

The International Law Dimensions of the Plight of Julian Assange

Written by Donald Rothwell

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DONALD ROTHWELL, OCT 9 2012

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

Sweden's Extradition Request

Assange originally became embroiled in these current legal proceedings when the Swedish Prosecution Authority sought extradition via a European Arrest Warrant on 2 December 2010 at a time when Assange was resident in the UK. The warrant was issued not in relation to charges formally brought against Assange, but in relation to his further questioning in relation to matters that were alleged to have taken place in Stockholm in August 2010. The accusations related to sexual molestation in one case, and rape. Following the issue of the European Arrest Warrant, Assange was taken into custody in London but was soon released under strict conditions. This was followed by a protracted legal process involving a series of appeals against his extradition. Ultimately, the UK Supreme Court on 30 May 2012 dismissed Assange's appeal against his extradition in a finding that upheld the legitimacy of the Swedish European Arrest Warrant, and Britain's obligations under European and international law to extradite Assange.[iii] A further attempt by Assange's legal team to overturn the Supreme Court's decision was dismissed on 14 June 2012.[iv]

Assange's Asylum Claim

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

Ecuador's decision to grant Assange diplomatic asylum resulted in speculation as to whether Assange will eventually be able to find his way from London to Ecuador. This speculation has arisen because Assange is now effectively under Ecuador's protection, and just as in the case of persons who are granted asylum because their claims to refugee status are recognised under the Refugee Convention,[vii] there is something of an expectation that Ecuador will seek to transfer him to its territory. However, there is every indication that Assange will remain in the Ecuadorian

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Embassy for many months until such time as some resolution is reached over his situation.

Vienna Convention on Diplomatic Relations

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

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

International Law and Asylum

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

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

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

Assange's Legal Options

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

Unless then there was a sudden change in position from either Britain or Sweden, there is every likelihood that this standoff will continue for some considerable time. Persons granted asylum have been known to live in Embassies for

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lengthy periods until their situation has been resolved. Cardinal Mindszenty enjoyed the diplomatic protection of the US Embassy in Budapest for 15 years between 1956-1971 until the Pope was able to broker a resolution.[xiv]

Notwithstanding denials by the US, these legal twists and turns including Assange's asylum claim continue to be assessed against whether ultimately the US will seek Assange's extradition. Ecuadorian President Rafael Correa indicated Assange was granted asylum because his extradition to a third country was not guaranteed.[xv] Even if US extradition was sought, whether it be from Sweden, the UK or even Australia, a series of legal processes would need to be followed within which Assange would enjoy multiple legal protections. These include the extradition exception of 'political offences', which would extend to espionage.[xvi] Extradition can also be blocked if a conviction could result in the death penalty. [xvii]

Notwithstanding Assange's stated fear that his onward extradition from Sweden to the United States is inevitable, this is by no means the case. Suggestions that an extra-judicial process would occur in which Assange was effectively rendered by Sweden to the US without reference to any legal process fail to take into account that for such an act to occur Sweden would be acting contrary to its own laws and international human rights obligations. Sweden has adopted extra-judicial processes in the past and critics point to its December 2001 summary expulsion and rendition to Egypt of Mohammed El Zari and Ahmed Agiza where they suffered torture. Both the United Nations Human Rights Committee and the Committee against Torture reviewed Sweden's conduct which was found to be in violation of international law.[xviii] Nevertheless, any suggestion that Assange would be subject to onward extradition to the United States via a process under which his legal rights under Swedish law, including the Sweden-US Extradition Treaty,[xix] were effectively ignored, remains difficult to comprehend given the international profile the case of Julian Assange has attracted.

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

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[i] Michael Ratner "Julian Assange is right to fear US extradition" *The Guardian* (2 August 2012) at <http://www.guardian.co.uk/commentisfree/2012/aug/02/julian-assange-right-fear-prosecution>

[ii] Mark Baker "US denies Assange 'secret warrant'" *The Sydney Morning Herald* (1 June 2012) available at <http://www.smh.com.au/opinion/political-news/us-denies-assange-secret-warrant-20120531-1zkug.html>

[iii] *Assange v The Swedish Prosecution Authority* [2012] UKSC 22 (Judgment given on 30 May 2012).

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

[v] Embassy of Ecuador (London) "Statement on Julian Assange" (June 19, 2012) available at <http://www.ecuadorembassyuk.org.uk/news/statement-on-julian-assange>

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[vi] Embassy of Ecuador (London), "Statement of the Government of the Republic of Ecuador on the Asylum Request of Julian Assange" (August 16, 2012) available at <http://www.ecuadorembassyuk.org.uk/news/text-of-statement-of-ricardo-patino-foreign-minister-of-ecuador-on-julian-assange%c2%b4s-asylum-application>

[vii] Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 150

[viii] 500 United Nations Treaty Series 95

[ix] *United States Diplomatic and Consular Staff in Tehran Case* (United States v Iran) [1980] ICJ Reports 3

[x] Embassy of Ecuador (London), "Ecuador Shock at Threats from British Government" (August 15, 2012) available at <http://www.ecuadorembassyuk.org.uk/news/ecuador-shock-at-threats-from-british-government>

[xi] "Julian Assange: Hague says Britain is obliged to extradite Wikileaks founder" *The Guardian* (27 September 2012) available at <http://www.guardian.co.uk/media/2012/sep/27/assange-hague-ecuador-extradition-legal>

[xii] *Asylum Case* (Colombia/Peru) Judgment [1950] ICJ Reports 266, 284.

[xiii] ABC News "Ecuador proposed Assange extradition alternative" *ABC News Online* (22 September 2012) available at <http://www.abc.net.au/news/>

[xiv] Embassy of the United States (Budapest, Hungary) "Personal Reminiscences about 1956 and Cardinal Mindszenty" available at <http://hungary.usembassy.gov/reminiscence.html>.

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

[xvi] Torsten Stein "Extradition" *Max Planck Encyclopedia of Public International Law*, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e797&recno=103&letter=E

[xvii] Ibid.

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

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

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