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**DOES JULIAN ASSANGE ILLUSTRATE
A GAP IN THE LAW THAT SHOULD
BE CODIFIED?**
Hamish Tye

Abstract

This article dissects the legality and purpose of diplomatic asylum, an intrinsically controversial area of international law. It becomes evident that diplomatic asylum residing in a grey area of international law suits many states. It provides an opportunity to reject diplomatic asylum as illegal when it suits a state but grant diplomatic asylum when an opportune moment arises. I conclude that it would be appropriate to introduce a form of diplomatic asylum internationally. Diplomatic asylum appears as a legal concept which persists in providing politically persecuted individuals protection regardless of the criticism grants of diplomatic asylum receive. Therefore Julian Assange illustrates a gap in international law should be codified in a range of regional treaties allowing for cultural and political difference to be accounted for.

Keywords: diplomatic asylum, international law, Julian Assange

Introduction

Julian Assange has been confined to the Ecuadorian Embassy in London since June 2012. Facing extradition from the United Kingdom after a series of appeals to the judicial system, Assange sought diplomatic asylum in the inviolable premises of the Ecuadorian embassy.¹ Diplomatic asylum in layman's terms is a country granting protection to an individual outside of their territory, on their diplomatic premises, who is accused of political crimes. Academic definitions focus on the granting of asylum on diplomatic premises as a means of preventing the persecution the 'asylee' is facing irrespective of their nationality and to prevent any possible consequences of that persecution in that state.²

¹ BBC Europe. 2015. 'Timeline: Sexual Allegations against Julian Assange in Sweden', March 13. <http://www.bbc.co.uk/news/world-europe-11949341>

² Malinowska, Alina 'The Institution of Diplomatic Asylum as the Possibility of Protecting Human Rights. (2014).

Despite fluctuating practice of diplomatic asylum there has been no international treaty (outside of Latin America) which has governed its dynamics. Despite granting diplomatic asylum in their consular premises, neither the UK or the United States (US) recognise the right to diplomatic asylum, the UK describing its use as principally objectionable³ whereas the US have maintained the grant of diplomatic asylum does not allow an individual to become immune from local jurisdiction.⁴

General dissatisfaction with the practice of diplomatic asylum stems from the derogation of sovereignty of the territorial state that it embodies. Latin American states have been proponents of the practice employing regional treaties on the basis of humanitarian grounds as conflict and political revolution have endangering the lives of any members of the losing party.⁵ Nonetheless admiration of diplomatic asylum is not restricted to Latin America; a member of the International Law Commission has praised the practice as an 'essential, traditional...function of missions'.⁶ Ergo diplomatic asylum is intrinsically a controversial practice as it is hard to imagine any nation seeking to punish an individual being satisfied with derogation from their sovereignty within their own jurisdiction. However large scale codification, international approval and usage of diplomatic asylum has wavered.

In Europe diplomatic asylum was employed from the sixteenth century and became far more widespread, due to the Congress of Westphalia 1648. The treaty fashioned two developments in the context of diplomatic asylum; temporary embassies being announced as permanent embassies and most importantly the inviolability of the ambassador's dwelling. Asylum was largely informal often leading to those sought by authorities on no political basis to be granted asylum. Over time the inviolability of the ambassador's dwellings spread to the inviolability of the buildings in the quarter the ambassador's dwelling was located. This expansion of diplomatic asylum was reversed at the end of the seventeenth century via the actions of the King of Spain and Pope Innocent XI.⁷

Regardless diplomatic asylum continued to be used under the restrictions set in Europe until the early nineteenth century where it was renounced except in cases of political unrest, for

³ Morgenstern, F "'Extra-Territorial' Asylum'." (1948). *British Yearbook of International Law* 25.

⁴ Heijer, Maarten Den. 'Diplomatic Asylum and the Assange Case.' (2013). *Leiden Journal of International Law* 26 (02): 399–425.

⁵ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol.I, p.25.

⁶ Behrens, Paul, 'The Law of Diplomatic Asylum - A Contextual Approach.' (2014). *Michigan Journal of International Law* 35.

⁷ UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General, 22 September 1975, A/10139 (Part II).

example the Revolution in Greece in 1862.⁸ The slow decline continued in Europe leading John Basset Moore to conclude the institution had disappeared⁹ in 1906. Latin American states continued to actively practise diplomatic asylum. A number of regional treaties were created for the purpose of administering diplomatic asylum, which all shared common constraints. The precedent is now set by the Convention on Diplomatic Asylum signed by the Organisation of American States (OAS) in Caracas in 1954.¹⁰

The International Court of Justice (ICJ) made the decision in the Asylum case¹¹ on the prescriptions of the treaties introduced before 1950. The main features of the treaties were; the limitation of the right to asylum to persons charged with political offences¹², the exclusion of asylum to persons accused of 'common offences'¹³, a duty to notify the territorial state¹⁴ and the questionable right to require safe exit for the refugee.¹⁵ The right to require safe exit is one of the most contentious issues in diplomatic asylum.

The ICJ in the *Haya De La Torre* case clarified the dispute whilst setting precedent for the grant of diplomatic asylum for countries who were bound by the Havana Convention of Asylum of 1928. The conclusions of the ICJ were as follows; the assessment of a fugitive as a political offender is not binding on the territorial state but may be accepted at their discretion, diplomatic asylum must be granted under conditions of urgency, diplomatic asylum is terminated once safe passage is granted and the practical solution must come via diplomatic channels rather than judicial action.¹⁶ The ICJ confirmed the lack of uniformity in law concerning diplomatic asylum in its judgment.¹⁷ As above the OAS introduced the Convention on Diplomatic Asylum in reaction to the judgment of the ICJ which 14 countries

⁸ Ibid.

⁹ Moore, John Basset. *Digest of International Law* 2: 761–62. (1906).

¹⁰ Asylum Case (*Colombia v. Peru*), International Court of Justice (ICJ), 20 November 1950.

¹¹ *Columbia v Peru* (1950) is referred to as the Asylum Case as the Columbian consulate allowed Victor Haya de La Torre asylum in the embassy after mounting a civil war against the Peruvian Government.

¹² *Havana Convention on Asylum 1928* Article 2, *Montevideo Convention on Political Asylum 1933* Articles 2-3.

