish to grant asylum to a particular individual, it is forbidden to send him/her back to the State where he/she faces persecution (principle of non-refoulement). As a result, the State must allow the particular individual remain in its territory.
The current legal regulation for territorial asylum is found in the Convention relating to the Status of Refugees (1951) and its supplementary protocol (1967).\textsuperscript{10} The amended convention defines a refugee as a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is \textit{outside the 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 \textit{being outside the country of his former habitual residence} as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{11} Therefore the recognition of the status of refugee requires that the particular individual is outside the country from which he/she is seeking protection from. But as mentioned above, it is possible, in principle, to enquire whether the potential protective State is willing to recognise the individual as a refugee, while the individual is still in his/her own State.

\subsection*{1.2. Extraterritorial Asylum}

This is about providing sanctuary to individuals in the premises of diplomatic missions. But less conventionally, sanctuary has been offered also in military facilities and on board military vessels and aircraft.\textsuperscript{12} Extraterritorial or more commonly diplomatic asylum is problematic because, unlike in case of territorial asylum, the protected individual is still in the territory of his/her own country and therefore the protective State interferes with the sovereignty of another State.

Nowadays, one cannot take seriously the argument that the premises of diplomatic mission form a part of the territory of the sending State, not the receiving State, and diplomatic asylum is still provided in the “territory” of the State granting asylum. The theory of extraterritoriality was formulated by Hugo Grotius in the 17 century in order to explain why diplomatic missions do not fall under the jurisdiction of the receiving State in a similar manner as everything else. According to a fundamental rule of international law, States may not exercise their jurisdiction outside their territory, i.e. abroad, and because diplomatic missions are also “abroad”, States must refrain from exercising their jurisdiction in

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  \item Article 1(A)(2) (emphasis added).
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the premises of diplomatic missions.\textsuperscript{13} However, the International Law Commission, while drafting of the Vienna Convention on Diplomatic Relations (1961), rejected the theory of extraterritoriality because it is based on a legal fiction and does not reflect factual reality or modern understanding of diplomatic relations.\textsuperscript{14}

This position has been confirmed by later court practice. For example, a British court had to decide whether a divorce in a foreign embassy in London was obtained outside the United Kingdom.\textsuperscript{15} In April 1970, an Egyptian Muslim husband asked his English Christian wife to the United Arab Republic\textsuperscript{16} embassy where he pronounced a Talaq divorce.\textsuperscript{17} But the wife contested the divorce because it took place in the United Kingdom, where such divorce is not legally valid and, in return, sought a divorce on the ground of cruelty. The court concurred with the wife, agreeing that foreign embassies are part of the territory of the receiving State although its jurisdiction in the premises of diplomatic missions is very limited.

Therefore, people seeking shelter in diplomatic missions are still in the territory of receiving States and sending States are, as a result, interfering in their territorial sovereignty. This explains why States mostly reject the right to diplomatic asylum. The International Court of Justice has equally been cautious about diplomatic asylum due to its dangerous and offensive interference is the sovereignty of another State:

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 a 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.\textsuperscript{18}

Considering how much importance States and international law have always accorded to sovereignty, such an intrusion into independence is acceptable only if it has a clear basis in international law. Moreover, it was already noted by the Permanent Court of International Justice in the renowned \textit{Lotus} case that inter-

\textsuperscript{13} Grotius, H., \textit{The Rights of War and Peace} (3 vols, Liberty Fund, Indianapolis, 2005), II, XVIII, IV, 5.
\textsuperscript{14} Yearbook of the International Law Commission (2 vols, New York: United Nations, 1957), vol I, p 4: “It was true that the theory of extraterritoriality had found favour for a time, not only in connexion with diplomatic privileges and immunities …. It was not, however, in accordance with modern thinking to base international law on a fiction. Moreover, the theory of extraterritoriality could give rise to confusion and anomalies.”
\textsuperscript{15} \textit{Radwan v Radwan}, [1972] 3 All ER 1026, [1972] 3 WLR 735. See also the Australian judgment \textit{R v Turnbull, ex parte Petroff}, 17 FLR 438 (1971); the United States judgment \textit{McKeel v Islamic Republic of Iran}, 722 F 2nd (1983).
\textsuperscript{16} A short-lived political union between Egypt and Syria from 1958 to 1961.
\textsuperscript{17} A divorce under Islamic law where the husband divorces his wife by telling her three times “I divorce you”.
\textsuperscript{18} Asylum, supra nota 5, pp 274–275.
national law which governs relations between independent States emanates from their free will and “restrictions upon the independence of States cannot therefore be presumed”.\(^{19}\) So, is there such a basis for diplomatic asylum?

