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Diplomatic Asylum and the Assange Case

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Abstract
This article traces the place and development of diplomatic asylum in international law in close connection with the more specific questions raised by the case of Julian Assange, who was granted asylum in the Ecuador embassy in London on 16 August 2012. After discussing the historical rise and decline of diplomatic asylum, the article reviews the current status of diplomatic asylum in international law and its implications for the triangular legal relationship between the United Kingdom, Ecuador, and Mr Assange. The article submits that, although there would not seem to be a title in general international law or human rights law for Ecuador to grant asylum to Assange, there is no obvious legal route for the United Kingdom to terminate the asylum. The fate of Assange resembles that of a long series of historical precedents where diplomatic asylum resulted in protracted stays. Although this may seem an unsatisfactory result from the perspective of international law, the uneasy balance between territorial sovereignty and diplomatic inviolability also engenders incentives to avoid disputes or to resolve them through diplomatic channels.

Key words
diplomatic asylum; diplomatic immunities; diplomatic law; human rights; non-intervention

1. Introduction

The year 2012 witnessed two prominent cases of diplomatic asylum. On 19 June 2012 Wikileaks founder Julian Assange entered the Ecuador embassy in London seeking asylum in an attempt to forestall his imminent extradition to Sweden where he was facing charges of sexual assault. Some months earlier, in April, the blind Chinese civil rights activist Chen Guangcheng escaped from house arrest and sought sanctuary in the United States embassy in Beijing. Whilst Assange remains in the compound of the Ecuador embassy under a formal grant of asylum, Chen Guangcheng and his family were issued US visas and flown to the United States, albeit under protest from the Chinese government.[1]

The case of Assange, in particular, illustrates the conflict inherent in diplomatic asylum between the receiving (or territorial) state's territorial sovereignty and the sending (or extraterritorial) state's diplomatic inviolability. Because both the sending and the receiving state hold a legal trump card – the receiving state its territorial

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1 A. Jacobs and J. Ansfield, 'Challenge for U.S. after Escape by China Activist', *New York Times*, 27 April 2012; J. Adetunji and L. Davies, 'Julian Assange Granted Asylum by Ecuador—as It Happened', *Guardian*, 16 August 2012.

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sovereignty to prevent a fugitive from leaving its territory and the sending state the inviolability of its diplomatic premises to withstand the fugitive's physical recovery – frictions flowing from diplomatic asylum may well result in protracted disputes. The unsatisfactory character of diplomatic asylum, legally and practically, explains the reluctance of states to make use of it. In those rare cases where states, whether for reasons of political expediency or humanitarian concerns, do decide to grant diplomatic asylum, disputes are normally averted or resolved by diplomatic means. Although the Chinese government demanded that the United States apologize for the Chen Guangcheng incident, it also declared that there would be no obstacles for Chen to study abroad and did not intervene when Chen was flown to the United States. For the Chinese government, the significant public relations risks of Chen's escape probably outweighed the concern that the United States was meddling in its domestic affairs. In the case of Mr Assange, however, Ecuador and the United Kingdom have found reason to stand firm and only time can tell how the incident will be resolved.

In the coverage of the Assange case in the popular press, law blogs, and other commentaries, three questions seem to fight for supremacy: whether Ecuador has a right to grant Assange asylum, whether the United Kingdom has a right to terminate any grant of asylum, and whether Assange can invoke a right to be protected against alleged injustices in (primarily) the United States.[2] Questions of this type are not new to international law. Diplomatic asylum is probably one of international law's oldest institutions, in existence ever since kings and princes started sending permanent missions to foreign countries. Whether, indeed, the 'house of an ambassador affords asylum' is a question that has occupied the minds of politicians and legal scholars throughout the various forming stages of international law.[3] This article traces the place and development of diplomatic asylum in international law in close connection with the more specific questions raised by the Assange case. It discusses the historical rise and decline of diplomatic asylum (section 2), the status of the right to grant diplomatic asylum in current international law (section 3), the extent to which diplomatic privileges may prevent the termination of asylum (section 4), and the potential of human rights law to modify the legal relationship between the sending and receiving states (section 5).

Apart from examining the rights and duties of the United Kingdom, Ecuador, and Assange, the contribution aims to determine whether the current legal regime on diplomatic asylum functions satisfactorily or, as some states and commentators have suggested, that it would be better to expressly regulate its exercise with a view

2 C. Gardner, 'Julian Assange: Can Ecuador's Embassy Be Stripped of Its Diplomatic Status?', *Guardian*, 16 August 2012; R. O'Keefe, 'Enter at Your Own Risk', *EJIL: Talk!*, 16 August 2012, http://www.ejiltalk.org/enter-at-your-own-risk; D. Akande, 'The Julian Assange Affair: May the UK Terminate the Diplomatic Status of Ecuador's Embassy?', *EJIL: Talk!*, 17 August 2012, http://www.ejiltalk.org/may-the-uk-terminate-the-diplomatic-status-of-ecuadors-embassy; J. Kurbalija, 'International Law and the Assange Asylum Case', *Diplo*, 20 August 2012, http://www.diplomacy.edu/blog/international-law-and-assange-asylum-case; J. Ku, 'Can We All Admit that Assange Has No Legal Case for "Safe Passage"?', *Opinio Juris*, 21 August 2012, http://opiniojuris.org/2012/08/21/can-we-all-admit-that-assange-has-no-legal-case-for-safe-passage.

3 Thus reads the title of Chapter XXI of Van Bynkershoek's treatise on diplomatic law: C. van Bynkershoek, *De Foro Legatorum Liber Sigularis* (1744/1946), 113.

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to solidifying humanitarian aspirations and preventing abuse.[4] The article submits in that connection that the status quo, although not guaranteeing a uniform or 'just' practice of diplomatic asylum, provides a befitting equilibrium between the rights of the receiving and sending states. It reserves the practice of diplomatic asylum to exceptional cases, puts incentives into place for avoiding and resolving disputes by diplomatic means, and may account for developments in the sphere of human rights law that can distort the ordinary legal relationship between the sending and receiving states.

2. A SHORT HISTORY OF DIPLOMATIC ASYLUM

Diplomatic asylum originated in the fifteenth and sixteenth centuries in Europe as a consequence of the transformation of temporary embassies into permanent ones and the corollary extension of the privilege of the ambassador's personal inviolability to his dwellings (and other properties such as his carriage).[5] When it became forbidden for local authorities to enter the house of the ambassador, fugitives sought refuge there and were often permitted to enjoy it. The principle of diplomatic asylum was recognized by legal writers of the time such as Alberico Gentili and Francisco Suárez.[6] The spreading practice of diplomatic asylum in that era has further been explained by the demise of more traditional forms of asylum, such as the abolition of cities of refuge and the falling into disuse of church sanctuary.[7] But also relevant was the still nascent and imperfect conception of territorial sovereignty: the state was at the time quite familiar with sharing jurisdiction with other authorities.[8]

Studies on the practice of diplomatic asylum from the fifteenth to the eighteenth centuries reveal that, although well established, grants of diplomatic asylum often gave rise to disputes, especially if the beneficiary was accused of high treason or other crimes affecting essential political interests.[9] In such cases, territorial authorities did at times enter embassy premises to seize the offender. One famous episode concerned the Duke of Ripperda, the former Dutch ambassador who in search of further career opportunities had offered his services to King Philip V of Spain and was subsequently accused of abusing his office and misappropriating large sums of money. Fearing the wrath of the Spanish king, the duke sought refuge

4 P. Porcino, 'Toward Codification of Diplomatic Asylum', (1976) 8 NYJILP 435, at 448–52; A. J. Jeffery, 'Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights', (1985) 1 SAJHR 10, at 22–6. See further the views of Australia (which initiated the discussions on codification in the UN General Assembly in 1974), Bolivia, Ecuador, Jamaica, and Liberia in UN General Assembly. UN General Assembly, Question of Diplomatic Asylum: Report of the Secretary-General, UN Doc. A/10139 (Part I) (1975) (hereafter Report of the Secretary-General, Pt I).

5 S. P. Sinha, *Asylum and International Law* (1971), 21; E. Reale, 'Le droit d'asile', (1938) 63 *Recueil des cours de l'Académie de droit international* 469–602, at 513; UN General Assembly, Question of Diplomatic Asylum: Report of the Secretary-General, UN Doc. A/10139 (Part II) (1975) (hereafter Report of the Secretary-General, Pt. II), para. 2.

6 A. Gentili, *De Legationibus Libri Tres* (1548/1924), 104–5; F. Suárez, *De Legibus et Deo legislatore* [1612], *Selections from Three Works of Francisco Suarez* (1944).

7 Sinha, *supra* note 5, at 21.

8 J. B. Moore, *Digest of International Law*, Vol. 2 (1906), 762.

9 Ibid., 763–6; Reale, *supra* note 5, at 518–22. Also see Report of the Secretary-General, Pt II, *supra* note 5, para 3.