¹³ *Havana Convention on Asylum 1928* Article 1, *Montevideo Convention on Political Asylum 1933* Article 1, *Montevideo Treaty on Political Asylum and Refuge 1939* Articles 2-3, *Montevideo Treaty on International Penal Law 1889* Article 17.

¹⁴ *Havana Convention on Asylum 1928* Article 2, *Montevideo Treaty on Political Asylum and Refuge 1939* Article 4, *Montevideo Treaty on International Penal Law 1889* Article 17.

¹⁵ *Havana Convention on Asylum 1928* Article 2, *Montevideo Treaty on Political Asylum and Refuge 1939* Article 6, *Montevideo Treaty on International Penal Law 1889* Article 17

¹⁶ Evans, Alona. 1951. "The Colombian-Peruvian Asylum Case: Termination. of the Judicial Phase." *The American Journal of International Law* 45: 755–62.

¹⁷ Asylum Case (*Colombia v. Peru*), International Court of Justice (ICJ), 20 November 1950.

now recognise.¹⁸ It is the last International convention which directly dictates the use of diplomatic asylum despite political motives having encouraged diplomatic asylum to occur worldwide.

The closest codification of the practicalities intrinsic to diplomatic asylum in international law is the Vienna Convention of Diplomatic Relations (VCDR) signed in 1961. A pertinent provision in the Convention includes that the premises of diplomatic missions are inviolable and the authorities are unable to enter without the consent of the head of the mission.¹⁹ Prima facie this allows extra territorial asylum to be granted without any lawful reaction from the territorial state. Conversely restraints are also placed, as the Convention states all people possessing privileges or immunity also have a duty to respect the laws of the receiving state and not to interfere with the internal affairs of that state.²⁰ Commentators argue that this does not only place restrictions on diplomatic asylum but the provision rather is a legal authority prohibiting the grant of asylum, as asylum inevitably interferes with internal affairs. Regardless of this, the preamble ensures that Convention does not preclude diplomatic asylum, as it states ‘the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention’.²¹ After 1961 no formal international legislation has been introduced to establish any guidance on how diplomatic asylum may operate. When the Universal Declaration of Human Rights was drafted the issue of asylum was not included. The General Assembly also flirted with the idea of introducing a form of legislation in 1974 however due to opposition it was not pursued.²²

Consequently when deliberating over the present International status of diplomatic asylum it is unproblematic to conclude the fragmentation of international law creates a ‘grey area’²³ of legality. A lack of codification despite continued grants of asylum can only breed dispute. The most feasible method of dealing with controversial grants of asylum is via diplomatic channels. Unsurprisingly, this has proved to be an unreliable means of resolving any

¹⁸ ‘Convention On Diplomatic Asylum’ 2015. Organization of American States. Accessed April 19. <http://www.oas.org/juridico/english/signs/a-46.html>.

¹⁹ *Vienna Convention on Diplomatic Relations* Article 22 (1).

²⁰ *Vienna Convention on Diplomatic Relations* Article 41(1).

²¹ Vark, Rene, ‘Diplomatic Asylum: Theory, Practice and the Case of Julian Assange.’ (2012). *Proceedings of the Estonian Academy of Security Sciences* 11: 240–57.

²² UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General,

²³ Jeffery, Anthea, ‘Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights.’ (1985). *South African Journal on Human Rights* 1: 10–30.

differences, exempli grata Julian Assange, Fang Lizhi and Manuel Noriega.²⁴ Although it should be noted much less controversy arises in cases of mass asylum for humanitarian purposes as shown when East German citizens entered the West German embassies in Prague and Budapest.²⁵ Thus academic commentators have attempted to classify the current law irrespective of the 'grey area' in which it resides. John Chisholm suggests the 'incident method'²⁶ which draws conclusions by using the actions of international actors to constitute legal norms, subsequently eradicating the 'need' for codification of diplomatic asylum internationally.

1 The Julian Assange Case

Julian Assange has been living in the Ecuadorian embassy since June 2012. His legal position is now dictated by the 'grey area' of legality that diplomatic asylum is encompassed within and has rightfully been described as a 'prisoner of process'.²⁷ However, he sought asylum in the Ecuadorian embassy as a last resort to escape extradition to Sweden and then expected extradition to the US.

The Swedish authorities issued an International Arrest Warrant against Assange in November 2010, after this Assange handed himself over to British authorities where he was consequently granted bail in December of 2010. Following this Assange challenged the extradition order placed against him in the British courts, appealing against the decision of the courts until eventually his challenge to the validity of the arrest warrant was dismissed in the Supreme Court by a majority.²⁸ Despite Sweden issuing the arrest warrant for the questioning of Assange for the crimes of rape and molestation, Assange's main concern was his potential extradition to the US. He is accused of espionage, conspiracy to commit espionage and theft of government documents due to Wiki-Leaks releasing confidential

²⁴ Prominent Cases of Asylum-Seeking at Embassies.' 2015. Boston.com. Accessed March 4. http://www.boston.com/news/world/europe/articles/2012/06/20/prominent_cases_of_asylum_seeking_at_embassies/.

²⁵ Schuster, Liza, *The Use and Abuse of Political Asylum in Britain and Germany*. (2003, Cass Series on British Politics and Society, London: Frank Cass Publishers).

²⁶ Chilsholm, John, 'Chen Guangcheng and Julian Assange: The Normative Impact of International Incidents on Diplomatic Asylum Law.' (2014). *The George Washington Law Review* 82 (2): 528–55.