2. Legal Position under International Law

Victor Raul Haya de la Torre was the leader of the Peruvian political movement American People’s Revolutionary Alliance which was constantly in troubles with the government. When his movement revolted and lost a one day civil war on 3 October 1948, he sought refuge in the Columbian embassy. Columbia recognised Haya de la Torre as a political offender, but Peru refused to grant him safe passage to leave the country. To settle their dispute, the States turned to the International Court of Justice, giving the latter a great opportunity to clarify the position of international law on diplomatic asylum. The Court delivered a cautious judgment in Asylum case saying that (1) diplomatic asylum as a serious derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case\(^{20}\) and (2) when relying on customary international law, the protective State must prove that it has a right to grant diplomatic asylum and the territorial State has an obligation to respect diplomatic asylum.\(^{21}\)

Overall, the Court was sceptical that diplomatic asylum is a generally recognised concept of international law. Indeed, when it comes to the treaties concerning diplomatic asylum, there are only regional, Latin and Central American instruments, but no global treaties. If the States from other regions of the world provide exceptionally sanctuary in their diplomatic missions, they use other justification than diplomatic asylum, e.g. humanitarian concerns. Also, contemporary diplomatic law does not include, intentionally, the right to grant diplomatic asylum. But one thing is certain – no State is known to claim or to admit a sanctuary for common criminals.\(^{22}\) Diplomatic asylum is clearly confined to political offenders who hope to escape persecution by those in power and who cannot expect a fair trial.

2.1. Diplomatic Asylum in Latin and Central America

When speaking about regional international law, the right to grant diplomatic asylum in Latin and Central America is a typical example. Indeed, there are sev-

\(^{19}\) The Case of the SS Lotus (France/Turkey), Judgment, PCIJ Series A, No 10 (1927) 4, p 18.

\(^{20}\) Asylum, supra nota 5, p 275.

\(^{21}\) Ibid, p 276.

eral international instruments and notable state practice\textsuperscript{23} concerning diplomatic asylum. However, even there, the law and practice were not clear enough and a dispute between Columbia and Peru (the above mentioned incident of Haya de la Torre) led to two proceeding before the International Court of Justice.\textsuperscript{24} Although the proceedings took place at the beginning of the 1950s, the aspects of international law addressed and established in these cases are still valid today.

There are three most relevant agreements on diplomatic asylum in Latin and Central America. First, the Havana Convention on Political Asylum (1928) proclaims that States have to respect the asylum granted to political offenders in diplomatic missions to the extent it is allowed, as a right or through humanitarian toleration, by international law, state practice and domestic law of the territorial State.\textsuperscript{25} Asylum should be granted only in urgent cases and for the period strictly necessary to ensure the safety of the asylum seeker. Once asylum is given, the territorial State may require that the refugee leaves the country within the shortest time possible and the State granting asylum may, in turn, require guarantees that the asylum seeker may safely leave the country. But interestingly, if the territorial State does not require the asylum seeker to leave the country, the State granting asylum may not legally demand the former to provide safe passage out of the country. The convention also stresses that it is not permissible to grant diplomatic asylum to persons accused or condemned for common crimes – such persons must be surrendered upon request of local authorities.\textsuperscript{26}

But who decides what a political offence is? In the dispute between Columbia and Peru, the former claimed that the State granting asylum has a unilateral competence to qualify the offence with definitive and binding force for the territorial State. However, the International Court of Justice disagreed with Columbia because (1) the Havana Convention did not specify the issue and (2) Columbia was going dangerously far by claiming that such a competence (of exceptional character, according to the Court) is implied, inherent element of diplomatic asylum.\textsuperscript{27} This position is correct from the point of law, but logically it must be the State granting asylum who decides whether the crime in question is common or political by nature because giving such a right to the territorial State makes granting diplomatic asylum virtually impossible, i.e. the territorial States may maliciously claim in every case that the particular individual is a common

