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JULIAN ASSANGE'S ALLEGEDLY ILLEGAL DETENTION BY THE UNITED KINGDOM AND SWEDEN IN THE ECUADORIAN EMBASSY IN LONDON

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Abstract

Julian Assange, the founder of Wikileaks, is residing in the Ecuadorian Embassy in London since 2012. The Working Group on Arbitrary Detention described his stay as *arbitrary deprivation of liberty*.

Assange, after publishing many classified documents of the US Army, has feared extradition to the US, which is why he sought protection at the Ecuadorian Embassy. Ecuador granted him diplomatic asylum status, however, diplomatic asylum is not internationally accepted as a legal concept. The UK is not obliged to recognize the diplomatic asylum status and is under no obligation to grant him safe passage. But the British authorities are bound to carry out the European Arrest Warrant (EAW) issued by Sweden. After unsuccessfully challenging the EAW both in Sweden and the UK, Assange decided to stay in the Ecuadorian Embassy until it was guaranteed that he would not be extradited to the US. When Sweden refused to give any assurances, the situation turned into a *deadlock*.

The thesis evaluates the merits of the Opinion given by the Working Group on Arbitrary Detention and whether or not Assange's human rights are being violated. After the human rights considerations, the possible safeguards to protect Assange from being extradited to the US are covered. The case law of the European Court of Human Rights (ECtHR) on extradition is examined with detail and compared to the case of Julian Assange. The thesis emphasizes that States have to work together for the promotion of human rights protection and the achievement of justice, and that the determination to find a common ground is crucial and this will sometimes require compromises. It is concluded that the solution to Assange's case depends on the cooperation among States.

Keywords: diplomatic asylum, Julian Assange, arbitrary detention, Wikileaks, extradition, human rights

Table of Contents

Julian Assange's Allegedly Illegal Detention by the United Kingdom and Sweden in the Ecuadorian Embassy in London

A. Introduction

I. Summary of the Case of Julian Assange

Julian Assange, an Australian national, is the founder of Wikileaks, which has published several classified documents for the reach of the public with the aim of "transparency". Wikileaks was described by Assange as "a giant library of the world's most persecuted documents"[1] that was proven true especially after it came to the top of its fame in 2010 by publishing materials provided by Bradley Manning on Guantanamo and the US Army's actions in Iraq and Afghanistan. Reactions to Assange afterwards were divided deeply as some called him "a high-tech terrorist"[2] and harshly criticized, as where others celebrated his journalism. Evidences have surfaced, which suggest a Grand Jury was established in US to investigate Wikileaks and Assange under the Espionage Act.[3]

Towards the end of 2010, Swedish authorities issued an arrest warrant for the questioning of Assange, which was turned into a European Arrest Warrant, on the allegations of unlawful coercion, sexual molestation and lesser-degree rape. Assange had applied to a residence permit in Sweden in order to benefit Wikileaks with Sweden's press freedom laws, however, his application was denied before the allegations had come to light.[4] So he had left Sweden and was in UK when the warrant was issued. After the EAW was unsuccessfully challenged in both the Swedish and British courts, Assange skipped his bail, seeking asylum in the Ecuadorian Embassy in London. Summer of 2012, Ecuador has granted asylum to Assange on the basis that his fear of political persecution was well founded and "a situation may come where his life, safety or personal integrity will be in danger."[5]

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[1] http://www.spiegel.de/international/world/spiegel-interview-with-wikileaks-head-julian-assange-a-1044399.html, (15/07/2016).
[2] http://www.theguardian.com/media/2010/dec/19/assange-high-tech-terrorist-biden, (15/07/2016).
[3] http://www.salon.com/2011/04/27/wikileaks_26/, (15/07/2016).
[4] http://www.thelocal.se/20101018/29684, (15/07/2016).
[5] https://web.archive.org/web/20130615201655/http://www.mmrree.gob.ec/eng/2012/com042.asp, (15/07/2016)

Since then Assange has been residing in the Ecuadorian Embassy and has never left the building. After an application made by Assange, the UN's Working Group on Arbitrary Detention decided that his stay in the Embassy was deprivation of liberty and his rights have been violated. This Opinion, adopted in 2015, was rejected by both UK and Sweden.

II. Basis for the Assange's Fear

The preliminary investigation in Sweden is about sexual assault and seems irrelevant to the occupation of Assange as the editor-in-chief of Wikileaks. However, Assange has claimed that the accusations of sexual assault were without base and the reason for such an inquiry was to extradite Assange to US once he steps foot in to Sweden. In this claim, Assange also draws attention to the fact that Sweden has been and still is a close ally of US. Is Assange right to fear such a course of events? Is there any possibility that Sweden has a secret agenda to deliver Assange in to US jurisdiction?

The purpose of this paper is not to examine the substance of the accusations made in Sweden or whether or not there is a link between the timing of the events in Sweden and the convening of a grand jury in US to investigate Wikileaks and Assange. But some consideration has to be given in order to have a wider perspective on the issues that will be discussed.

Bradley Manning, later recognized as Chelsea Elizabeth Manning, was an intelligence analyst for the U.S. Army, who has leaked several classified documents to Wikileaks and then has been arrested for it. His conditions of imprisonment caused an international reaction, as he was treated harshly and degrading. UN Special Rapporteur Juan Mendez, after a long investigation, concluded that US was responsible of cruel and inhumane treatment towards Manning.[6] Manning was sentenced to 35 years in prison with a dishonorable discharge. As a result of the mistreatment he received during pretrial period, parole will be available for him in seven years.[7]

[6] http://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un, (1/08/2016).
[7] https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html, (5/08/2016).