²⁷ Addley, Esther.. 'Julian Assange Has Had His Human Rights Violated, Says Ecuador Foreign Minister.' (2014). *The Guardian*, August 18. <http://www.theguardian.com/media/2014/aug/17/julian-assange-human-rights-violated-ecuador>

²⁸ *Julian Paul Assange v Swedish Prosecution Authority* [2012] UKSC 22.

information from US government departments. If found guilty under US jurisdiction Assange is liable to face the death penalty.²⁹

Leaving Assange with two options to evade extradition to Sweden; appeal to the European Court of Human Rights or seek diplomatic asylum, a request for diplomatic asylum was received by the Ecuadorian embassy in June 2012. Asylum was granted a month later, regardless of the hostility from Britain, the US and Sweden who all challenged the legitimacy of a grant of diplomatic asylum. Thus to this day Assange is stuck in the Ecuadorian embassy unable to leave.³⁰

British authorities would not allow Assange safe passage out of the country to Ecuador.³¹ Britain threatened to enforce the UK Diplomatic and Consular Premises Act 1987 and enter the Ecuadorian embassy to enforce the extradition order³², the Act stipulates that under the specified circumstances embassies are no longer inviolable.³³ However this threat was never fulfilled as Britain renounced diplomatic asylum as a concept stating 'the British authorities are under a binding obligation' to extradite Assange to Sweden.³⁴

The Ecuadorian legal position (because of its participation in the OAS Convention on Diplomatic Asylum) is contrary to Britain's; diplomatic asylum is a concept they are legally bound to recognise. The Ecuadorian position is reliant on the Convention to defend the legality of the Ecuadorian decision; the Convention establishes that 'Every State has the right to grant asylum'³⁵ as well as verifying that 'It shall rest with the State granting asylum to

²⁹ Ratner, Michael. Swedish Prosecutor in Julian Assange's Case Retreats; US Continues Espionage Investigation Interview by Sharmini Peries. (2015) *The Real News*. http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=13445

³⁰ See http://www.huffingtonpost.co.uk/2015/10/15/julian-assange-leave-ecuadorian-embassy-mri-scan-shoulder_n_8300416.html.

³¹ BBC UK. 'Julian Assange: Ecuador Grants Wikileaks Founder Asylum', (2012) 16 August <http://www.bbc.co.uk/news/uk-19281492>

³² Kurbalija, Jovan, 'International Law and the Assange Asylum Case | DiploFoundation.' (2015) Diplomacy. Accessed March 5. <http://www.diplomacy.edu/blog/international-law-and-assange-asylum-case>.

³³ *Diplomatic and Consular Premises Act* Section 1(3) 1987.

³⁴ Office, Foreign Commonwealth &, and The Rt Hon William Hague. 'Foreign Secretary Statement on Ecuadorian Government's Decision to Offer Political Asylum to Julian Assange.' GOV.UK. (2012) August 16. <https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange>

³⁵ *Organization of American States Convention on Diplomatic Asylum* Article 2

determine the nature of the offence'.³⁶ The Ecuadorian government's decision was made to protect the human rights of Assange.³⁷

The legality of the grant of diplomatic asylum is disputed by Sweden, the US and the UK on the basis they are not a party to the OAS Convention and thus do not have to act accordingly to the provisions. The UK is unable to act despite disputing the legality of Ecuador's decision due to the protections Assange receives under international law. The 1961 Vienna Convention on Diplomatic Relations (VCDR) has significant provisions affecting the validity of Assange's presence in the Ecuadorian embassy. Article 22(1) ensures that the premises of the embassy have inviolable status and guarantees protection from the authorities of the receiving state as without the head of the mission's consent authorities are unable to enter. The protection of consular premises is also a provision in the 1963 Vienna Convention on Consular Relations (VCCR).

Therefore the British authorities are unable to execute the extradition of Assange while he remains in the embassy as restricted by international law which holds precedence over domestic law and consequently the UK Diplomatic and Consular Premises Act 1987. The lack of international law that directly deals with the practice of diplomatic asylum means that solutions to disputes over the legality of diplomatic asylum are scarce and have largely come via diplomatic negotiations.³⁸ Assange is currently in limbo between the territorial rights of the UK and the diplomatic privileges that are produced by the inviolable status of consular premises. He is a product of the 'grey area' of international law in which diplomatic asylum resides. He could travel in a diplomatic car, or a diplomatic bag, as the VCDR establishes these are 'immune from search, requisition, attachment or execution'³⁹ but his only viable option is for diplomatic negotiations between Ecuador and the UK to result in safe passage being granted.

2 Grounds for Introduction of Codification of Diplomatic Asylum

The 'grey area' of legality has led to commentators suggesting that codification and a uniform approach would allow for a more efficient process where individuals do not have to

³⁶ Ibid, Article 4.

³⁷ 'Statement of the Government of the Republic of Ecuador on the Asylum Request of Julian Assange - Ministerio de Relaciones Exteriores Y Movilidad Humana.' (2015). Ministerio de Relaciones Exteriores y Movilidad Humana. Accessed March 12. <http://www.cancilleria.gob.ec/statement-of-the-government-of-the-republic-of-ecuador-on-the-asylum-request-of-julian-assange/?lang=en>.

³⁸ For example the right of safe passage was given to Chenguang, The Republicans in the Spanish Civil War and eventually Cardinal Mindszenty via diplomatic negotiations.

³⁹ *Vienna Convention on Diplomatic Relations* Article 22(3) 1961.

suffer prolonged occupation of consular premises until diplomatic negotiations are successful. One can suggest that codification would provide greater protection of human rights via a uniform approach to diplomatic asylum for those suffering political persecution, as evidenced in Latin America. Other clear reasons for codification include; it prevents political bias affecting who is and who is not granted political asylum as well as creating a tool to fairly regulate conduct of political parties during and after revolutions. It is appropriate to consider what other form of protection is available to individuals claiming persecution.

Many academic opinions for the codification of diplomatic asylum stem from the protection it is able to provide of human rights.⁴⁰ By definition diplomatic asylum is a tool against persecution irrespective of a person's nationality and has acted as an instrument to prevent human right abuses on several occasions, both for individuals seeking political asylum as well mass numbers claiming asylum to avoid living within an oppressive state. Commentators with a liberal stance state 'the dictates of humanity were the true legal basis of diplomatic asylum', per Sir Gerald Fitzmaurice.⁴¹ Cases where asylum was not granted and persecution occurred could be avoided if a codified right to diplomatic asylum were to be established.

The case of the Durban Six⁴² demonstrates the benefit of a codified right of diplomatic asylum as it exhibits the political considerations that are deemed to be of more importance than the prevention of political persecution and protection of human rights. Arguably the reasoning of the foreign embassies for not granting diplomatic asylum was that the political initiative was not regarded as credible enough to warrant granting an unlegislated right. Furthermore in the circumstances the Durban Six faced, a codified right would have prevented persecution and created a platform for other countries to maintain an effective opposition to apartheid without acting under questionable legal grounds.