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at the British embassy in Madrid, but Philip V, referring to the lese-majesty nature of his crimes, had 60 soldiers enter the embassy and recover the duke.[10] Sovereigns also came to renounce abuses of diplomatic asylum, such as arising from the *franchise du quartier*, the practice in some European cities, including Madrid, Venice, Rome, and Frankfurt am Main, under which embassies claimed the right to prevent the arrest of persons and the levying of taxes in the area around the embassy and where entire districts were thus considered to share in the embassy's inviolability.[11]

Until the nineteenth century, the right of diplomatic asylum was often explained by the now defunct idea of exterritoriality, holding that diplomatic premises are part and parcel of the sovereignty of the sending state, over which the receiving state consequently wields no power.[12] One of the first to reject this theory was Cornelis van Bynkershoek, who posited that the ambassador's immunities are functional and that his premises may not be used to offer refuge to fugitives.[13] He found the notion that diplomatic privileges would allow for the concealment of criminals so preposterous that 'it scarcely called for serious discussion'.[14] Vattel, somewhat less categorically, agreed that diplomatic privileges were never meant to be used for asylum and that sovereigns should not be deterred from recovering offenders whose punishment was of great importance to the state, but he also posited that it would be better to refrain from such incursions in respect of persons accused of lesser crimes since they 'are often more unfortunate than guilty'.[15]

Abuse of diplomatic privileges, the cementing idea of exclusive territorial sovereignty, and insistence on the orderly administration of justice explain the waning popularity of diplomatic asylum in Europe in the nineteenth century. Moore, having surveyed practices and official positions on diplomatic asylum, concluded in 1906 that the institution had 'generally' disappeared; that it was no longer 'systematically employed'; and that it continued to occur only 'at certain times and places', and only 'for the purpose of shielding fugitives from naked violence'.[16] British diplomats, for example, were at various occasions in the nineteenth century instructed to grant asylum only if it accorded with local usage or if it concerned persons whose life was in imminent danger.[17] The official British government's position on diplomatic asylum was summed up as that it was 'in itself and in principle objectionable'.[18] The

10 Moore, *supra* note 8, at 765.
11 Ibid., at 761; Reale, *supra* note 5, at 520–2; Report of the Secretary-General, Pt II, *supra* note 5, para. 5.
12 H. Grotius, *De Jure Belli ac Pacis* (1625/1925), Bk. II, Ch. 18, Section IV, para. 5: '[B]y a similar fiction, ambassadors were held to be outside the limits of the country to which they were accredited. For this reason they are not subject to the municipal law of the State in which they are living.'
13 Van Bynkershoek, *supra* note 3, Ch. XVI, at 79–80. See also F. Hélie, *Traité d'instruction criminelle*, Vol. 2 (1866), para. 127; G. F. de Martens, *Précis du droit des gens modernes de l'Europe* (1864), Bk. VII, Ch. V, para. 220. Courts of various jurisdictions came to deny the theory of exterritoriality in the twentieth century, e.g., Court of Appeals of the District of Columbia (United States) 12 July 1963, *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963); Court of Criminal Appeal (United Kingdom) 5 February 1941, *R. v. Tyler Kent*, [1941] 1 KB 454; Conseil d'État (Belgium), *Belgian State v. Maréchal*, 1954, International Law Rep. 249.
14 Van Bynkershoek, *supra* note 3, Ch. XXI, at 114–15.
15 E. de Vattel, *Le droit des gens* (1758/1867), Book IV, Ch. IV, para. 118.
16 Moore, *supra* note 8, at 766–7. Also see Reale, *supra* note 5, at 527–8.
17 See, extensively, F. Morgenstern, '"Extra-Territorial" Asylum', (1948) 25 BYBIL 236, at 242–3.
18 Ibid., at 243.

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United States, too, denied the existence of a right of asylum. In the Instructions to Diplomatic Officers of the United States of 1897, it was laid down that 'the privilege of immunity from local jurisdiction does not embrace the right of asylum' and that the US government did not sanction the usage of diplomatic asylum, although it remained indisposed to direct its representatives to deny temporary shelter to persons whose life is threatened by mob violence.[19]

One shift in thinking on diplomatic asylum was that extending asylum to common criminal-law offenders was widely denounced and that, if the right was still considered to exist, it accrued only to perpetrators of political crimes or persons fleeing from political upheaval.[20] This rationale reflected not only the securing of ordinary systems of justice but also the spread of revolutionary thinking. It explains why the practice of diplomatic asylum persisted in Spain, which was afflicted by sanguinary disturbances throughout various periods in the nineteenth century. In the 1840s, for example, when the country was in a chronic state of revolution, the Chevalier d'Alborgo, chargé d'affaires of Denmark in Madrid, decided on multiple occasions to grant sanctuary to high-profile Spanish revolutionaries, amongst whom were the Marquis of Casa Irujo (who would later become the Duke of Sotomayor) and a certain Señor Salamanca.[21] In 1846, when the revolutionaries had come to power, d'Alborgo was made a Spanish noble with the fitting title of Baron del Asilo. And later, during the Spanish Civil War of 1936–39, thousands of Republicans as well as Nationalists found asylum in diplomatic missions in Madrid from Latin American as well as a number of European countries.[22] The official position of the Franco regime was that although Spain was under no obligation to recognize the right to asylum, it would act in accordance with international humanitarian practice on the matter and thus respect asylum granted to political offenders.[23] Contrary to those refugees who had found asylum on foreign warships and had been transported away from Spanish waters, however, the new Franco government did not allow the '*asilados*' in Madrid a safe conduct out of the country.[24]

It is for the same reason that, at the time diplomatic asylum was on the decline in most European countries, it made major advances in Latin America, where countries had gradually freed themselves from colonial rule. The endorsement of the institution in Latin America is directly related to the frequent occurrence of political turmoil and civil war in that part of the world, resulting in a state of affairs where 'today's government officials may be tomorrow's refugees, and *vice versa*'.[25] Because at different times different political factions benefited from it, the right to seek and to be granted asylum in legations came to be respected across the political

19 Ibid., at 242–3. See also Moore, *supra* note 8, at 779.
20 Report of the Secretary-General, Pt II, *supra* note 5, para. 13.
21 Moore, *supra* note 8, at 768.
22 Report of the Secretary-General, Pt II, *supra* note 5, para. 148.
23 J. Grugel and M. Quijada, 'Chile, Spain and Latin America: The Right of Asylum at the Onset of the Second World War', (1990) 22 *Journal of Latin American Studies* 353, at 357–8.
24 Ibid., at 361.
25 A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 2 (1972), 46. See also A. E. Evans, 'The Colombian–Peruvian Asylum Case: Termination of the Judicial Phase', (1951) 45 AJIL 755, at 761.

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spectrum in a majority of American countries.[26] This custom included the principle that persons granted diplomatic asylum were to be allowed safe conducts out of the country to the territory of the state granting asylum. From the second half of the nineteenth century onwards, a series of treaties were concluded that aimed to regulate the exercise of the right. These are discussed in the next section.

The usage of diplomatic asylum in Latin America subsists until today, as is demonstrated by more recent episodes such as the gathering of thousands of Cubans at the Peruvian embassy in Havana in 1980 that prompted Fidel Castro to open the port of Mariel for anyone wishing to leave Cuba;[27] the escape into embassies of Mexico, Panama, and Venezuela of hundreds of supporters of Salvador Allende after Pinochet's *coup d'état* in 1973;[28] and general Manuel Noriega's decision to seek temporary refuge in the Papal Nunciature in Panama after being overthrown by a US invasion.[29] When serious consideration was given in the 1970s to codifying diplomatic asylum in a treaty of universal applicability, several Latin American countries staunchly supported the idea, noting that the institution's humanitarian aspirations should be elevated into the international legal order since political instability continued to endanger human beings in all parts of the world.[30]

But, as is further discussed below (section 3), attempts at codifying diplomatic asylum outside Latin America have remained inconclusive. It does, however, not follow that diplomatic asylum has become extinct outside Latin America. On the contrary – the twentieth century has continued to abound with instances of diplomatic asylum. To mention just some of the most prominent incidents, in 1956, after the Soviet Union had invaded Hungary, the anti-communist Cardinal Jozsef Mindszenty fled into the US embassy in Budapest where he was permitted to stay for the next 15 years, until the Hungarian government finally allowed him to leave the country after the Pope had declared him to be a 'victim of history'.[31] In 1967, Svetlana Iosifovna Alliluyeva, the daughter of Joseph Stalin, approached the US embassy in New Delhi and was offered political asylum and a new life in the United States by the US ambassador Chester Bowles.[32] In June 1978, two Pentecostal families walked into the US embassy in Moscow, where they were allowed to remain in a basement apartment for five years before being permitted to emigrate to Israel in 1983.[33] In November 1979, six United States diplomats were taken into the private residence of the Canadian ambassador in Tehran after the US embassy had been seized by Iranian students and were two months later covertly flown out of the country and

26 Grugel and Quijada, *supra* note 23, at 355.
27 A. Larzelere, *Castro's Ploy: America's Dilemma: The 1980 Cuban Boatlift* (1988).
28 K. Clark and R. Figueroa, 'Ecuador Has Its Sovereignty Too', *Guardian*, 16 August 2012.
29 S. Rowley and N. Sheppard Jr, 'Noriega in Vatican Embassy', *Chicago Tribune*, 25 December 1989.
30 Report of the Secretary-General, Pt II, *supra* note 5, para. 213. See also the views of Argentina, Bolivia, Ecuador, and Uruguay in Report of the Secretary-General, Pt I, *supra* note 4.
31 M. Whiteman, *Digest of International Law*, Vol. 6 (1968), 451. In the wake of Assange's asylum, The *Telegraph* and Associated Press published summaries of prominent cases of diplomatic asylum. See 'Julian Assange Asylum Row: A History of Diplomatic Rifts', *Telegraph*, 16 August 2012; 'Prominent Cases of Asylum-Seeking at Embassies', Associated Press, 20 June 2012.
32 The *Telegraph*, 16 August 2012, *supra* note 31.
33 J. F. Burns, '15 Pentecostals to Leave Soviet: 5 Spent 5 years in U.S. Embassy', *New York Times*, 27 June 1983.

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into safety.[34] In 1985, the turncoat CIA agent Edward Lee Howard, having shaken off pursuing FBI agents in his home town of Santa Fe, New Mexico, managed to fly to Helsinki and walk into the Soviet Union embassy there, thus effecting his defection to the Soviet Union.[35] In June 1989, one day after the Chinese military had forcefully cleared Tiananmen Square of protesters, the political activist Fang Lizhi found refuge in the US embassy in Beijing together with his wife, where they would stay for 13 months before being allowed a safe conduct to the United States.[36]

In August 1989, in what is probably the most consequential episode of diplomatic asylum in modern history, the West German embassies in Prague and Budapest were occupied by increasingly large numbers of East German citizens who were demanding passage to the West. To avert a humanitarian crisis within the overpopulated embassies, trains bound to West Germany were eventually arranged, resulting in thousands more East Germans seizing the opportunity to escape their country in the following days. The embassy occupations played a significant role in the Hungarian decision to open its borders to the West, and with it, the fall of the Berlin Wall.[37] The route of diplomatic asylum has in more recent years also been taken by North Koreans who seek to escape to South Korea. In 2002, dozens of North Korean citizens sought refuge in the embassies of South Korea and of several Western countries in Beijing, most of whom were eventually allowed to leave for Seoul via third countries.[38] Further escalations were prevented due to the Chinese government taking strict security measures around embassies and other diplomatic compounds.