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\item\textsuperscript{24} Asylum, supra nota 5; Haya de la Torre (Columbia/Peru), Judgment, ICJ Reports (1951) 71.
\item\textsuperscript{25} Convention on Asylum, Havana, 20.2.1928, entry into force 21.5.1929, Article 2.
\item\textsuperscript{26} Article 1.
\item\textsuperscript{27} Asylum, supra nota 5, p 275.
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criminal and must be handed over to local authorities. However, when analysing specifically the accusations against Haya de la Torre, the Court found that he was a political offender (partly because Peru had failed to prove otherwise).\textsuperscript{28}

The Court pronounced also on other generally relevant aspects. Diplomatic asylum is meant to provide sanctuary in \textit{urgent} cases for the period strictly necessary to ensure the safety of the individual in question. Haya de la Torre was granted diplomatic asylum three months after the rebellion, which led the Court to a conclusion that “there did not exist a danger constituting a case of urgency”.\textsuperscript{29} The Court emphasised that diplomatic asylum is not, in principle, an opposition to the operation of justice. But this happens “if, in the guise of justice, arbitrary action is substituted for the rule of law”, more precisely “if the administration of justice were corrupted by measures clearly prompted by political aims”.\textsuperscript{30} Diplomatic asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take against its political opponents.

At the end of the first proceedings, Columbia and Peru were left somewhat confused, especially about whether Columbia is obliged to surrender Haya de la Torre to Peru. In the second judgment, the Court delivered yet again a puzzling opinion. On the one hand, Columbia is under no legal obligation to surrender Haya de la Torre to the Peruvian authorities, but on the other hand, the asylum granted should be terminated immediately.\textsuperscript{31} How to resolve this dilemma? The Court admitted that it is unable to give any practical advice as to the various courses which might be used to terminate the asylum, but hoped that Columbia and Peru are able to find a practical and satisfactory solution by seeking guidance from courtesy and good-neighbourliness.

Second, the Montevideo Convention on Political Asylum (1933) elaborates on some ambiguous issues in the Havana Convention.\textsuperscript{32} Perhaps two aspects are most relevant. While clarifying who are common criminals not benefiting from diplomatic asylum, Article 1 also stresses that they must be surrendered as soon as requested by local authorities. But most importantly, the Montevideo Convention makes it clear that it is the State granting asylum who decides whether the offence is common or political by nature.\textsuperscript{33} However, this helpful provision was not usable in the dispute between Columbia and Peru, because Peru had not ratified the Montevideo Convention at the time and claimed that the territorial State had a say in classifying the offence.

\textsuperscript{28} Ibid, pp 281–282.
\textsuperscript{29} Ibid, p 287.
\textsuperscript{30} Ibid, p 284.
\textsuperscript{31} Haya de la Torre, supra nota 24, p 83.
\textsuperscript{33} Article 2.
Third, the Caracas Convention on Diplomatic Asylum (1954) is a reaction to the proceedings before the International Court of Justice.\(^{34}\) In the end, no State was satisfied with the judgments or ambiguities in the law governing diplomatic asylum and it was decided to adopt two new, more comprehensive treaties on both territorial and diplomatic asylum. All-in-all, the Caracas Convention codifies and clarifies earlier agreements and state practice, and enjoys wider acceptance than the Montevideo Convention.\(^{35}\) It recognises that every State has the right, not the obligation to grant diplomatic asylum\(^ {36}\) and this is not subject to reciprocity.\(^ {37}\) The convention reconfirms that the State granting asylum determines the nature of the offense or the motives for the persecution\(^ {38}\) and the degree of urgency of the particular case.\(^ {39}\) One essential provision is Article XII which stipulates that once diplomatic asylum is granted, the State granting asylum may request that the asylum seeker is allowed to leave the country and the territorial State is under an obligation to grant immediately the necessary guarantees of his safety as well as the safe passage to leave the country. If diplomatic relations are ruptured and the State granting asylum is therefore forced to withdraw its diplomatic mission, it does not terminate the already granted diplomatic asylum.\(^ {40}\) Diplomatic personnel should leave with the individuals who had been granted sanctuary or, if this is not possible, they should surrender these individuals to another State which is willing to extend its protection to them.

After the gradual development, the law on diplomatic asylum reached a point where the State granting asylum was given the power to take the principal decision affecting the fate of the asylum seeker. Where the International Court of Justice was cautious and inclined in favour of the territorial State, Latin and Central American States decided to take daring steps and led the law to an opposite direction.