The success of the asylum granted to Guangcheng prevented his persecution based on political activism and protected his fundamental human rights in China.⁴³ Therefore if the right were codified its use would not be restricted to cases of political interest to the extra territorial party, rather the uniform application of diplomatic asylum could guarantee the issue

⁴⁰ Lavander, Thomas, 'Using the Julian Assange Dispute to Address International Law's Failure to Address the Right of Diplomatic Asylum.' (2014) *Brooklyn Journal of International Law* 39: 433–86.

⁴¹ Fitzmaurice, Sir Gerald. 'The Law and Procedure of the International Court of Justice.' *British Year Book of International Law* (1950). 27: 32.

⁴² Riveles, Susanne. 'Diplomatic Asylum as a Human Right: The Case of the Durban Six.' (1989). *Human Rights Quarterly* 11 (1),

⁴³ Chilsholm, 'Chen Guangcheng and Julian Assange': 528–55,

of asylum in the appropriate circumstances. This would prevent the US from solely issuing grants of diplomatic asylum to those with mutually exclusive goals and allow those persons suffering political persecution asylum in a similar manner to Guangcheng.

The protection of human rights that diplomatic asylum offers extends to thousands of people fearing political persecution on behalf of an oppressive government, for example North Korea⁴⁴, Havana and the former Soviet states. Precedent for grants of diplomatic asylum to large groups derives from the 10,000 Cubans seeking asylum in the Peruvian embassy in 1980 and similar situations in Budapest and Prague as thousands of people sought asylum in the West German embassies to evade the oppression of East Germany. Codification would allow diplomatic asylum to operate around the world to prevent political persecution and human right abuses of the masses in countries where oppression is embodied within the system.

Regardless of the protection of human rights diplomatic asylum is able to provide generally its initial introduction is credited with the protection it is able to offer in the frequent revolutions throughout Latin America. This has enabled the protection of the opposition of the new government after the Spanish Civil war⁴⁵ and most famously the protection of Haya De La Torre disputed in the Asylum case.

Not only does codification thwart government attempts at persecuting its opposition but it enables citizens of Latin American states to act against an oppressive state without fear of political persecution. The codification of diplomatic asylum in Latin America has provided a functional resource to protect human rights, prevent persecution founded on political persuasion in and outside of revolution. Outside of Latin America diplomatic asylum has been condemned by many states although this has not deterred hypocritical and sporadic grants of diplomatic asylum. The need for further international codification on the basis of humanitarian considerations is evidenced by the case of the Durban Six but also from the responses the Secretary General received when asking states to express their views prior to producing a report on diplomatic asylum, particularly Norway, Sweden and Canada. Whilst evaluating the cases of the Durban Six and Guangcheng, both of whom were politically persecuted, the granting of diplomatic asylum differentiated due to the political preference of the country granting asylum. Jamaica, Liberia and Pakistan all supported codification to

⁴⁴ 'North Korea.' 2015. Human Rights Watch. Accessed March 17. <http://www.hrw.org/nkorea>.

⁴⁵ Grugel, Jean, and Monica Quijada, 'Chile, Spain and Latin America: The Right of Asylum at the Onset of the Second World War.' (1990) *Journal of Latin American Studies* 22: 353–74.

prevent political persecution for urgent cases.⁴⁶ Academic commentators have also observed the political influence in grants of diplomatic asylum suggesting that 'It is as much a matter of politics as of law; perhaps it is more a matter of politics'.⁴⁷ Therefore codification of diplomatic asylum prevents human right abuses whilst providing a defence for politically persecuted persons not subject to their political persuasion being correlated with another state's.

A potential argument against an international law codifying diplomatic asylum is the illegitimate grants of diplomatic asylum that could be a by-product of codification. The 1954 OAS Convention allows the extraterritorial state to determine whether an individual is politically persecuted and whether the offence is of a political nature or not. However this creates a potential loophole for countries to grant diplomatic asylum at their discretion even if it is generally contended that the offence they are accused of is not of a political nature.

Grants of diplomatic asylum have in many instances correlated with political aims, therefore international codification may only increase this. Theoretically the codification of diplomatic asylum in the style of the OAS Convention would allow a terrorist to be granted diplomatic asylum if an extraterritorial state contended they were being politically persecuted. As politically controversial as this may be hypothetically it could occur. It has also been noted that certain states have sponsored terrorism including Iran⁴⁸, Pakistan and Saudi Arabia.⁴⁹ The punishment of perpetrators is of high importance to western governments, this is likely to be a concern of widespread ratification of treaties including provisions concerning diplomatic asylum. It represents a loophole that can be created by maintaining the inviolability of consular premises alongside the codification of diplomatic asylum in a similar style to Latin America.

It could be argued that the introduction of diplomatic asylum in cases of mass asylum is outdated and is unlikely to be used therefore codification is pointless. Despite the protection of human rights diplomatic asylum may offer in oppressive states there are already international initiatives in place to prevent such oppression. The initiatives put in place to

⁴⁶ Behrens, Paul, 'The Law of Diplomatic Asylum - A Contextual Approach.' 35.

⁴⁷ Evans, Alona E., 'The Colombian-Peruvian Asylum Case: The Practice of Diplomatic Asylum.' (1952) *The American Political Science Review* 46 (1).

⁴⁸ Levitt, Matthew, *Iran's Support for Terrorism Worldwide. Congressional Testimony: House Committee on Foreign Affairs* (2014).

<http://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20140304.pdf>

⁴⁹ Carpenter, Ted, *Terrorist Sponsors: Saudi Arabia, Pakistan, China.* (2001) Cato Institute. <http://www.cato.org/publications/commentary/terrorist-sponsors-saudi-arabia-pakistan-china>

target oppressive states also importantly do not entail a derogation of sovereignty, therefore are likely to be favoured by states to large scale diplomatic asylum.

The same rationale is able to be applied to the protection of human rights of individuals seeking diplomatic asylum in consular premises. Currently there is international human rights law protecting fundamental human rights as well as regional protection of human rights. Pertinent international law in this context includes the 1951 Refugee Convention while Europe has also implemented the European Convention on Human Rights. Article 1(2) of the Refugee Convention guarantees refugee status for those individuals who have a well-founded fear of persecution based upon political opinion. Ergo states may question the need for diplomatic asylum when there is already widely accepted international law not requiring a derogation of sovereignty that offers protection for those in fear of political persecution.