What these examples show is not that diplomatic asylum must be considered to have persisted as international custom that enjoys abundant practice or recognition of governments. They do indicate, however, that requests for diplomatic asylum may be so exceptional or so intertwined in wider international events, or entertain such significant political considerations, that it would be too sweeping and absolute to discard every grant of asylum as an abuse of international law. Few would contest the Canadian government's justification of the events in Tehran in 1980 that 'it upheld rather than violated international law' in protecting the US diplomats.[39] And the world might have been a different place indeed if the West German ambassador in Prague in 1989 had simply responded to the throngs of East Germans climbing over the fence of his exquisite baroque Lobkowicz Palace just below Prague Castle that to grant them sanctuary would fly in the face of established standards of international law. Diplomatic asylum may be perceived as a lamentable practice in strict legal terms, but its ramifications can be of such significance that it remains in use even by those countries that most strongly disapprove of it.

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34 For a legal appraisal: C. V. Cole, 'Is There Safe Refuge in Canadian Missions Abroad?', (1997) 9 IJRL 654.
35 The *Telegraph*, 16 August 2012, *supra* note 31.
36 Ibid.
37 F. Taylor, *The Berlin Wall* (2006), 599–636.
38 E. Rosenthal, 'North Koreans Get Asylum at Beijing Embassies', *New York Times*, 27 April 2002; 'Talks Due on Korean Asylum Seekers', *BBC News*, 27 May 2002. The episode was portrayed in a wonderful documentary film: *Seoul Train*, Dir. J. Butterworth, Incite Productions, 2005.
39 L. H. Legault, 'Canadian Practice in International Law during 1979 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs', (1980) 18 CYIL 301, at 305.

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3. The right of the sending state to grant diplomatic asylum

The problem with accepting a right on the part of states to grant diplomatic asylum was aptly articulated in the *Asylum* case, concerning the grant of asylum by the Colombian ambassador in Lima, Peru, to Víctor Raúl Haya de la Torre, after his American People's Revolutionary Alliance had lost a one-day civil war in Peru on 3 October 1948:

> 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. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.[40]

The International Court of Justice (ICJ) clarified, therefore, that diplomatic asylum (i.e., asylum by a state outside its territory, most commonly in its diplomatic missions) must be distinguished from territorial asylum (i.e., asylum granted by and in the territory of the petitioned state). Since territorial asylum benefits from the shield of territorial sovereignty, it is commonly accepted, and this was affirmed by the ICJ in the *Asylum* case, that it constitutes a normal exercise of state sovereignty that is to be respected by other states.[41] The reverse implication of the oft-invoked 'inherent' right of states to refuse entry to aliens as it sees fit is that the state is also free to admit any alien it wishes to admit. But this maxim cannot be upheld in respect of diplomatic or other forms of extraterritorial asylum. Contrary to some suggestions, therefore, the fact that a person seeking asylum at an embassy may be a 'refugee' under the 1951 Convention on the Status of Refugees or be protected from recovery by or refoulement to his home country under general human rights treaties does not necessarily render diplomatic asylum legal. Although such treaties may in theory (see section 5) enliven obligations on the part of the sending state vis-à-vis the asylum seeker, they do not displace a state's duty to respect the territorial prerogatives of the receiving state.

The question which thus arises is what legal bases there could be for such inroads into the sovereignty of the territorial state.

In the *Asylum* case, Colombia referred to the treaties in force in Latin America, including the Montevideo Convention of 1889 on International Penal Law, the Bolivarian Agreement on Extradition of 1911, the Havana Convention on Asylum of 1928, the Montevideo Convention on Political Asylum of 1933, and the Montevideo Convention on Political Asylum and Refuge of 1939.[42] The general outline of these treaties is that diplomatic asylum may only be granted in urgent situations and for

40 *Colombian–Peruvian Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266, at 274–5.

41 Ibid., at 274; UN General Assembly, Declaration on Territorial Asylum, UN Doc. A/RES/2312(XXII) (1967), Art. 1(1).

42 1889 Treaty on International Penal Law; 1911 Agreement of Extradition; 1928 Havana Convention on Asylum, 132 LNTS 323; 1933 Convention on Political Asylum, 37 Pan-Am. T.S. 48; 1939 Treaty on Political Asylum and Refuge, OAS T.S. 34.

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the period indispensable to ensure the safety of the person seeking asylum;[43] that states may only grant diplomatic asylum to persons who are sought for political reasons as opposed to common criminals;[44] and that the territorial state may at all times request that the person granted asylum is removed from its territory.[45] The conventions do not enliven an individual entitlement to receive asylum and petitioned states are thus free to refuse asylum also when the grant would be lawful vis-à-vis the territorial state. Although some of the regional conventions speak of beneficiaries as 'refugees', this term does not correspond to the definition of a refugee in the 1951 Refugee Convention: the right to grant asylum arises only in respect of political offenders or, alternatively, persons fleeing from general political upheaval. The United States, although invited to many pan-American conferences, refused to take part in any of these treaties, taking the position that 'it did not recognize the doctrine which held that diplomatic asylum was part of international law'.[46]

Although the 1928 Havana Convention that was binding on Colombia and Peru provided that grants of asylum to political offenders in legations were to be respected, the Court found that Colombia had not complied with the conditions that asylum should only be granted in 'urgent' cases and for the 'period of time indispensable to ensure the safety of the person concerned', noting that Haya de la Torre had waited for three months before seeking refuge in the embassy and was awaiting prosecution by the ordinary Peruvian judicial authorities.[47] The judgment signified, in short, that even in Latin America, the treaty basis for diplomatic asylum was narrowly construed so as to prevent abuse and that Haya de la Torre, even if he was to be qualified as a political offender and not as a common criminal, could not use asylum as a means to avoid the regular application of Peruvian laws.

Neither, the Court held, could general international law or regional custom be considered to provide a legal basis for the Colombian grant of diplomatic asylum.[48] The Court noted that, even in respect of Latin America, the exercise of diplomatic asylum disclosed so much uncertainty and contradiction, and so much inconsistency in the rapid succession of conventions on asylum, that it was difficult to discern a constant and uniform usage.[49] As a consequence of the judgment, the Organization of American States concluded the Caracas Convention on Diplomatic Asylum of 1954, which solidified the juridical status of diplomatic asylum and clarified a number of issues such as the notion of urgency, the party that is entitled to qualify the nature of the offence, and the conditions for a safe conduct out of the country.[50]

Outside Latin America, successive efforts, mostly initiated by Latin American countries, to establish a universal basis for diplomatic asylum have all failed. When the Universal Declaration of Human Rights was drafted, Bolivia and Uruguay had

43 1928 Havana Convention on Asylum, Art. 2.
44 1928 Havana Convention on Asylum, Art. 1; 1939 Treaty on Political Asylum and Refuge, Art. 3.
45 1928 Havana Convention on Asylum, Art. 2; 1939 Treaty on Political Asylum and Refuge, Art. 6.
46 Report of the Secretary-General, Pt II, *supra* note 5, para. 220.
47 *Colombian–Peruvian Asylum Case*, at 287.
48 Ibid., at 276–7.
49 Ibid., at 277.
50 1954 Convention on Diplomatic Asylum, 1438 UNTS 104, esp. Arts. 4, 6, 7, 11, and 12.

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proposed an amendment to the provision dealing with the right of asylum (current Article 14) to the effect that the right would extend to asylum in embassies and legations.[51] The amendments, however, were withdrawn, and the Russian delegate commented that they were an attempt to intervene in matters within the domestic jurisdiction of states and a 'misuse of the principle of extra-territoriality'.[52] In 1959, the General Assembly requested the International Law Commission (ILC) to undertake the codification of the principles and rules of international law relating to the right of asylum, which was understood as primarily referring to diplomatic asylum.[53] But the ILC, occupied with important topics already under study, postponed the subject, although it did summarily discuss diplomatic asylum in the context of its work relating to diplomatic and consular relations.[54]

The issue resurfaced in the General Assembly in 1974, when upon the instigation of Australia it decided to 'initiate preliminary studies on the humanitarian and other aspects of the question of diplomatic asylum'.[55] But after a report of the Secretary-General on the topic forwarded to the General Assembly mentioned that only seven of the 25 states which had presented their views were in favour of drawing up an international convention on the topic, the debates in the Assembly were shelved indefinitely.[56]

The report noted that some, mostly Latin American, countries had expressed the view that diplomatic asylum should be recognized in international law for humanitarian reasons, but a majority of delegations had considered international practice insufficiently ripe for the successful conclusion of an international convention.[57] Some of these states, including the United Kingdom, France, and Spain, underlined in this connection that the provision of temporary refuge in an embassy to protect persons from violent and disorderly action on the part of irresponsible actors was something different from a right to grant diplomatic asylum.[58] A considerable number of states further pointed to the danger that a set of rigid rules would limit the present flexibility on the part of states.[59] The United States and the Soviet Union

51 UN Doc. A/C.3/227 (1948) and UN Doc. A/C.3/268 (1948).
52 UN Doc. A/C.3/SR.122 (1948).
53 UN Doc. A/RES/1400 (XIV) (1959).
54 (1962) YILC, Vol. 2, at 369, para 45. See further *infra* note 82.
55 UN Doc. A/RES/3321 (XXIX) (1974).
56 Report of the Secretary-General Pt II, *supra* note 5.
57 Ibid., para. 242. Also see Report of the Secretary-General Pt I, *supra* note 4.
58 Ibid., para. 224.
59 Ibid. France, for example, stated that it was 'among the States which consider that the formulation of rigid rules on this subject might run counter to the humanitarian concerns' and considered that 'if . . . an attempt were made to formulate, in the United Nations, rules concerning diplomatic asylum, very great difficulties would be encountered, and the results attained might be the opposite of what was sought'. Belgium expressed that it was 'not convinced that it would be useful to draw up a legal instrument on principles governing the practice of diplomatic asylum', because '[s]uch an instrument might minimize or have too repressive an effect on the humanitarian motivation and the personal interpretation of certain factors'. Sweden argued that 'there is no need to codify the circumstances surrounding such evident humanitarian obligations', since '[i]t would not seem immediately necessary to elaborate an international legal instrument in a field where humanitarian rather than strictly legal considerations determine the action of States'.