2.2. Practice Elsewhere in the World

The legal development and state practice in Latin and Central America has had little effect elsewhere. Global attempts to codify the concept of diplomatic asylum have remained inconclusive. The topic has, for example, been on the agenda in the United Nations, both in the General Assembly and the International Law

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\(^{35}\) The convention is accepted by 14 Caribbean, Central and Latin American States (six more signed, but never ratified or acceded).

\(^{36}\) Article II.

\(^{37}\) Article XX.

\(^{38}\) Article IV.

\(^{39}\) Article VII.

\(^{40}\) Article XIX.
Commission, but eventually they decided to remove diplomatic asylum from their agenda due to the lack of interest. The Secretary-General submitted to the General Assembly a report for which States were asked to submit their view on the topic – only 25 States reacted and out of these mere seven States favoured the drafting of a new global treaty.\textsuperscript{41} The General Assembly still decided to address the topic in the future,\textsuperscript{42} but so far this has not happened. Earlier, the General Assembly had tasked the International Law Commission to codify the law of asylum,\textsuperscript{43} but the latter concluded almost two decades later that this topic did not “appear at present to require active consideration in the near future”.\textsuperscript{44} There were also private, academic efforts (e.g. Institute de Droit International, International Law Association) to develop and codify the law on diplomatic asylum, but these have not led to legally significant results.

Consequently, under general international law, diplomatic asylum is regarded as a matter of humanitarian practice rather than a legal right. It is probably safe to conclude that providing sanctuary in diplomatic missions is accepted if accorded for the purpose of saving life or preventing injury in the face of imminent threat and the individual is handed over to local authorities as soon as lawful demand is made and threat has passed.\textsuperscript{45} Because, as it was stated in 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”.\textsuperscript{46} It may well be that in some situations the sanctuary in a diplomatic mission does not derogate from the sovereignty of the territorial State, e.g. violent riots against which the latter cannot provide protection or revolutionary events where justice is not adequately administered.\textsuperscript{47}

The United States and European States have for long been sceptical about diplomatic asylum, but have exceptionally offered sanctuary for humanitarian reasons. In 1956, during the Soviet invasion in Hungary, Jozsef Mindszenty, a Cardinal of Roman Catholic Church, sought refuge in the American embassy in Budapest. He was seen as a Catholic opposition leader and charged with treason. The Soviet actions in Hungary left no doubt that Cardinal Mindszenty was in danger of being imprisoned or even executed and the American embassy was authorised to provide him sanctuary. But what the United States could not pre-

\textsuperscript{41} UN Doc A/10139 (1975).
\textsuperscript{43} GA Res 1400 (XIV), 21.11.1959.
\textsuperscript{45} See also Roberts, I. (ed), Satow’s Diplomatic Practice (Oxford University Press, 2009), p 110.
\textsuperscript{46} Asylum, supra nota 5, p 284.
dict was how long he would stay in the embassy. Cardinal Mindszenty remained there for 15 years until he was promised safe passage out of the country.\(^{48}\) In 1973, following the fall of President Allende’s regime in Chile, about 8,000 people find refuge in 25 diplomatic mission in order to escape the repression of the military junta which organised a coup d’état.\(^{49}\)

East Germans who wished to emigrate to West Germany had frequently sought asylum in Western embassies, either in East Germany or other Easter European States.\(^{50}\) However, in August and September 1989, when East German borders were opened with Poland and Czechoslovakia, hundreds of East Germans entered West German embassies there and demanded free passage to the west. The West Germany authorities struggled with the flow of refugees, e.g. temporarily closing its embassies, negotiating travel to West Germany for those already in the embassies. But once the solution was found for the existing refugees, e.g. travelling from Warsaw to West Germany in specially sealed trains, new refugees came.\(^{51}\) The embassy in Budapest was forced to lease a nearby building to house the constantly arriving East Germans. The situation was unsustainable and in November 1989, the border between two Germanys was opened.

North Koreans have tried same tactics (a plan instigated by a German doctor) with Western embassies in Beijing. In 2002, 25 North Koreans stormed the Spanish embassy and following multilateral negotiations, the Chinese authorities allowed them to leave for the Philippines (an effort to avoid offending North Korea). But once in the Philippines, the defectors continued their journey to South Korea.\(^{52}\)

### 2.3. Diplomatic Law on Diplomatic Asylum

Contemporary diplomatic law is codified in the Vienna Convention on Diplomatic Relations (1961),\(^{53}\) but it contains no provision on diplomatic asylum. The

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\(^{48}\) Rossitto, “Diplomatic Asylum in the United States and Latin America”, supra nota 23, pp 118–120.