Moreover, the criticisms of the reasoning given for diplomatic asylum are; codification may create a loophole for systematic abuse of diplomatic asylum to meet political aims, cases of mass asylum are unlikely to occur in the current political climate and the protection available via diplomatic asylum is emulated in human rights legislation.

3 Why States Are Reluctant to Codify Diplomatic Asylum

Regardless of the sporadic but persistent practice of diplomatic asylum globally when given the opportunity to introduce any form of codification many states opt against codifying what is often perceived as the 'legal norms' of diplomatic asylum. The rejection of diplomatic asylum has stemmed from concerns that if codified the practice could lead to the abuse of diplomatic privileges as well as constituting an unfounded derogation of sovereignty from the territorial state. Academic commentators as well as states have voiced this concern with the practice of diplomatic asylum often being perceived as directly contrary to the notion of territorial sovereignty.⁵⁰ While the abuse of diplomatic privileges that arguably diplomatic asylum creates a loophole for has also featured prominently in the condemnation of diplomatic asylum since the inviolability of diplomatic premises was established in the Congress of Westphalia in 1648. Another reoccurring criticism of attempts to introduce codification and the concept of diplomatic asylum generally is that it is not recognised by enough states to warrant implication internationally.

⁵⁰ Nervo, R, 'Le Droit D'asile.' (1932) *Dictionnaire Diplomatique de l'Académie Diplomatique Internationale* 1: 201.

Sovereignty is able to be defined in various forms although the cruxes of all definitions revolve around the premise that the sovereign body is the supreme authority within a territory. The interference with sovereignty that creates the apprehension to introduce a form of codified legislation has been considered at length, most views derive from the theoretical lack of control that the state could be argued to have if a codified form of diplomatic asylum was introduced. Codification could create a form of legislation which allows countries to protect 'common criminals' which are of high interest to the territorial state to punish. This is hypothetically permitted by the inviolability of the embassies which the VCDR and the VCCR guarantee in their provisions as well as the precedent and regional treaties governing diplomatic asylum.

When customary international law is included in treaties, it is generally established that it is a matter of ratifying the present norms. This means due to precedent established in the Asylum case and Article 4 of the 1954 OAS Convention on Diplomatic Asylum if globally codified 'It shall rest with the State granting asylum to determine the nature of the offence or the motives for the persecution'. Furthermore codification could lead to disputes over the classification of the individual being granted diplomatic asylum. By nature a dispute over this matter erodes the sovereignty of the territorial state as it derogates from the sovereignty of said state by acting as an exception to the international law that the local jurisdiction dictates the legal matters in said jurisdiction.⁵¹ The derogation of sovereignty diplomatic asylum entails was considered by the ICJ in the Asylum case and was judged to constitute interference in matters within the states jurisdiction. Therefore even in Latin America diplomatic asylum must be justified on a case by case basis.⁵²

The case of Assange illustrates why states are reluctant to introduce codified diplomatic asylum due to the concerns of the erosion of sovereignty. Firstly, Assange exhausted all domestic means of judicial appeal before seeking asylum, thus by seeking asylum Assange evaded the authority of the judicial system and also the executive's wishes. The grant of asylum to Assange also implicated Britain internationally as it prevented Britain from fulfilling the obligations it held to Sweden under the Extradition Act 2003. Thus the Ecuadorian grant of asylum entailed a serious derogation of Britain's sovereignty on two fronts; the bypassing of the judicial authority allowing Assange to avoid all consequences of the Supreme Court judgment as well as preventing Britain from fulfilling its own legal obligations. The grant of asylum was described by William Hague, Foreign Secretary, as 'for the purposes of

⁵¹ Morgenstern, "'Extra-Territorial' Asylum'".

⁵² Asylum Case (*Colombia v. Peru*), International Court of Justice (ICJ), 20 November 1950.

escaping the regular processes of the courts'⁵³ therefore Ecuador was able to interfere in the authority of Britain within its own territory.

Embassies' status as inviolable creates the potential of diplomatic abuse of privilege, as it hypothetically allows the head of the diplomatic mission to grant asylum without any feasible repercussion. Currently due to lack of codification this abuse of diplomatic privilege is rarely committed, although it is likely many countries fear an implication of codification would lead to disputes concerning the abuse of diplomatic privilege when segregating those accused of 'common crimes' to those accused of 'political crimes'. In response to the secretary general many countries voiced that if codified there must be provisions to prevent this. Other countries echoed these concerns; Czechoslovakia stated if a 'common criminal' was to seek refuge in an embassy then it would be appropriate for him to be given to the local authorities regardless of the applicable international law. Czechoslovakia's concerns articulate an issue many countries consider when implicating codification as the reaction they deem appropriate to the abuse of diplomatic privilege contradicts established international law to which they are obligated to abide by.⁵⁴

Haya De La Torre illustrates the disagreements likely to occur between the territorial and extraterritorial state concerning the classification of an individual as a 'political criminal' or a 'common criminal'.⁵⁵ The grant of asylum by Columbia was abuse of the diplomatic privilege to grant diplomatic asylum in the Peruvian perspective. Subsequently if codified it is likely that disputes will arise concerning the relevant grant of asylums legality with the state granting asylum often being accused of abusing diplomatic privileges. The US were aware of this potential threat to sovereignty and made steps to evade a dispute of this nature in 1897 by instructing Diplomatic officers that the privilege of immunity of diplomatic officers from local jurisdiction does not extend to those granted asylum by diplomatic officers.⁵⁶ John Basset Moore, the first American Judge to serve on the Permanent Court of International Justice (later replaced by the ICJ) commented in 1892 that originally the practice of diplomatic asylum was born from abuse of ambassadorial privilege and those supporting

⁵³ 'William Hague's statement on Ecuador's decision to offer political asylum to Julian Assange'. (2012). *ITV*, 16 August. <http://www.itv.com/news/2012-08-16/william-hagues-statement-on-ecuadors-decision-to-offer-political-asylum-to-julian-assange/>

⁵⁴ UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General.