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agreed that there was no need to keep the item on the agenda.[60] Referring to the debates in the General Assembly, the ILC concluded in 1977 that the topic did not appear at that time to require its active consideration.[61]

In view of the absence of worldwide treaty law on diplomatic asylum, William Hague, the UK foreign secretary, was entirely correct in stating that the UK is not bound by any instrument which requires it to recognize the grant of diplomatic asylum by a foreign embassy.[62] Neither, we may safely assume, is the practice of diplomatic asylum sufficiently extensive and uniform to belong to international customary law, quite apart from the fact that a range of governments have rejected outright the existence of such a right.[63]

But it does not follow that all grants of diplomatic asylum must be considered illegitimate. First, the absence of a right to grant diplomatic asylum merely implies that the grant remains subject to the territorial sovereignty and therewith the approval or acquiescence of the receiving state. This means that if the territorial authorities do not object to the grant, it is perfectly legal. This might also explain, for example, why some European states have on occasion granted diplomatic asylum in Latin American countries under circumstances that comply with local usage and therewith may be considered to imply the acceptance of the receiving state.[64] Further, one might reason that to provide asylum to persons fleeing from mob violence against which the territorial authorities cannot offer protection does not impinge upon the prerogatives of the territorial state.[65] From a similar rationale, it is stated that to provide protection in situations of general political upheaval, in which justice is not adequately administered, does not oppose the rule of non-intervention.[66]

Second, the question stands, what we should make of those utterances of states that, exceptionally, granting temporary refuge would be allowed if necessary to shield a person from imminent danger. Could it be upheld that, even if confronted with claims to surrender the fugitive, exceptional humanitarian circumstances may make it legitimate for diplomatic missions to refuse surrender?

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60 Ibid., para. 243. In a further resolution, the Secretary-General was thanked for his efforts, member states wishing to express further views were invited to do so, and the matter was reserved for a further session. See UN Doc. A/RES/3497 (XXX) (1975).

61 Possible additional topics for study following the implementation of the current programme of work, 1977 YILC, Vol. 2 (Part Two), at 129–30.

62 Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange, 16 August 2012, https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange.

63 Cf. *North Sea Continental Shelf (Germany v. Denmark; Germany v. The Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 43. Morgenstern, in particular, has forcefully rejected the proposition that a right to grant diplomatic asylum is part of customary law. See Morgenstern, *supra* note 17, at 241–6. Also see Porcino, *supra* note 4, at 445–6; Sinha, *supra* note 5, at 238; B. Gilbert, 'The Practice of Asylum in Legations and Consulates of the United States', (1909) 3 AJIL 562, at 585; A. M. Rossitto, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis', (1987) 13 Brooklyn JIL 111, at 114.

64 F. Morgenstern, 'Diplomatic Asylum', (1951) 67 *Law Quarterly Review* 362, at 362; Morgenstern, *supra* note 17, at 242–3.

65 Grahl-Madsen, *supra* note 25, at 46; Morgenstern (1951), *supra* note 64, at 376; Porcino, *supra* note 4, at 446–7. Cf. *Colombian–Peruvian Asylum Case*, at 282–3, where the ICJ noted (albeit in relation to the 1928 Havana Convention on Asylum): '[A]sylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population'.

66 Morgenstern, *supra* note 64, at 377.

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Some of the more recent episodes mentioned in the previous section, but also the official views of states during the General Assembly debates on the issue, may point to an affirmative answer. Even today, many states retain diplomatic asylum 'as an option' in their instructions to diplomatic and consular officers. The present Foreign Affairs Manual issued by the US Department of State, for example, sets forth that, although diplomatic posts 'may not grant or in any way promise "asylum" to any foreign national' (which is because the term 'asylum' has specific meaning in US immigration law and is reserved to persons who are physically present in the United States or at a land border or port of entry), protection may be granted in US missions, '[d]ue to the wide variety of circumstances that may be involved'.[67] The manual specifies that 'the ability of the U.S. Government to give assistance will vary with location and circumstances of the request'.[68] In the Netherlands, too, although its government abolished the possibility to request asylum at its embassies in the meaning of the Dutch Aliens Act (for the same reason as the USA), policy guidelines provide that embassies may grant temporary protection to aliens who are 'in an acute situation of distress'.[69] It appears that the Canadian position is similar[70] and that a range of other European countries employ procedures that either allow for asylum at embassies in exceptional cases and in an informal fashion or, less frequently, provide for formalized entry mechanisms as a prelude to territorial asylum.[71] It is, however, not always specified whether refuge may also be granted in opposition to demands of the receiving state. It seems that applicable procedures are commonly tailored in such a way as to leave decisions to grant protection within the discretionary power of the responsible foreign affairs ministry, which can take all relevant facts and circumstances into consideration.[72]

Legal writers have underlined as well that diplomatic asylum is essentially about reconciling the principle of territorial sovereignty with claims of humanitarianism.[73] Morgenstern has stated that '[i]t probably cannot be maintained that asylum can never be granted against prosecution by the local government'.[74] Grahl-Madsen does not rule out that in a case of 'the most compelling considerations of humanity', heads of diplomatic missions may refuse to surrender a person.[75] And

67 US Department of State Foreign Affairs Manual, 2 FAM 227.1(a) and 227.2(b).

68 Ibid., para. 227.1(a).

69 *Staatscourant* 2003, No. 173, at 17.

70 Legault summarized the official Canadian position as follows: '[D]iplomatic missions may not grant asylum on the premises of a post except in extraordinary circumstances. The sort of circumstances that we have in mind is when temporary asylum would be granted on humanitarian grounds to a person whether a Canadian citizen or not, if he is in imminent personal danger of his life during political disturbances or riots, with care being taken to ensure that the humanitarian character of the mission's intervention should not be misinterpreted', *supra* note 39, at 305. See also Cole, *supra* note 34, at 659–61.

71 G. Noll, J. Fagerlund, and F. Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (2003).

72 See, e.g., the US Department of State Foreign Affairs Manual, 2 FAM 227.1(c); and the statement of facts in *R (B and Others) v. Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643.

73 Morgenstern, *supra* note 17, at 236.

74 Morgenstern, *supra* note 64, at 376. See also S. Riveles, 'Diplomatic Asylum as a Human Right: The Case of the Durban Six', (1989) 11 HRQ 139, at 158.

75 Note that while Grahl-Madsen first suggests (at 46) that this exception may even be invoked vis-à-vis the authorities of the territorial state, he concludes (at 77) that this 'office of humanity' may not be exercised vis-à-vis the lawful organs of the territorial state. See Grahl-Madsen, *supra* note 25, at 46–7 and 77.

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in the standard works of Satow en Oppenheim, it is stated that although diplomatic asylum is not to be regarded as a legal right, it is accepted that it may be accorded on a temporary basis for the purpose of saving life or for other compelling reasons of humanity.[76]

Some authors refer in this connection to the judgment in the *Asylum* case, in which it was stated that:

> In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.[77]

It is, however, uncertain whether this passage should be taken as suggesting that asylum may be granted also in direct opposition to actions taken by the territorial state if these are of 'manifestly extra-legal character'. The Court was occupied specifically with delineating under what circumstances the 1928 Havana Convention on Asylum permitted the issuing of asylum to political offenders and concluded that the aim of Article 2(2) of the Convention was to exclude protection against the regular application of the laws and ordinary prosecutions of the receiving state.[78] Whether that says anything about a generally applicable exception for granting diplomatic asylum is at the least doubtful.

But the main problem with accepting diplomatic asylum as humanitarian exception to territorial sovereignty (or simply as an instrument of humanitarian intervention) is the inconsistent and contradictory manner in which states have asserted a right to grant protection on such grounds. It does appear that reasons of political expedience, much more than clearly outlined humanitarian principles, guide the practice of offering refuge. Moreover, even if one sees support for a humanitarian exception in state practice, the complication remains that no agreement exists on such auxiliary issues as what exactly the humanitarian threshold is for granting asylum, what state has the right to determine whether that threshold is met, and whether the grant is to be coupled with the right to effectuate a safe conduct out of the country. The difficulty of formulating appropriate principles in these respects was precisely the reason why a significant number of states recommended in the 1970s not to embark on the path of universal recognition of diplomatic asylum.

It can be concluded, therefore, that granting extraterritorial asylum by way of humanitarian exception in opposition to demands of the territorial state has a very weak legal basis. Possibly, an alternative avenue for underpinning the legality of diplomatic asylum would be to accommodate the rule of non-intervention with specific human rights obligations a sending state may incur vis-à-vis an individual requesting protection in the receiving state. In theory, human rights obligations of

76 I. Roberts (ed.), *Satow's Diplomatic Practice* (2009), at 108; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, Vol. 1 (1992), at 1085.

77 *Colombian–Peruvian Asylum Case*, at 284.

78 Ibid., at 284.

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the sending state may complement the duties it owes vis-à-vis the receiving state. This possibility is further explored in section 5.

The discussion above in any event reveals that the argument in favour of granting diplomatic asylum to Julian Assange is quite problematic. His recourse to diplomatic asylum as a means to preclude the ordinary application of United Kingdom extradition laws and Swedish criminal laws may well be branded as abuse, in line with the ICJ's considerations in the case of Haya de la Torre. Even if one accepts Assange's argument that his extradition to Sweden is a mere prelude to his onward extradition to the US to face charges for a political crime, he has only alluded to ineffective legal protections in Sweden and not explained, for example, why a complaint before the European Court of Human Rights in the event his extradition is ordered would be futile. It is also to be observed that – quite apart from the question whether any procedure in the United States would be of manifestly extra-legal character – no formal request for his extradition to the United States was pending at the moment Assange entered the embassy, questioning the urgency of his claim. In sum, it is highly doubtful whether Assange was indeed in such an acute situation of distress as to meet the conditions for diplomatic asylum as accepted even in Latin America, and as interpreted by the ICJ in the *Asylum* case.