\(^{53}\) Vienna Convention on Diplomatic Relations, 18 April 1961, entry into force 24 April 1964, 500 UNTS 95 [hereinafter the Vienna Convention]
International Law Commission, which was tasked with codifying the rules of diplomatic intercourse and immunities, occasionally discussed diplomatic asylum, but the topic was left aside. Why? Firstly, the Sixth Committee (legal) of the General Assembly made it clear, while preparing the mandate for the Commission, that diplomatic asylum was not intended to be covered. Secondly, even if one member of the Commission, Sir Gerald Fitzmaurice, proposed a special paragraph about diplomatic asylum to the draft article on the premises of diplomatic mission, that proposed paragraph, but also the very idea of having such a paragraph (even in a different formulation) was rejected by the majority in the Commission. Besides the fears of acting ultra vires, they believed that the whole topic is very complex and warrants a preliminary study before inclusion in the draft convention. Moreover, regardless of the legality of granting diplomatic asylum, the inviolability of the premises of diplomatic missions were regarded absolute and the territorial State was in any case prohibited from entering the premises in order to terminate diplomatic asylum.

But, at the same time, the Vienna Convention does not resolutely preclude diplomatic asylum for two reasons. Firstly, according to the preamble “the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention”. Secondly, when laying down the rule that the premises of diplomatic missions must not be used in any manner incompatible with the diplomatic functions, the Vienna Convention indicates that these functions are not defined only in its text, but also by other rules of general international law or by any special agreements between the sending and the receiving State. The element of “incompatibility” is not defined in the Vienna Convention, but in practice, it has been understood to prohibit activities which fall clearly outside diplomatic functions or which constitute a crime in the receiving State. To sum up, state practice does not support a conclusion that the granting of diplomatic asylum is definitely “incompatible” with the Vienna Convention. To the contrary, these provisions were designed

55 He proposed two alternative formulations. First, “Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds”. Second, “Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds”. Yearbook of the International Law Commission, supra nota 14, vol I, p 54.
56 Ibid, pp 54–57.
57 Article 3 (this is a non-exhaustive list, allowing reasonable additions).
58 Article 41(3).
to accommodate, among other things, the special status that diplomatic asylum enjoys in Latin and Central America.\footnote{See also Denza, Diplomatic Law, supra nota 51, pp 471–472.}

Nevertheless, the Vienna Convention contains several provisions which are relevant for assessing the rights and obligations of States when a case of diplomatic asylum arises. The core rule asserts that the premises of diplomatic missions are inviolable and the authorities of the receiving State may not enter them without the consent of the head of the mission.\footnote{Article 22(1).} This rule is intentionally without exceptions and continues to apply also when the premises are inappropriately.\footnote{Yearbook of the International Law Commission, supra nota 14, vol I, pp 55–56; Yearbook of the International Law Commission (2 vols, New York: United Nations, 1958), vol I, p 129; Kerley, E. L., “Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities”, 56 American Journal of International Law (1962) 88–129, pp 102–103.} The inviolability of the premises is a “sacred” institution and States take its violation very seriously, even if the violation was prompted by good intentions. In 1980, Spain terminated diplomatic relations with Guatemala after the police had entered the Spanish embassy against the will of the ambassador in order to free the premises of the farmers who had taken the ambassador and other members of the mission hostage.\footnote{Sen, B., A Diplomat’s Handbook of International Law and Practice (3rd rev edn, Dordrecht: Martinus Nijhoff, 1988), p 113.} Therefore, even if the receiving State does not recognise the right to grant diplomatic asylum, it must respect the inviolability of the premises of diplomatic missions. In practical terms, this leads to a forced, \textit{de facto} acceptance of diplomatic asylum.