⁵⁵ Asylum Case (Colombia v Peru), International Court of Justice (ICJ) 20 November 1950.

⁵⁶ Chilsholm, 'Chen Guangcheng and Julian Assange': 528–55

international codification of diplomatic asylum do not comprehend the territorial states rightful interest in domestic affairs.⁵⁷

Former ICJ Judge Badawi Pasha in his dissent of the decision in the Asylum case noted that all cases of diplomatic asylum in Latin America bare one common denominator; they were all in connexion to revolution. Additionally, declaring that in times of revolution 'exceptional measures' were usually adopted.⁵⁸ In the late 19th century and early 20th century civil wars and political revolutions were common place in Latin America. Academic literature concerning international law has also described Latin America in the 20th century as riddled with political uncertainty 'where today's government officials may be tomorrow's refugees, and vice versa'.⁵⁹ The lack of uncertainty in Latin America illuminates the need for regional codification of diplomatic asylum, hence the numerous treaties that have been formed in this regard. The treaties, although indicating a derogation of sovereignty, have been produced with a clear motive to allow a derogation of sovereignty due to the political climate. Conversely, Norway, a member of the European Economic Area (EEA), has little incentive to choose to implicate international law derogating from their sovereignty as a state. Norway also opted against joining the European Union (EU) due to concerns over sovereignty.⁶⁰ Although EU law as a necessity of membership must be introduced in member states the derogation of sovereignty entailed may not be as directly opposed to the wishes of the government as diplomatic asylum is in many cases and presumably a uniform approach would necessitate.

A uniform approach may also provide an incentive against codifying diplomatic asylum for many countries, as it would impede any attempts to grant diplomatic asylum to meet political ends. If a uniform approach was adopted which set a standard of 'political offender' and obliged states to grant asylum to those seeking extra territorial asylum or provide a legal justification for rejecting their request it would prevent this. In Latin America the OAS Convention provides in Article two that 'Every State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it'. However if codified it would likely be

⁵⁷ Basset Moore, John, 'Asylum in Legations and Consulates and in Vessels. II.' (1892) *Political Science Quarterly* 7 (June): 397–405.

⁵⁸ Asylum Case (Colombia v. Peru), International Court of Justice (ICJ), 20 November 1950.

⁵⁹ Grahl-Madsen, Atle, *The Status of Refugees in International Law: V. 2: Asylum, Entry and Sojourn.* (1972) Leiden: Kluwer Academic Publishers.

⁶⁰ 'Why Isn't Norway in the EU.' (2015) *Euro News*. Accessed March 25 2015. <http://www.euronews.com/2013/03/29/norway-and-the-eu>

due to humanitarian concerns; thus would oblige states to protect rights of political persecuted individuals in similar style to the 1951 Refugee Convention.

Therefore countries that have become renowned for granting diplomatic asylum to meet political ends or to showcase political influence would be unable to continue in this regard. For example the US would be unable to offer six Siberian Pentecostals refuge in the US embassy in Moscow for nearly five years⁶¹ but then reject the refuge of the Durban Six. The US when granting asylum has a reoccurring tendency to only offer refuge in rival countries such as Russia⁶² or China⁶³ in an attempt to invade the sovereignty of their rivals. Chen Guangcheng, the Siberian Pentecostals, Fang Lizhi and his wife⁶⁴, and Joseph Stalin's daughter Svetlana Alliluyeva⁶⁵ are examples. Hence codification would not only prevent politically aimed grants of diplomatic asylum but also would potentially constitute a derogation of sovereignty to states who grant diplomatic asylum with political aims. States who have historically aggressive foreign policy such as the US⁶⁶ and Russia⁶⁷ are also coincidentally against the introduction of codification of diplomatic asylum arguably from fear of being perceived as weak domestically and weakened international influence.

Furthermore the initial derogation of sovereignty implicated in a grant of diplomatic asylum combined with the potential for further derogation due to abuse of diplomatic privilege has allowed countries to dispute the validity of diplomatic asylum for centuries. The rejection of the concept on the whole derives from historically powerful countries outside of Latin America not wanting to accept the derogation of sovereignty inclusive to a grant of diplomatic asylum.⁶⁸ When fusing the derogation of sovereignty which a treaty codifying

⁶¹ Burns, John. '15 Pentecostals to Leave Soviet: 5 Spent 5 Years in U.S. Embassy.' (1983) *The New York Times*, June. 15.

⁶² Trenin, Dmitri. 'Get Ready World: The U.S.-Russian Rivalry Is Back.' (2015) *The National Interest*. Accessed April 2. <http://nationalinterest.org/feature/get-ready-world-the-us-russian-rivalry-back-10545>

⁶³ Brown, Jason. 'America's Greatest Economic Rival Offers Lessons For US.' (2015) *The Independent Voter Network*. Accessed April 2. <http://ivn.us/2013/01/15/america-s-greatest-economic-rival-offers-lessons-for-us/>.

⁶⁴ 'Julian Assange Asylum Row: A History of Diplomatic Rifts.' (2015). *The Telegraph*. Accessed April 3. <http://www.telegraph.co.uk/news/worldnews/wikileaks/9480877/Julian-Assange-asylum-row-a-history-of-diplomatic-rifts.html>.

⁶⁵ 'Julian Assange, Chen Guangcheng & More Famous Embassy Stays.' (2015). *The Daily Beast*. Accessed April 3. <http://www.thedailybeast.com/articles/2012/08/17/julian-assange-chen-guangcheng-more-famous-embassy-stays-photos.html>.

⁶⁶ Cloughley, Brian, 'Aggressive US Foreign Policy.' (2012) *The News*, July 28.

⁶⁷ Mills, Laura, and Nataliya Vasilyeva. 'President Vladimir Putin Defends Russia's Aggressive Foreign Policy.' (2015) *Huffington Post*. Accessed April 12. http://www.huffingtonpost.com/2014/12/04/putin-russia-foreign-policy_n_6267568.html

⁶⁸ UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General,

diplomatic asylum would inevitably involve with the potential for further derogation and the possible implications of this to a states perceived image it is understandable to why states wouldn't be in favour of codification. A clear demonstration of this is the US's chosen exclusion from the 1954 OAS convention, despite being a member of the Organisation of American States.