4. The right of the receiving state to terminate diplomatic asylum[79]

Some writers have argued that the practice of diplomatic asylum finds a legal basis in the diplomatic function or in the privileges of diplomatic missions.[80] Others have forcefully rejected that argument, reasoning that diplomatic privileges and immunities serve freedom and security in discharging diplomatic functions and that granting asylum is not part of those functions, but, on the contrary, may jeopardize relations between the sending and receiving state.[81] Yet, diplomatic asylum for all practical matters persists precisely for reason of diplomatic immunities. It is the framework of diplomatic law that both defines the scope of diplomatic asylum and sets forth how disputes arising from grants of asylum ought to be resolved.

The Vienna conventions on diplomatic and consular relations do not categorize asylum as one of the recognized diplomatic or consular functions.[82] The topic of asylum was expressly omitted from both treaties, for it was at that time under

79 This section is partially based on M. den Heijer, *Europe and Extraterritorial Asylum* (2012), 116–18.

80 Jeffery, *supra* note 4, at 18. See further the discussion in Sinha, *supra* note 5, at 20–7.

81 Van Bynkershoek stated it as follows: 'All the privileges of ambassadors which they use in accordance with the tacit agreement of nations have been instituted for the sole purpose of enabling them to perform the duties of their office without delay and without hindrance from anyone. But they can do this safely even if they do not receive or conceal criminals and refrain from perverting . . . the jurisdiction of the prince in whose country they are'. Van Bynkershoek was of the opinion that ambassadors should open their houses to the pursuit and seizure of criminals and that the sovereign states, to that purpose, have a perfectly valid legal basis for entering it by force. See Van Bynkershoek, *supra* note 3, Ch. XXI, at 114–15. See further Sinha, *supra* note 5, at 24–6.

82 See 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95, Art. 3; and 1963 Vienna Convention on Consular Relations, 596 UNTS 261, Art. 5.

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consideration of the UN General Assembly.[83] This leaves us with a somewhat unclear legal status of the institution of diplomatic asylum under diplomatic and consular law. An implied reference to asylum can nonetheless be found in Article 41(3) of the Vienna Convention on Diplomatic Relations (VCDR), which includes as recognized functions of the mission those functions laid down in special agreements concluded between the sending and receiving states. This clause was inserted precisely to accommodate for conventions on diplomatic asylum in force in Latin America.[84] Although a corresponding provision was not included in the Vienna Convention on Consular Relations (VCCR), this omission is compensated by Article 5(m), which lists as a residual category of consular functions those functions

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

This provision may be taken not only as allowing for the conclusion of agreements on consular asylum, but also as recognizing asylum as a consular function if it does not come in conflict with local laws or does not meet the disapproval of the receiving state, subject to the condition that asylum is granted with the consent of the authorities of the sending state.

In the absence of special agreements, the question of asylum under both conventions depends, on the one hand, on the duties not to interfere with domestic affairs and not to use diplomatic and consular premises in any manner incompatible with recognized diplomatic or consular functions,[85] and, on the other hand, on the inviolability of diplomatic and consular premises.[86] It is clear that offering shelter to persons seeking to evade justice is in violation of the duty not to interfere with local laws. Using diplomatic or consular buildings to offer shelter to refugees may further come within the ambit of Article 41(3) VCDR or 55(2) VCCR, if the situation of asylum is considered 'incompatible' with the functions of the mission. The element of 'incompatibility' not only refers to activity that violates local laws, but also covers conduct that falls outside the scope of ordinary diplomatic functions.[87] It may

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83 Under both Conventions, a provision on asylum was proposed which would prevent states from offering shelter to persons charged with an offence under local law. Both were defeated under the reasoning that the subject of asylum was not intended to be covered. An additional reason for not taking in such provision in the VCCR was that it might be deduced *a contrario* that the right of asylum did impliedly exist under the VCDR. For references, see E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (2008), at 141; and L. T. Lee, *Consular Law and Practice* (1991), at 398. Regarding the VCDR, see further the discussions in the ILC: Diplomatic intercourse and immunities, 1957 YILC, Vol. 1, at 54–7.

84 Diplomatic intercourse and immunities, 1957 YILC, Vol. 1, at 144. See also Draft articles on diplomatic intercourse and immunities, 1958 YILC, Vol. 2, at 104. Denza infers from the drafting history that the clauses 'other rules of general international law' and 'special agreements in force between the sending and receiving states' both cover asylum in diplomatic premises, implying that the prohibition to use premises for other than recognized functions would also be waived in circumstances where diplomatic asylum is permitted under customary international law. See Denza, *supra* note 83, at 471–2. It does not follow from the ILC discussions, however, that it was contemplated that diplomatic asylum formed part of customary international law.

85 Art. 41(1) and (3)VCDR and Art. 55(1) and (2)VCCR.

86 Art. 22(1) VCDR and Art. 31(2) VCCR.

87 Denza, *supra* note 83, at 471; B. S. Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (1989), at 417.

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well be argued that grants of refuge which meet disapproval of the territorial state are an affront to friendly relations and therefore incompatible with diplomatic and consular functions as laid down in Article 3(1)(e) VCDR and Article 5(b) VCCR.[88]

While diplomatic and consular asylum in opposition to demands of the local state may thus be considered an abuse of privileges and immunities, the inviolability of diplomatic premises remains a potent tool for sending states to refuse to answer calls for surrender. The prohibition to enter diplomatic premises laid down in Article 22(1) VCDR does not allow for exceptions, implying that once an embassy has granted asylum, the territorial state is effectively inhibited from terminating the grant of refuge.[89] It is due to the inviolability of diplomatic premises that receiving states opposing refuge have often seen no other option than to acquiesce in the situation and, in order to prevent protracted stays and the political frictions flowing from them, have consented to safe conducts out of the country, also in situations where criminal charges had been brought against the fugitive.

Under the Vienna Convention on Consular Relations, the inviolability of consular premises is considerably more limited. Article 31(2) prohibits the receiving state to enter that part of the consular premises which is used *exclusively* for the purpose of the work of the consular post.[90] This could be taken to mean that, if the receiving state has reason to believe that the consulate is used for other purposes, it is permitted to enter the building and to arrest persons charged with an offence.[91] It follows that consular grants of asylum are more susceptible to termination and that consulates are less appropriate locations for persons seeking asylum.[92] Grahl-Madsen concludes that the limited inviolability of consular premises makes a grant of refuge 'precarious at best'.[93]

Under general principles of treaty law, reasoning would be possible that a grant of asylum interfering with local laws is a fundamental breach of the VCDR or VCCR, which relieves the receiving state from its own obligations under these conventions vis-à-vis the sending state. Accordingly, the receiving state would be able to legitimately assert a right to enter the premises in order to ensure recovery.[94] The ICJ in the *Tehran Hostages* case made clear, however, that the rules of diplomatic and consular law constitute a self-contained regime which foresees the possible abuse of diplomatic privileges such as interference in internal affairs and specifies the means at the disposal of the receiving state to counter any such abuse.[95] The two recourses mentioned by the Court are to declare members of the diplomatic or consular staff *persona non grata* – which is unlikely to guarantee the termination of asylum – and to break off diplomatic relations and to call for the immediate

88 Contra, Jeffery, *supra* note 4, at 18–19.
89 Art. 22(1) and (3)VCDR.
90 Emphasis added.
91 Lee, *supra* note 83, at 387.
92 Ibid., at 398.
93 Grahl-Madsen, *supra* note 25, at 50.
94 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 60(2)(b).
95 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3, at 40.

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closure of the offending mission.[96] Although effective if one wishes to terminate an asylum, the latter option is notoriously drastic and will normally be considered too high a price to pay for recovery of a single fugitive. Moreover, Article 45(a) VCDR stipulates that even in the case of a breach of diplomatic relations, the inviolability of premises and members of the mission remains intact, presumably indicating that the diplomatic status is upheld until the mission is actually closed by the sending state.[97]

The United Kingdom has pointed to a further option that may terminate an asylum. In an aide-memoire presented to Ecuador by United Kingdom diplomats in Quito shortly before Assange was granted asylum, which was translated and made public by Ecuador, it was said that:

> You need to be aware that there is a legal base in the U.K., the Diplomatic and Consular Premises Act 1987, that would allow us to take actions in order to arrest Mr. Assange in the current premises of the embassy. We sincerely hope that we do not reach that point, but if you are not capable of resolving this matter of Mr. Assange's presence in your premises, this is an open option for us.[98]

Regardless of whether this was – in the view of Ecuador – a 'threat' or – in the view of the United Kingdom – a 'mere reminder of the applicable law',[99] the letter signified that the United Kingdom, at least initially, retained the option of unilaterally terminating Assange's asylum. How, precisely, this would be effectuated does not transpire from the letter. But the 1987 Diplomatic and Consular Premises Act, which was adopted with a view to implementing a firmer policy against abuse of the Vienna Conventions following the Libyan embassy crisis in London of 1984, provides for the withdrawal of diplomatic or consular status from premises if they are misused.[100] One consequence resulting from loss of status is that the premises can be entered and searched.

But it is for two reasons questionable whether the United Kingdom is entitled to simply withdraw diplomatic status from the Ecuador embassy and enter it. In the first place, as long as the embassy is also in use for genuine diplomatic purposes, it is to be defined as a 'premise of the mission' in the meaning of Article 1(i) VCDR and on that basis shielded from incursions by virtue of Article 22 VCDR.[101] Second, although Article 41(3) VCDR sets forth the prohibition of abusing diplomatic premises, it does not provide that inviolability is lost as a consequence of such abuse. During the drafting stages of the VCDR, the ILC explained that a failure to comply with

96 Ibid., at 39–40.

97 Article 45(b) VCDR further makes it possible for the sending state when diplomatic relations are broken off to entrust the custody of the mission to a third state acceptable to the receiving state.

98 This particular passage is cited in OAS Resolution of the Twenty-Seventh Meeting of Consultation of Ministers of Foreign Affairs, RC.27/RES. 1/12 rev. 3, 5 September 2012.

99 D. Pearse, 'Julian Assange Can Be Arrested in Ecuador Embassy, UK Warns', *Guardian*, 16 August 2012; A. Wallace, 'Julian Assange: UK "Threat" to Arrest Wikileaks Founder', *BBC News*, 16 August 2012.