But the Vienna Convention reminds all persons enjoying privileges and immunities that they have a duty, without prejudice to their privileges and immunities, (1) to respect the laws and regulations of the receiving State, and (2) not to interfere in the internal affairs of that State.\footnote{Article 41(1).} These duties can be construed as a counter-argument to the right to grant diplomatic asylum. If the local laws and regulations preclude diplomatic asylum, the members of diplomatic missions should not act against local laws and regulation by granting diplomatic asylum. Similarly, because stealing and killing is illegal, receiving States expect that the members of diplomatic missions do not steal or kill even if such acts were for some reason legal in their sending States. One may certainly claim that providing sanctuary and therefore removing an individual from the jurisdiction of the receiving State, the diplomatic mission is interfering in internal affairs of that State. As discussed earlier, the granting any form of asylum causes a clash between sovereigns, between their opinions and understandings, and leads to some extent to meddling in someone’s internal matters, e.g. the sending State argues that the individual is a political offender, the receiving State disagrees.
Although there is merit in the position that these duties make the granting of diplomatic asylum illegal, the lack of supportive state practice leads to a conclusion that the receiving States do not consider the granting of diplomatic asylum illegal activity. But it may be considered politically unacceptable activity resulting in declaring relevant members of diplomatic mission persona non grata.\textsuperscript{65}

In conclusion, the position of the Vienna Convention is somewhat inconclusive (like the International Court of Justice which failed to give clear guidelines in the above discussed cases), but it does not preclude diplomatic asylum.

3. Analysis of the Quarrel over Julian Assange

Over summer 2012, tensions accumulated in the relations between Ecuador and the United Kingdom, and almost lead to a diplomatic disaster. But this is not a dispute between just two States, it may well be seen as a clash between ideologies and two fronts, i.e. between States which recognise or reject the right to grant diplomatic asylum. The centre piece of this quarrel is Julian Assange, an Australian best known as the founder, spokesman and editor-in-chief of WikiLeaks.

Since November 2010, Assange is wanted by the Swedish authorities in relation to a rape and sexual assault investigation. Because he was living in the United Kingdom when the European Arrest Warrant was issued, they applied for the extraction of Assange to Sweden.\textsuperscript{66} He decided to fight against the extradition, but his steps were unsuccessful on all levels. Finally, on 14 June 2012, Assange had exhausted all remedies available in the United Kingdom, but the decision to extradite him to Sweden remained in force.\textsuperscript{67} He was given 14 days to appeal to the European Court of Human Rights, but he decided to pursue an unusual alternative. On 19 June, Assange entered the Ecuadorian embassy where he asked for the protection of the Ecuadorian government. The latter informed, on the same day, the British government that it was considering Assange’s request.\textsuperscript{68} On 16 August, Ecuador informed the world that they have decided to grant Assange diplomatic asylum and provided a detailed explanation why sanctuary was given.\textsuperscript{69} To sum the arguments, Ecuador found that Assange faced a situation

\textsuperscript{65} Vienna Convention, Article 9.
\textsuperscript{67} Assange v The Swedish Prosecution Authority, [2012] UKSC 22.
that meant to him an imminent danger which he could not resist. The United Kingdom disagreed with the Ecuadorian decision,\textsuperscript{70} but he has remained in the premises of the Ecuadorian embassy since.

Why did Assange choose a small Latin American State? The most obvious reason is that Ecuador recognises the right to grant diplomatic asylum and is a party to the Caracas Convention on Diplomatic Asylum (1954). But these facts are not very strong legally. Although it was demonstrated that the use of the premises of diplomatic missions to provide sanctuary may be compatible with diplomatic functions, it is doubtful that the necessary requirements are met in this case. Most importantly, that such a right is recognised in general international law or is stipulated in “special agreements between the sending and the receiving State”.\textsuperscript{71} But the United Kingdom like the overwhelming majority of States “does not accept the principle of diplomatic asylum” and “is not a party to any legal instruments which require [the United Kingdom] to recognise the grant of diplomatic asylum by a foreign embassy in this country”.\textsuperscript{72} Hence, the United Kingdom is not obliged to guarantee Assange safe passage out of the country. Moreover, the British authorities have implied that Assange is not charged with a political, but a common crime – “it is well established that, even for those countries which do recognise diplomatic asylum, it should not be used for the purposes of escaping the regular processes of the courts” and “in this case that is clearly what is happening”.\textsuperscript{73} Although, the granting of diplomatic asylum to Assange by Ecuador was not completely in accordance with the Vienna Convention, this does not, as discussed above, give the receiving State the right to take measures against the inviolability of the premises of the Ecuadorian embassy. The International Court of Justice has emphasised that the Vienna Conventions establishes a legal regime which contains its own remedies against the breach of diplomatic law – States may not resort to other legal or extra-legal measures.\textsuperscript{74}