Regardless of the contended validity of the rationale given by states for choosing against the codification of diplomatic asylum there are many areas in which the rationality of said arguments is questionable. Firstly although a derogation of the sovereignty of the territorial state inevitably occurs when granting diplomatic asylum one can propose that the opposition to codification on this basis is disproportionate. Academics have suggested that derogation of sovereignty may occur however the actual derogation does not imply an improper intervention into the sovereignty of the state. This is on the basis that the system of punishment would be more efficient if states were able to provide mutual assistance to one another and ensure that other states were abiding by international law.⁶⁹ Therefore the derogation of sovereignty would be communal and theoretically provide a greater transparency of punishment internationally. Others have suggested that such derogation of sovereignty is necessary as when the state is concerned with a 'political offender' the reaction of the state is more concerned with self-preservation than providing the essential values necessary.⁷⁰ The proposed rationale for states to allow the derogation of sovereignty on this basis is very persuasive, as undoubtedly when times are in crisis states can act in self-preservation, placing preservation of self-interest over the humanitarian values of the state. A resounding example of this is the introduction of the Patriot Act in reaction to the 9/11 terrorist bombings, later deemed illegal⁷¹ but represented the introduction of harsh measures in the aim of self-preservation. Thus one can suggest that the disproportionate reaction to the potential of derogation of sovereignty is one which stems from aggressive foreign policy which is hard to argue should be placed above humanitarian considerations.

Another criticism one may propose of the rejection of the codification of diplomatic asylum is that the derogation of sovereignty emulates the sovereignty that is reduced of states that are members of the European Union (EU). When states become party to the EU they also by default agree to implicate any laws and treaties that the EU choose to introduce, therefore

⁶⁹ Porcino, Peter. 'Toward Codification of Diplomatic Asylum.' (1975) *New York University Journal of International Law and Politics* 8, 435.

⁷⁰ Sinha, Prakash S., 'Diplomatic Asylum.' (1971) *Asylum and International Law*, 207–62.

⁷¹ Keller, Susan, 'Judge Rules Provisions in Patriot Act to Be Illegal.' (2007) *The New York Times*, September 27.

eroding the sovereignty of the sovereign body in the member state, Parliament in the UK for example. Many states when addressing the report of the Secretary General voiced concerns that the derogation of sovereignty entailed was in violation of international law. In response to the Secretary General the Hungarian representative claimed such an interference was clearly an intervention in the matters of the territorial state and hence a violation of international law.⁷² However Hungary, as a member of the EU, has many of its internal matters dictated by EU legislation. The EU throughout its history has introduced many forms of effective legislation protecting human rights; the ECHR is a prominent illustration of this. Codification of diplomatic asylum would provide protection of human rights similar to EU human rights legislation without hindering other domestic affairs.

Many states choose to not recognise the practice of diplomatic asylum despite the concept being available and the Congress of Westphalia in 1648 guaranteeing the inviolability of foreign embassies. The US have renounced diplomatic asylum yet have provided diplomatic asylum on numerous occasions around the world to those 'politically persecuted'. Chen Guangcheng being one example. The definition of diplomatic asylum given by the Secretary General of diplomatic asylum is 'asylum granted by a State outside its territory, particularly in its diplomatic missions'.⁷³ Guangcheng's stay in Beijing in the views of any unbiased commentator falls within the area encompassed by this definition. While later in the year the US released a statement in response to Julian Assange's refuge in the Ecuadorian embassy providing they do not recognise the concept of diplomatic asylum.⁷⁴ When placing the US statement in the context of their grants of asylum to Cardinal Mindszenty, Fang Lizhi, Svetlana Alliluyeva and the Siberian Pentecostalists it seems rather hypocritical and frankly inaccurate. Admittedly not every country who rejects the concept of diplomatic asylum also grants refuge in its diplomatic missions abroad. However due to the influence of the US its behaviour wields great significance internationally and therefore is an appropriate example. Ergo the refusal to recognise the concept of diplomatic asylum ought to be opposed as an erratic use of diplomatic missions for refuge still constitutes use of diplomatic missions for refuge.

The criticisms of the reluctance to introduce codification of diplomatic asylum rather than the opposing arguments presented in the 'grounds for codification' chapter are undeniably

⁷² UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General.

⁷³ UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General.

⁷⁴ Rogin, Josh. 'State Department: The U.S. Does Not Recognize the Concept of 'diplomatic Asylum'.' (2015) Foreign Policy. Accessed April 12. http://foreignpolicy.com/2012/08/17/state-department-the-u-s-does-not-recognize-the-concept-of-diplomatic-asylum/?wp_login_redirect=0

credible. The derogation of sovereignty that states rationalise the rejection of codification of diplomatic asylum can transparently be seen as an attempt by states to preserve political power, especially when contrasting the derogation of sovereignty with that entailed in European Union membership. Whereas the reluctance of states to codify diplomatic on the basis of not recognising the practice is flawed when said states grant diplomatic asylum at will.

4 Recommendations

Firstly, if codified, the main practical difficulty with implementation would be how to classify an individual as a 'political offender'.⁷⁵ Currently the OAS Convention of 1954 deals with this in Article 4 by stating 'It shall rest with the State granting asylum to determine the nature of the offence or the motives for the persecution'. Sinha proposed that a political crime for the purposes of diplomatic asylum can be derived from; if the act is related to an organised political activity, if the act is preformed based on political characteristics and if non-extradition is vindicated on the belief of preventing political persecution.⁷⁶ Assange would fall within this criterion due to his organised political activity, which had inherently political characteristics⁷⁷. If Sinha's proposed method was introduced Britain would be obligated to grant Assange safe passage to Ecuador. If a dispute was to arise an impartial court could adjudicate over the legality of the decision to grant diplomatic asylum. The treaty would have to stipulate that if the criteria was decided to not be met then the state granting asylum would have to return the individual to the receiving state or have the inviolability of their embassy removed until doing so. Including this stipulation may contradict the VCDR and the VCCR but any codification must deal with the inviolability of the embassies to be effective. An advantage of regional codification would be that each region of states could dictate the scope of what is able to fall within political persecution. The 1954 OAS Convention approach would inevitably breed dispute over the classification of the individual. However it could allow Assange to be granted safe passage and form a more reliable method of resolving issues compared to diplomatic negotiations.