100 Art. 1(3) Diplomatic and Consular Premises Act 1987. Note that para. 4 of that provision provides that withdrawal of diplomatic states shall only occur if the Secretary of State is satisfied that to do so is permissible under international law.

101 Cf. Denza, *supra* note 83, at 471, arguing that '[p]remises which are used *solely* for such [i.e., abusive] purposes may, of course, not be accepted by the receiving State as constituting "premises of the mission" at all within the definition given in Article 1 of the Convention'. Emphasis added.

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Article 41(3) 'does not render Article 20 (inviolability of the mission premises) inoperative'.[102]

It thus seems that the option of unilateral termination of a diplomatic mission on the sole basis of abuse is not foreseen in the VCDR. This is not all too surprising in view of the serious consequences of such a measure – potentially endangering the functioning, safety, and communications of the mission – as well as the fact that such a remedy would itself be susceptible to abuse. Denza concludes that inviolability of diplomatic premises is so strict that any legal justification for forcible entry would have to rest on self-defence. [103]

That the inviolability of diplomatic buildings is not easily lost is also demonstrated by the peculiar episode involving the Dutch anti-apartheid activist Klaas de Jonge, who, having found refuge in the Dutch embassy in Pretoria in 1985, was left behind in that building under protection of the Dutch military police when the embassy moved as planned to another building and the South African authorities had refused to allow him to travel on South African territory. After South African president Botha indicated intent to lift the building's inviolability, negotiations with a Dutch special envoy ensured that de Jonge could remain in the abandoned place for two further years, before being released in a prisoner exchange.[104]

A separate issue is the matter of a possible safe conduct for Mr Assange out of the United Kingdom. Ecuador has said that it would pursue every legal means to bring Assange to Ecuador and, according to some reports, would leave open the possibility to bring the case before the ICJ if the United Kingdom continued to refuse Julian Assange safe passage out of the country.[105] The United Kingdom has stressed that it would not allow Mr Assange a safe conduct and that the Metropolitan Police have the power and right to arrest Assange if he steps outside the embassy.[106] The UK position accords with the generally accepted view that, since they constitute a further incursion into their territorial sovereignty, receiving states are under no duty to allow safe conducts to fugitives.[107] In the *Asylum* case, where one of the provisions of the 1928 Havana Convention on Asylum regulated the issue of safe conduct, the ICJ found that since that provision's conditions were not met, the absence of a treaty

102 Draft articles on diplomatic intercourse and immunities, 1958 YILC, Vol. 2, at 104. Draft Article 20 corresponds with Article 22 VCDR. In response to Assange's asylum, the Ministers of Foreign Affairs of the Organization of American States adopted a resolution in which they rejected 'any attempt that might put at risk the inviolability of the premises of diplomatic missions', reiterated the obligation of states 'not to invoke provisions of their domestic law to justify noncompliance with their international obligations' and expressed 'solidarity with and support for the Government of the Republic of Ecuador', *supra* note 98, para. 4. The United States, voting in favour of the resolution, did declare in respect of that particular paragraph that there were no indications that the United Kingdom had invoked domestic law contrary to international law. Canada voted against the resolution.

103 Denza, *supra* note 83, at 150.

104 D. Crary, 'President Botha Greets Soldier Freed in Four-Way Swap', Associated Press, 3 September 1987. For an extensive account see K. de Jonge, *Dagboek uit Pretoria* (1987).

105 'An Ecuadorean History of the World', *The Economist*, 25 August 2012,

106 Foreign Secretary statement, *supra* note 62. 'WikiLeaks: Met Police Embarrassed as Assange Arrest Plan Revealed', *Telegraph*, 24 August 2012.

107 E.g. Grahl-Madsen, *supra* note 25, at 48–50.

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obligation on the part of Peru to allow a safe conduct implied that it was not legally bound to accede to a request for a safe conduct.[108]

Some commentators have suggested some rather outlandish alternatives for effectuating Assange's safe passage out of the United Kingdom. He could try to get to a British airport in an Ecuadorian ambassadorial car (Article 22(3) VCDR), he might be smuggled out of the country via diplomatic bag (Article 27(3) VCDR), or he could be designated an ad hoc diplomatic courier with the task to deliver a diplomatic bag to a consignee somewhere in Ecuador (Article 27(6) VCDR).[109] Admittedly, there is some precedence for a line of thought that diplomatic immunities may bring about a safe exit for fugitives. In 1655, the French ambassador in Rome, having granted asylum to a number of Neapolitan exiles but unwilling to provide for their upkeep, sought to send them back to Naples by sea. As they were travelling in the ambassador's coach to the harbour, the exiles were arrested by the Pope's guard and imprisoned. The prolonged controversy that followed was eventually resolved by the Pope agreeing to release the exiles and to pay reparations to the king of France 'on account of the violence that had been done to the ambassador's coach'.[110] But it should be recalled that this episode took place at a time when there still was widespread endorsement of diplomatic asylum.

There is no doubt that diplomatic law protects the safe movement of diplomatic envoys and goods in foreign territories.[111] But the issue is whether this would always compel a receiving state to tolerate the movement of diplomatic goods or envoys within its territory, irrespective of the danger they present. Although current diplomatic law bestows near absolute protection on diplomatic cars, bags, and couriers, precluding their opening, search or arrest,[112] the ICJ held in *Tehran Hostages* that the observance of the principle of inviolability does not mean 'that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving state in order to prevent the commission of the particular crime'.[113] States retain, for obvious reasons, the right to protect public safety and to prevent the commission of serious crimes.[114] Such preventive measures may then be followed up by diplomatic sanctions such as

108 *Colombian–Peruvian Asylum Case*, at 279.

109 J. Keating, 'Can You Smuggle a Person in Diplomatic Mail?', *Foreign Policy Blog*, 15 August 2012, http://blog.foreignpolicy.com/posts/2012/08/15/can_you_smuggle_a_person_in_diplomatic_mail; C. Gardner, 'Julian Assange: Can He Get out of This?', *Head of Legal*, 21 August 2012, http://www.headoflegal.com/2012/06/26/julian-assange-can-he-get-out-of-this; Akande, *supra* note 2.

110 Moore, *supra* note 8, at 760.

111 Extensively Denza, *supra* note 83, at 160–1, and 205–10.

112 Art. 22(3), 27(3)(5), and Art. 6 VCDR. It is, however, accepted that diplomatic bags can be screened for safety purposes by a receiving state or airliner, as long as the diplomatic contents of the bag are not compromised; see extensively Roberts, *supra* note 76, at 116–18.

113 *United States Diplomatic and Consular Staff in Tehran*, at 40.

114 E.g., US Department of State, 'Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities', Department of State Publication 10524, July 2011, Ch. V: 'Personal inviolability is, however, qualified by the understanding, well established in international practice, that the host country does not give up its right to protect the safety and welfare of its populace and retains the right, in extraordinary circumstances, to prevent the commission of a crime'.

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declaring envoys *persona non grata*.[115] There thus seems little reason not to expect the United Kingdom to stifle any attempt at smuggling a wanted man out of its territory. In two reported incidents in recent decades that involved the covert smuggling of a person out of a country by diplomatic means, the attempts were foiled by the authorities of the United Kingdom and Italy respectively, and the responsible diplomats declared *persona non grata*.[116]

5. The individual right to be granted diplomatic asylum

Assange based his asylum claim with the Ecuador authorities on a fear of being surrendered to the United States by either the British, Swedish, or Australian authorities, where he would face persecution on account of his disclosure of compromising information for the United States government.[117] In support of his claim, it was also stated that a secret Grand Jury in the United States had issued a sealed indictment against him that would anticipate a formal request for his extradition.[118] The Ecuador government granted asylum on 16 August 2012, because it found that there were 'serious indications of retaliation by the country or countries that produced the information disclosed by Mr. Assange'; that the judicial evidence showed that in case he were to be extradited to the United States, he 'would not have a fair trial, could be judged by a special or military court, and it is not unlikely that he would receive a cruel and demeaning treatment'; and that it transpired from public statements and diplomatic communications that the United Kingdom, Sweden, and the United States, 'would not respect the international conventions and treaties and would give priority to internal laws of secondary hierarchy'. Moreover, the Ecuador government proclaimed the right of asylum of *jus cogens* nature and did not see an essential difference between territorial and diplomatic asylum.[119]

It is not known why Assange preferred the Ecuadorian gambit to remaining legal avenues in Europe, such as a complaint with the European Court of Human Rights (ECtHR). Possibly, Assange might have been informed that any complaint or request for an interim measure with the ECtHR would have been considered premature by that Court, for he would still be in a position to bring such requests once extradited

115 See, extensively, M. S. Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Priviliges and Immunities', (1989) 4 AUJILP 173.

116 In July 1984, Nigerian government agents attempted to abduct the former Nigerian civilian government minister Umaru Dikko out of the United Kingdom in a large crate to be loaded on to a Nigerian Airways cargo airplane. The crate was, however, not labelled as a diplomatic bag, allowing customs officials to open it and foil the kidnapping. The diplomats involved in the kidnapping were declared *persona non grata*. See HC Deb 6 July 1984, Vol. 63, cols. 609–17. In November 1964, a 30-year-old man was found drugged, bound, and gagged in a trunk at Rome airport that was marked as diplomatic mail. Two Egyptian diplomats were accused of the smuggling attempt and declared *persona non grata*. See 'Italy Expels 2 Egyptian Envoys Accused in Trunk Abduction Attempt', *New York Times*, 19 November 1964.

117 Statement of the Government of the Republic of Ecuador on the asylum request of Julian Assange, 17 August 2012.

118 'Stratfor Emails: U.S. Has Issued Sealed Indictment against Julian Assange', *Press release Wikileaks*, 28 February 2012.