The British authorities have (unofficially) hinted that the police may enter the Ecuadorian embassy and arrest Assange by force. Such a step would be clearly illegal under international law, regardless of the fact that there is a potentially permissible basis in the British law. The Diplomatic and Consular Premises Act (1987) stipulates that the premises of diplomatic missions may lose their invio-

\textsuperscript{71} Vienna Convention, Article 41(3).
\textsuperscript{72} Foreign Secretary Statement on Ecuadorian Government’s Decision to Offer Political Asylum to Julian Assange, supra nota 70.
\textsuperscript{73} Ibid.
\textsuperscript{74} United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), Judgment, ICJ Reports (1980) 3, paras 83–87.
lability under certain circumstances.\textsuperscript{75} Namely, if (1) the sending State ceases to use the land for the purposes of its mission, or (2) the British Secretary of State withdraws his acceptance or consent in relation to the land. This measure is not even popular in British legal practice, not least because of its risky precedent effect. In order to understand the reasons why that Act includes such a strong measure, it is useful to know about one intense episode which occurred in London. On 17 April 1984, gunfire was opened from the Libyan embassy into the anti-Gaddafi protesters, wounding 10 people and killing a policewoman. The police sieged the embassy for 11 days while the British authorities tried to find an appropriate solution for the incident. Among other options, they assessed the possibility of entering the embassy by force because the premises were manifestly ill-used.\textsuperscript{76} However, the inviolability was upheld and instead, diplomatic relations were broken off and occupants of the embassy were allowed to freely leave the country. To conclude, the United Kingdom has experienced some exceptional cases which raised a legitimate question of how long the premises of diplomatic mission remain inviolable.

But those who believe or advocate that the Secretary of State may and should strip the Ecuadorian embassy of its diplomatic status tend to forget that the Diplomatic and Consular Premises Act allows such a step only if the Secretary of State “is satisfied that to do so is permissible under international law”.\textsuperscript{77} One has to conclude that it is highly unlikely that depriving the inviolability of the premises of diplomatic missions is legal under international law in such circumstances. Nevertheless, there is some practice of withdrawing diplomatic status. In 1975, the Khmer Rouge overthrew the government in Cambodia and started one of the bloodiest social experiments the world has ever known. The members of the Cambodian embassy in London refused to serve the regime and handed the keys of the embassy to the Foreign and Commonwealth Office. Next year, the squatters moved into the premises and in 1988, became eligible under English law to obtain a title to the land by adverse possession. The Secretary of State saw this possibility as a shameful prospect and possibly a breach of international law. To avoid this happening, he decided to vest the title to the premises in himself because these were no longer diplomatic premises (not used for diplomatic functions over 12 years) and ordered the squatters to be removed.\textsuperscript{78} But the cases of the squatters in the Cambodian embassy and Julian Assange in the Ecuadorian embassy are not exactly comparable.

\textsuperscript{76} See also Denza, Diplomatic Law, supra nota 51, p 148.
\textsuperscript{77} Section 1(4).
\textsuperscript{78} R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Samuel, 83 International Law Reports 231.
Some have suggested that the United Kingdom should break off diplomatic relations with Ecuador because then the latter is forced to close the embassy and recall its staff. As a result, Assange would remain alone and the police could enter the embassy. It is not so simple, but there is some merit in this idea. To begin with, the Vienna Convention demands that even if diplomatic relations are broken off, the receiving State must respect and protect the premises of diplomatic missions. But it does not specify how long the premises remain inviolable. It would certainly be absurd to argue that the premises of diplomatic mission retain their diplomatic status indefinitely without diplomatic relations. If considering the reason for granting privileges and immunities to diplomatic missions and their staff – “to ensure the efficient performance of the functions of diplomatic missions as representing States” – it is not necessary to grant inviolability to the premises which have not been used for diplomatic functions for quite some time. If one agrees with these positions, then for how long the diplomatic status continues? When the functions of diplomatic agents come to an end, they are given “a reasonable period” to wind up their activities and leave the country, before their privileges and immunities expire. The United Kingdom prescribes generally a period of one month. This rule could be extended to the premises of diplomatic missions by using analogy, although the reasonable period should be longer in such cases. But in case of the Libyan embassy discussed above, the police entered its premises seven days after breaking of diplomatic relations and expiry of the period which had been allowed for all mission staff to departure. The analysis shows that there are no easy, straight forward solutions in diplomatic law to deal with a case of diplomatic asylum where the receiving State does not wish to recognise it.