The most appropriate means of codification would be several continental treaties which dictate the operation of diplomatic asylum in that continent only. For example the Ecuadorian grant of diplomatic asylum to Assange would be dictated by the European treaty regulating

⁷⁵ Asylum Case (*Colombia v. Peru*), International Court of Justice (ICJ), 20 November 1950.

⁷⁶ Sinha, 'Diplomatic Asylum.', 207–62.

⁷⁷ WikiLeaks. (2015). Accessed April 17. <https://wikileaks.org/>.

diplomatic asylum rather than the Latin American treaty. Additionally regional implication provides a means of reducing the derogation of sovereignty as the sovereignty would be derogated on the terms the territorial state has agreed to rather than the treaty the extraterritorial state is bound by. If diplomatic asylum is not codified any further than the current Latin American treaties it would be beneficial for law to be adopted to restrain its use rather than allowing individuals such as Assange to remain in a 'grey area' of legality when utilizing diplomatic asylum. If not codified outside of Latin America it would remain appropriate to reach a conclusion on how a grant of diplomatic asylum would operate when granted by a state bound by the 1954 OAS Convention in the territory of a state that does not recognise the concept of diplomatic asylum. Currently the question of jurisdiction that this scenario produces is what creates the 'grey area' of law.

Therefore the most logical approach to a scenario such as Assange's would be to modify the VCCR and VCDR to account for illegitimate grants of diplomatic asylum from an extraterritorial state in a territorial state not bound by the 1954 OAS Convention. A method to render grants of diplomatic asylum illegitimate could be as simple as deciding that grants of diplomatic asylum in states which do not recognise the concept fall within Article 41(1) of the VCDR as they interfere with the internal affairs of the state. An alternative method would be classifying a grant of diplomatic asylum as illegal and remove the inviolability of the extraterritorial embassy. This could be pursued via emulating the provisions in the Diplomatic and Consular Premises Act 1987. Article 1(3) states if 'a State ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post' the Secretary of State is able to withdraw their consent towards the consular premises.

If diplomatic asylum remains uncodified the most effective means of regulating its use would be to construct the meaning of Article 41(1) of the VCDR to render grants of diplomatic asylum internationally illegal or to introduce domestic legislation similar to the UK⁷⁸ effectively prohibiting its use.

Regardless of the potential success of the recommendations suggested there are limitations to the idea of regional codification and the premise of removing the inviolability of an embassy if a grant of diplomatic asylum was considered illegitimate, for instance in a country which does not recognise the concept. The main difficulty in regional implementation would be the introduction of a right to diplomatic asylum in continents which do not recognise the

⁷⁸ Diplomatic and Consular Premises Act 1987.

concept such as Europe. Disputes may also occur when implementing codification of diplomatic asylum regionally as the criteria to determine a political offender is likely to be a contested area of law. For countries reluctant to introduce diplomatic asylum it is likely that if codified the criteria of political offender would be tailored to exclude grants of diplomatic asylum that the Sinha criteria may include. There are also limitations to the proposed approach to grants of diplomatic asylum if diplomatic asylum remains uncodified. The inviolability of embassies guaranteed by the VCDR and VDDR if removed would render grants of diplomatic asylum fruitless against the authorities of the territorial state.

Therefore, despite the advantages of the codification of diplomatic asylum in continental treaties, the limitations of codification in this form are; the potential reluctance of states and the conceivable abuse of the method suggested of classification of individuals who are eligible for grants of diplomatic asylum. Whereas regardless of the effect of removing the inviolability of an embassy it has significant shortcomings, as it allows for potentially dangerous situations to emerge in times of political hostility.

Conclusion

Assange's stay in the Ecuadorian embassy will soon reach three years. With no current international law which the UK are bound by Assange may remain within the embassy for years to come. The total cost of policing Assange's stay is slightly over £10million⁷⁹ thus far, which the British media has expressed its hostility towards.⁸⁰

With numerous individuals throughout history also enduring extended grants of diplomatic asylum in consular premises by extraterritorial states it is remarkable that there has been no international legislation governing the practice. This said there is an underlying political aim to many grants of diplomatic asylum outside of Latin America as the extraterritorial state is given the opportunity to erode the sovereignty of the territorial state by granting an individual diplomatic asylum. Diplomatic asylum as a controversial concept has been subject to manipulation by states and has remained in the 'grey area' because of this. Logic suggests states would rather act within a grey area of legality rather than confirming the legality of diplomatic asylum as it allows states to limbo between acting in questionably legal circumstances for humanitarian reasons yet conversely rejecting the concept on a whim. When questioned for their opinion on the codification of diplomatic asylum a large proportion

⁷⁹ 'UK Gov't Waste Explored.' 2015. Accessed April 17 2015. <https://govwaste.co.uk/>.

⁸⁰ Barrett, Davi., 'Julian Assange Policing Costs Reach £10 Million' (2015) *The Telegraph*, February 5.

of states were against the idea.⁸¹ Largely because of fear of derogation of sovereignty as well as states not acknowledging diplomatic asylum as a legal practice outside of Latin America. However there are other practical reasons that diplomatic asylum may not warrant introduction including general political stability. Consequently codification has not been a topic considered in treaties since.

Reason dictates that codification is a must to some degree. The consequential derogation of sovereignty from the state warrants cannot be given more importance than the saving of lives of those individuals politically persecuted. If codified implementation would be most successful in a form of regional treaties rather than an all-encompassing treaty it would allow regions to dictate the circumstances that a grant of diplomatic asylum can be given in. The conclusions made are ascertained on a theoretical basis as the deductions and recommendations concerning codification are made employing the notion that states are willing to act in good faith rather than letting political tensions override an attempt of codification.

Despite the gap in international law that Julian Assange's stay in the Ecuadorian embassy illustrates ought to be codified, it is unlikely that any form of international law will be introduced to prevent the 'grey area' of law producing more 'prisoners of process' The crux of the reluctance to recognise diplomatic asylum as a legal concept is due to the derogation of sovereignty embedded. Diplomatic negotiations are likely to continue providing solutions instead of concentrating negotiations towards treaties similar to the OAS Convention.

⁸¹ UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary-General.