119 Statement of the Government of the Republic of Ecuador, *supra* note 117.

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to Sweden.[120] Possibly too, Assange considered the ECtHR to be just as much a sycophant of the United States as Sweden, the United Kingdom, and Australia.[121]

However spurious Assange's human rights claims may seem – even in the light of all those erosions of the rule of law in the United States that were effectuated in the name of national security,[122] and an unfortunate record of Sweden of participating in extrajudicial renditions organized by the United States[123] – it is worth contemplating them because they raise, in the abstract, the question whether individual rights may distort the ordinary relationship between the receiving and the sending state in the context of diplomatic asylum. Traditional discourse on diplomatic asylum revolved exclusively around the reciprocal obligations of the sending and the receiving states. Under the current state of international law, however, it is no longer possible to ignore any independent rights the person requesting asylum may invoke against either the receiving or the sending state. Currently, the 'right of asylum' may therefore refer to both the right belonging to the state vis-à-vis another state to grant asylum on the latter's territory (diplomatic asylum) or to one of the latter's nationals (territorial asylum), and the right belonging to the individual to seek, to be granted, or to enjoy asylum. Although, different from the context of territorial asylum,[124] no individual right to be granted diplomatic asylum has been formulated in international law, individuals may well bring the argument that the safety of an embassy may guarantee against human rights abuses. Diplomatic asylum may after all constitute an effective means to shield an individual from harm.

The emergence and development of human rights raise two issues in the context of diplomatic asylum. The first one is whether human rights can be made operational in such a context.[125] And, if so, the second question is whether human rights obligations incumbent on the sending state may displace or qualify its obligations vis-à-vis the receiving state. Although human rights conventions of general character seem most relevant in this respect, this section first discusses the 1951 Refugee Convention, since that convention has been expressly brought up in discussions on Assange.

Assange's lawyer was reported as having posited that the United Kingdom was, under the terms of the 1951 Refugee Convention, bound to respect Ecuador's decision to grant asylum and on that basis obliged to permit Assange's safe conduct.[126] The Ecuador government also referred to the Refugee Convention as one of the international instruments informing its decision to offer asylum.[127] It is, however,

120 Cf. *K.R.S. v. United Kingdom*, Decision on Admissibility of 2 December 2008, ECHR, App. No. 32733/08.

121 C. Summers, 'Wikileaks Founder Julian Assange "Buoyed by Support"', *BBC News*, 25 June 2012.

122 E.g., J. Steyn, 'Guantanamo Bay: The Legal Black Hole', (2004) 53 ICLQ 1.

123 *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee, 10 November 2006; *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee against Torture, 20 May 2005.

124 Art. 14(1) Universal Declaration of Human Rights (referring to the right 'to seek and to enjoy asylum'); Art. 1 Declaration on Territorial Asylum, *supra* note 41; Art. 18 Charter of Fundamental Rights of the European Union.

125 In the context of so-called 'Protected Entry Procedures', Noll has earlier surveyed whether a legally binding right to be granted protection in embassies can be derived from human rights. See G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', (2005) 15 IJRL 542.

126 R. Alleyne, 'Wikileaks: Julian Assange Will Take Britain to the "World Court"', *Telegraph*, 17 August 2012.

127 Statement of the Government of the Republic of Ecuador, *supra* note 117.

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not self-evident that Assange would be able to claim the benefits of the Refugee Convention.

Apart from the question, first, whether Assange indeed has a 'well-founded fear of being persecuted' for reasons of political opinion (Article 1(A)(2) Refugee Convention), some have pointed, second, to Article 1(F)(b) of the Refugee Convention, which excludes any person from relying on the Convention with respect to whom there are serious reasons for considering that he has committed a serious non-political crime. The facts that Assange stands accused of offences of sexual molestation and rape and has been issued a European Arrest Warrant are probably sufficient to satisfy that threshold.[128] The very rationale of Article 1(F) Refugee Convention is to not shield persons accused of serious crimes against either criminal prosecution or expulsion.[129]

Third, a problem that will ordinarily arise in the context of diplomatic asylum is that the Refugee Convention was expressly conceived as providing solutions only for persons who have fled their own country and who are unable to avail themselves of the protection of their home state. The refugee definition accordingly stipulates that only persons outside their country of origin can be refugees and only if the country of origin fails in its protective duties.[130] Assange's case is exceptional in that he seeks diplomatic asylum in a foreign country (Assange is of Australian nationality) and therefore satisfies the requirement of alienage. But another matter is whether Assange can be said to be 'unable' to rely on protection from the Australian government. Although Australia has displayed restraint in interfering with legal proceedings in Britain and Sweden, it has extended consular services to Mr Assange and has declared that, in the event that a request for his extradition were made by the United States, it would emphasize the expectation that due process will be followed and seek assurances in that regard.[131] The disagreement between Assange and Australia on the well-foundedness of Assange's fears does not necessarily imply that Australia is unwilling or unable to offer protection. One might on that basis reproach Assange for having prematurely invoked the protection of a third government.

Lastly, even if one defined Assange as a refugee, it is doubtful whether he would be protected by the key right under the Refugee Convention, the right not to be

128 UNHCR guidelines specify that the offence of rape is to be qualified as a serious non-political crime; see UN High Commissioner for Refugees, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05, para. 14. Further, the issuing of an arrest warrant probably satisfies the threshold of 'serious reasons for considering that'. Exclusion from refugee status does not require formal proof of previous penal prosecution. See UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/PRO/4 (1979), re-edited January 1992. British courts had established that Assange was required for the purposes of being tried after being identified as the perpetrator of specific criminal offences and should therefore be considered as accused of the offences specified in the European Arrest Warrant: *Swedish Prosecution Authority v. Assange*, [2011] EWHC 2849 (Admin), para. 140.

129 UNHCR Guidelines, ibid., para. 2. See also UNHCR, 'Addressing Security Concerns without Undermining Refugee Protection, UNHCR's Perspective', Position Paper, 29 November 2001, para. 3.

130 Art. 1(A)(2) 1951 Refugee Convention: 'is outside the country of his nationality and is unable or . . . unwilling to avail himself of the protection of that country'.

131 Letter from Australian Attorney General regarding Julian Assange, June 2012, http://wikileaks.org/Effective-Declaration-of.html.

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expelled to the country where persecution is feared, because it may be difficult to construe the act of removing someone from an embassy as prohibited 'expulsion or return . . . in any manner whatsoever' of a refugee 'to the frontiers of territories where his life or freedom would be threatened'.[132]

Under human rights treaties of general scope, the system for protecting persons who request asylum rests on somewhat different principles and textual notions. These appear more favourable to accepting that persons claiming asylum at an embassy can successfully invoke a right not be removed from it. One key difference from the Refugee Convention is that general human rights treaties presuppose that everyone – including terrorist offenders or other persons who stand accused of serious crimes – is deserving of protection and should thus be able to invoke human rights.[133] Further, although under human rights treaties such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) the issue of the state's extraterritorial duties is not fully fleshed out,[134] one of the few uncontroversial categories of extraterritorial state conduct that attract human rights obligations is acts of diplomatic and consular agents. According to the ECtHR, 'it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others'.[135] The Human Rights Committee (HRC) has also accepted that acts of consular officers may come within the purview of the ICCPR.[136]

There is some judicial precedence, too, on the more specific question whether expulsion from an embassy can amount to prohibited refoulement under human rights treaties (in the meaning of inter alia Article 3 ECHR and Article 7 ICCPR). In *W.M.* v. *Denmark*, in circumstances similar to those of Assange, the former European Commission of Human Rights considered that the handing over to the GDR police by the Danish ambassador of an East German citizen who had entered the Danish embassy in East Berlin in an attempt to effectuate his exit to West Germany did attract Denmark's obligations under the ECHR, but the Commission found the

132 Art. 33(1) 1951 Refugee Convention. See extensively Noll, *supra* note 125, at 548–56. The United States Supreme Court and the House of Lords have considered that Art. 33(1) Refugee Convention cannot entertain extraterritorial effect at all. See *Sale v. Haitian Centers Council*, 509 US 155 (Sup.Ct. 1993), at 181–2; *Regina v. Immigration Officer at Prague Airport and Another, ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, paras. 17–18 and 70.

133 E.g., *Saadi v. Italy* [GC], Decision of 28 February 2008, [2008]ECHR.

134 E.g., A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', (2003) 14 EJIL 529; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

135 *Al-Skeini and Others v. the United Kingdom* [GC], Decision of 7 July 2011, [2008] ECHR, para. 134. See also *Banković and Others v. Belgium* [GC], Decision on Admissibility of 12 December 2011, [2001-XII] ECHR, para. 73; *X v. Federal Republic of Germany*, Commission Decision of 25 September 1965, App. No. 1611/62; *X v. the United Kingdom*, Commission Decision of 15 December 1977, App. No. 7547/76; *W. M. v. Denmark*, Commission Decision of 14 October 1993, App. No. 17392/90.

136 *Vidal Martins v. Uruguay*, No. 57/1979, UN Doc. CCPR/C/15/D/57/1979 (1982), at 157; *Lichtensztejn v. Uruguay*, No. 77/1980, UN Doc. CCPR/C/OP/2 (1990), at 102; *Montero v. Uruguay*, No. 106/1981, UN Doc. CCPR/C/OP/2 (1990), at 136; *Nunez v. Uruguay*, No. 108/1981, UN Doc. CCPR/C/OP/2 (1990), at 143. Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 180: 'the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.

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subsequent events in the GDR too remote to attract the responsibility of Denmark.[137] In *Mohammad Munaf* v. *Romania*, which is also relevant for it concerned the handover of an Iraqi-American dual national from the Romanian embassy in Baghdad to the US military forces in Iraq, which subsequently detained him in 'Camp Cropper', where he was allegedly beaten and tortured before being transferred to an Iraq criminal court that sentenced him to death, the HRC found that its ordinary case law on refoulement was applicable, but reasoned that, at the time of his departure from the embassy, the Romanian authorities could not have known that he ran a risk of his rights under the Covenant being violated.[138]

In the light of these cases, the argument is not too eccentric that if departure from an embassy would expose a person to a real risk of being subjected to serious human rights violations, the sending state's responsibility under human rights treaties will be engaged.[139] In view of the speculative nature of Assange's claims, it is rather unlikely that his case would entertain such responsibility on the part of Ecuador. But let us accept, for the sake of argument, that Assange is right in his claim that the charges brought against him in Sweden are a mere pretext for his delivery to the United States, that he will be secretly rendered to the United States without Swedish courts or the ECtHR being able to intervene, and that the Americans will indeed subject him to their most infamous and harsh counterterrorism methods. Would a human rights obligation on the part of Ecuador to protect Assange from harm then not displace its duty not to interfere in the United Kingdom's domestic affairs?