**Conclusion**

Although diplomatic asylum has been around for centuries and different States have granted diplomatic asylum to the individuals seeking refuge from the local authorities, its legality remains dubious and debatable. At the present moment, it is safe to conclude that diplomatic asylum has developed into a recognised concept in Latin and Central America, where the State granting asylum has the unilateral and definitive competence to determine whether the individual is accused of a common crime or political offence. The territorial States are basically forced to recognise the decision to grant diplomatic asylum, but may ask that the individual in question leaves the country. But elsewhere in the world, the

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79 Article 45(1).
80 Vienna Convention, preamble.
81 Ibid, Article 39(2).
83 Denza, *Diplomatic Law*, supra nota 51, p 490.
concept of diplomatic asylum is rejected as a legal right – under general international law, diplomatic asylum is regarded as a matter of humanitarian practice. States are prepared to provide and, more likely, to accept the sanctuary in diplomatic missions if it is provided for the purpose of saving life or preventing injury in the face of an imminent threat. Even then the States involved negotiate and try to find an amicable solution without severing irreparably their relations. Bizarrely, the fact that the receiving State rejects the concept of diplomatic asylum makes little difference because the premises of diplomatic missions are protected by unconditional inviolability against any forceful action proposed for arresting the refugee. In the case of Julian Assange, it is not obvious that the sanctuary is necessary for the purpose of saving life or preventing injury in the face of an imminent threat. It is rather a classic example of Latin and Central American diplomatic asylum where the protective State wishes, for whatever reason, to extend its protection to a person accused of a political offence. But once again, this does not give the United Kingdom the right to forcefully enter the Ecuadorian embassy in order to arrest Assange. What next? Because the States involved have opposite understandings and legally binding obligations about diplomatic asylum, it is difficult, if not impossible, to find a legal solution. The stalemate is likely to end with negotiations.

Kokkuvõte

Diplomaatiline asüül: teooria, praktika ja Julian Assange'i juhtum

Märksõnad: diplomaatiline asüül, rahvusvaheline õigus, diplomaatiline õigus


Rahvusvaheline õigus on pikka aega teinud vahet territoriaalsel (antakse kaitsva riigi territooriumil) ja ekstraterritoriaalsel ehk diplomaatilisel (antakse enamasti
kaitsva riigi diplomaatilises esinduses) asüülist. Esimese õiguspärasuse üle tavaliselt ei vaielda, sest selle juhul on abi otsiv inimene kaitseva riigi territoriumil, kuigi selle andmine võib siiski põhjustada pahameelt ja poliitilisi pingeid riikide vahel. Teise andmist on alati iseloomustainud ebaselgus, vaidlused ja ebajärjekindlus.


Diplomaatiliste suhete Viini konventsioon ei käsitle diplomaatilise asüüli andmist, kuid antud kontekstis on määrava tähtsusega regel, et diplomaatilise esinduse valdused on tingimusteta puutumatud – nendesse võib siseneda ainult esinduse juhi nõusolekul. Samas ei tohi lähetajariik kasutada diplomaatilise esinduse valdusi viisil, mis ei sobi kokku diplomaatiliste funktsioonidega, kuid riikide praktika alusel ei ole võimalik väita, et diplomaatilise asüüli andmine oleks selgelt vastuolus selle keeluga. Seega, isegi kui vastuvõtjariik ei tunnusta diplomaatilise asüüli andmist, ei tohi see riik tingida diplomaatilise esinduse valdustesse, et jõuga vahistada varjupaika saanud inimene.

ei paku need ideed kiiret või õiguspärast lahendust tekkinud olukorrale ja tekitaks kasutamisel ohtliku pretsedendi, millest ei ole ilmselt huvitatud ka Ühendkuningriigid, millel on väga lai diplomaatiliste esinduste võrgustik. Mis edasi? Kuna asjaosaliste riikide arusaamad ja siduvad reeglid diplomaatilise asüüli küsimuses on vastandlikud, siis on raske või pigem võimatu leida õiguslikku lahendit. Lahendust tuleb seega otsida läbirääkimistest.

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