This is primarily a question of conflicting international obligations. In the case of *Al-Saadoon*, concerning the lawfulness of the proposed transfer of two Iraqi nationals from a British military compound in Iraq to the Iraqi authorities to face charges of having murdered two British soldiers, the ECtHR found that the United Kingdom had violated the ECHR because it had entered into arrangements with Iraq that conflicted with its obligations under the ECHR.[140] It further considered that the absence of any available course of action on the part of the United Kingdom consistent with respect for Iraqi sovereignty other than the transfer of the applicants was of the United Kingdom's own making and did not modify its obligations under the ECHR.[141]

The Court of Appeal of England and Wales had approached the issue differently in a case that concerned the legality under the Human Rights Act and the ECHR of the refusal of the British consul in Melbourne, Australia, to grant asylum to two minor Afghan asylum seekers who had entered the waiting area of the consulate under escort of a nun and who submitted that their return to immigration detention in Australia would expose them to inhuman treatment.[142] The Court of Appeal

137 *W.M. v. Denmark*, *supra* note 135.
138 *Mohammad Munaf v. Romania*, No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, para. 14.5.
139 For the precise formula as to when such responsibility arises, cf. inter alia *Saadi v. Italy*, *supra* note 133, para. 125: 'However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3'.
140 *Al-Saadoon and Mufdhi v. the United Kingdom*, Decision of 2 March 2010, [2010] ECHR, paras. 141–143.
141 Ibid., para. 162.
142 *R (B) v. Secretary of State for Foreign and Commonwealth Affairs*, EWCA Civ 1344, [2005] QB 643.

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proceeded from the idea that 'the duty to provide refuge can only arise under the Convention where this is compatible with public international law' and, referring to existing doctrine on diplomatic asylum, it next concluded that the 'basic principle' that authorities of the receiving state can always request surrender of the fugitive allows only for limited exceptions, such as in the case where a fugitive would be subjected to a crime against humanity.[143] Since the risk of the two minors did not meet that threshold, no entitlement to grant diplomatic asylum could be derived from international law and consequently the ECHR could not be construed as imposing an obligation on the United Kingdom to grant asylum.[144]

Although the approach of the Court of Appeal has the charm of attempting to reconcile existing doctrine on diplomatic asylum with human rights, it effectively waters down the scope of human rights to those rights that protect against the most odious offenses known to international law. The issue with the *Al-Saadoon* judgment, on the other hand, is that it does not seem to accord appropriate weight to the principle of territorial sovereignty. This is problematic in view of the ICJ's emphasis in the *Asylum* case that extraterritorial asylum constitutes a potential intervention in the sovereign matters of the receiving state. But it should also be noted that the supervisory role of the ECtHR is restricted to examining whether states comply with the ECHR, quite independent from possible concurrent international obligations, and that any findings of violations by that Court do not necessarily imply that those other international obligations are displaced.

Further, notwithstanding the pronouncements of the ECtHR and HRC, it may still be questioned whether we must simply accept that no essential differences exist in respect of the scope of a state's human rights duties in situations of territorial and diplomatic asylum. Is a state indeed bound to respect human rights as rigorously in respect of each and everyone who just makes his intention to claim asylum known at an embassy gate or in respect of persons who – as happened in 1979 in the Peruvian embassy in Havana – crash their bus into an embassy compound so as to force themselves upon the hospitality of a foreign ambassador?[145] To state that human rights law must be fully respected in such situations may well pose issues in view not only of the dependence on the territorial state for safe conducts out of the country, but also of the fact that diplomatic missions may be ill-equipped to comprehensively examine asylum claims, and in view of the pull effect such obligations may have on other persons who wish to escape from the local authorities. Especially if faced with large numbers of asylum seekers, the capabilities of an embassy to ensure protection would seem limited. Arguably, therefore, the scope of the sending state's human rights duties should be considered to be commensurate with its capacity to offer protection.

Apart from this caveat, the soundest appraisal of the matter seems to be that it may simply happen that human rights conflict with the principle of territorial sovereignty in the context of diplomatic asylum and that, in such scenarios, it will

143 Ibid., paras. 85–89.

144 Ibid., paras. 93–94. The same test was applied in *R (on the application of (1) Faisal Attiyah Nassar Al-Saadoon (2) Khalaf Hussain Mufdhi) v. Secretary of State for Defence*, [2008] EWHC 3098 (Admin).

145 M. C. Garćia, *Havana USA: Cuban Exiles and Cuban Americans in South Florida, 1959–1994* (1996), 55.

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be up to the sending state to resolve that conflict.[146] It would follow, as the ECtHR appears to hint at in the *Al-Saadoon* case, that the likely course of action for the sending state is to enter into negotiations with the receiving state with a view to satisfying both human rights and demands of the receiving state.[147] Should it therefore in the unlikely event be considered that Ecuador is under a human rights duty not to surrender Mr Assange, the most obvious course of action would seem to be that it come to an agreement with the United Kingdom that would safeguard Assange's individual rights.

To accept that human rights can be applicable in the context of diplomatic asylum may well have significant consequences for the institution's future development. It transforms the legal framework on diplomatic asylum into one that involves not only the issue of a state's right, but also its potential obligation to grant protection. Although this complicates an already delicate affair, it does not detract from the essential challenge underlying all grants of diplomatic asylum that the sending and receiving states come to a solution that satisfies all rights and interests.

6. Conclusion

When serious consideration was given to codifying international practice on diplomatic asylum in the 1970s, sound reasons were advanced by a number of governments not to embark upon such a project. Codification presented the risk on the one hand of sanctioning diplomatic asylum in an increasing number of cases, but on the other hand of curtailing the flexibility on the part of the sending state to grant asylum in uncontemplated situations.

We may still conclude, on the basis of instances of diplomatic asylum in the more recent past, including that of Julian Assange, that the current legal framework applicable to diplomatic asylum provides an uneasy but befitting equilibrium between the rights of the receiving and sending states. Both countries stand much to lose from grants of diplomatic asylum. As unattractive as it is for a receiving state to have to tolerate a fugitive living 'freely' in a foreign embassy within its territory, so unappealing will the sending state find the prospect of having to allow a fugitive residence in one of its embassies for a potentially unlimited duration. The possibility of a diplomatic stranglehold will normally deter states from granting diplomatic asylum. It is only in exceptional situations that states are willing to risk affronting the receiving state, effectively reserving the practice to those cases where the risks for the individual seeking asylum are particularly grave or where the asylum seeker's interests coincide in some special way with those of the petitioned state.

This equilibrium does not guarantee a uniform or 'just' practice of diplomatic asylum. It merely offers sending states some flexibility in the manner they pursue

146 In the case of *Short*, the Dutch Supreme Court held that, in case of irreconcilable international obligations stemming from an extradition treaty and the ECHR, there is no conflict rule setting forth that primacy should be accorded to the ECHR. The Supreme Court thus established the rule that in case of irreconcilable international obligations, the interests protected by both obligations should be balanced. See Hoge Raad, 30 March 1990, *Nederlandse Jurisprudentie* 1991, at 249.

147 *Al-Saadoon*, *supra* note 140, para. 140.

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their interests in the receiving state. If invoked for purely humanitarian reasons, this flexibility may well be welcomed as a sound but modest correction on the principle of territorial sovereignty.[148] If invoked for other reasons, it is likely to be branded as an abuse or unjustified interference in domestic matters. But even in those cases, the very diplomatic environment in which the grant occurs, its non-forcible nature, and its exceptional character will normally lead to tacit acceptance by the receiving state. It would therefore seem that a majority of states remains willing to accept the institution as it is: falling outside the strict letter of international law, but informally tolerated as long as it is used in exceptional cases only. There is, from the perspectives of promoting friendly relations and safeguarding individual rights, much to be said for maintaining this state of affairs. To uphold it, the best recipe seems to be to preserve the balance between the receiving state's territorial sovereignty and the sending state's diplomatic inviolability. This implies that grants of diplomatic asylum must be greeted with the utmost suspicion, but so must threats or attempts to recover fugitives by force.

A complication may arise in case the asylum seeker presents a genuine human rights claim. In such situations, the receiving state may be confronted with a conflict between human rights and its duties vis-à-vis the territorial state. But in such cases, too, the appropriate course of action for the two countries is to resort to diplomatic channels with a view to safeguarding all rights and interests involved.

The fate of Julian Assange, who preferred the uncertainty of diplomatic asylum to his extradition to Sweden, currently hangs in the balance of the territorial rights of the United Kingdom and the diplomatic privileges of Ecuador. Now that the initial diplomatic furore has cooled down, the realization appears to have dawned on both countries that it takes the two of them to resolve the dispute.[149] How they will resolve it remains unclear, but, as the ICJ noted in the *Haya de la Torre* case, there are many ways to terminate an asylum.[150] The Court, in that case, refrained from giving any practical advice as to the various courses that might be followed, because that fell beyond its judicial function. It did, however, assume that Colombia and Peru would find a satisfactory solution by seeking guidance from 'considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics'.[151] Let us assume that these considerations will work for Ecuador and the United Kingdom as well. Victor Raúl Haya de la Torre was, after having resided in the Colombian embassy for five more years, eventually allowed to return to Peru, where he managed to become the president of Peru's constitutional assembly in 1979, responsible for drafting the new constitution. Julian Assange, and his supporters and antagonists, may wish to resign themselves to the knowledge that diplomatic asylum can last long indeed, but that it rarely lasts for life.

148 In this vein Porcino, *supra* note 4, at 450; Jeffery, *supra* note 4, at 24–6.
149 'Ecuador Minister to Meet Hague on Assange's 100th Day in Embassy', *Guardian*, 26 September 2012.
150 *Haya de la Torre Case (Colombia/Peru)*, Judgment of 13 June 1951, [1951] ICJ Rep. 71, at 83.
151 Ibid.

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