Having Bradley Manning as an exemplary scene to what could happen to him, it could be said that Assange has a base to fear that his rights would be violated. But Assange and Manning are not actually in the same situation. First of all, Assange is not an American citizen and he is not working for the US Government like Manning did during the time of his criminal actions. Second, Assange is the editor-in-chief of Wikileaks, which gives him enjoyment of freedom of press.

Moving forward from these differences, many have pointed out to the difficulties that the prosecution would face if they were to pursue a legal course against Assange.[8] The biggest issue is that no one, other than government workers, has been successfully prosecuted under the Espionage Act. There was a case against two Israeli lobbyists who had sent the classified US documents to Israel, however the charges were dropped. Another issue is that the First Amendment[9] gives journalists wide range of freedom in speech. Although the status of Assange has been discussed as a journalist, he would still be able to benefit from the First Amendment right.

Despite all the possible challenges and hard-to-overcome obstacles in the case of Assange, it has been said that the US Government will search for alternative ways to charge Assange.

Although a successful proceeding does not seem likely by many, there is still base for Assange's fear considering that the violations to Manning's rights were during the trial period and there is no guarantee Assange would not be treated the same way. Even if a successful outcome is not likely, the possible violations during the trial period seem to be enough for Assange to fear. The US Government sees him, as a threat to their national security and US does not really have a clean slate on their treatment towards people whom they consider a "threat".

B. Diplomatic Asylum Granted by Ecuador

[8] http://www.nbcnews.com/id/40653249/ns/us_news-wikileaks_in_security/t/us-v-wikileaks-espionage-first-amendment/#.V2P5LLuLSUk, (20/06/2016).

[9] First Amendment reads as the following; "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." http://www.usconstitution.net/xconst_Am1.html, (21/06/2016).

I. The Situation in International Law

1. Definition and History of Diplomatic Asylum

Julian Assange was granted asylum in the Ecuadorian Embassy in London and not within the territory of Ecuador. According to the UN's definition, "asylum granted by a State outside its territory, particularly in its diplomatic missions"[10] counts as diplomatic asylum.

The situation of diplomatic asylum in international law is complicated. There are exemplary cases, where the States have granted diplomatic asylum, but its acceptance as a legal concept has been problematic.

The history of diplomatic asylum goes back to the sixteenth-seventeenth centuries in Europe, when ambassadors' premises were accounted inviolable to support their personal immunity through which it was aimed to protect them from the influence of the receiving State. Overtime, ambassadors started using their premises to shelter fugitives from the reach of the local authorities. As this practice was abused, the receiving States were unhappy with the situation and the criticism began. By the nineteenth century the practice started to fade away and was no longer accepted in Europe. But at the same time, resulting from the nature of the political atmosphere, diplomatic asylum became more and more popular in Latin America, which caused an international division on the topic.

> *The American institution of asylum, with special characteristics which it assumes on the continent, is, in short, the result of two coexisting phenomena deriving from law and politics respectively and in evidence through-out the history of this group of States: on the one hand, the power of democratic principles, respect fort he individual and for freedom of thought; on the other hand, the unusual frequency of revolutions and armed struggles which, after each internal conflict, have often endangered the safety and life of persons on the losing side.*[11]

During the drafting of the Vienna Convention on Diplomatic Relations (VCDR), the inclusion of diplomatic asylum was proposed. The suggested article was;

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[10] UN Secretary General, Question of Diplomatic Asylum, UN Doc. A/10139 (Part II), (22/09/1975).
[11] *Ibid.*

> *Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds.*[12]

This clause allowed the sheltering of people persecuted for political crimes.

Despite the efforts of the Latin American States, the others refused to recognize it. However, an indirect recognition was made under Article 41/3 where it says "the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and receiving State."

Although the inclusion of diplomatic asylum was not accepted, the Convention allows the States to regulate it through agreements between them.[13] Latin American States have done this with the Havana Convention of 1928, Montevideo Conventions of 1933 and 1939 and the Caracas Convention of 1954. These Conventions are among the Latin American States and there are no other international agreements about diplomatic asylum, which means that the general acceptance of diplomatic asylum is regional and specific to Latin America.[14]

Apart from the indirect recognition of these regional treaties, VCDR actually has two rules that are not in favor of diplomatic asylum; Article 41/1: agents have the obligation not to interfere in the internal affairs of the receiving State and Article 41/3: diplomatic missions cannot be used incompatible with their functions. The functions of the diplomatic mission are listed under Article3/1, which is not an exhaustive list but rather gives examples from customary international law.[15]

In 1975, the UN turned back to the discussion on diplomatic asylum and asked for a report to be prepared about the opinions of the States on the topic. The report, *Question of Diplomatic*

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[12] Yearbook of the International Law Commission, A/CN.4/SER.A, vol. I, 1957, p. 54, para. 33.
[13] *Kurbalija,* Frequently Asked Questions About Diplomatic Asylum, DiploFoundation, 20/08/2012, http://www.diplomacy.edu/blog/frequently-asked-questions-about-diplomatic-asylum, (25/06/2016)
[14] *Happold,* Julian Assange and Diplomatic Asylum, European Journal of International Law Blog, 24/06/2012, http://www.ejiltalk.org/julian-assange-and-diplomatic-asylum/, (26/06/2016)
[15] *Denza*, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations, 2008, p. 35 ff.

Asylum, showed that still there was no unanimity about diplomatic asylum, which some authors have interpreted as the States not being ready to regulate the matter.[16]

Despite the lack of unanimity, everyone agrees that diplomatic asylum is "clearly confined to the political offender who, by virtue of his opposition to those in power, cannot expect a fair hearing regarding his alleged misdeeds and who may be threatened with death or arbitrary incarceration without the benefit of trial."[17] There is complete harmony in the fact that common criminals cannot, under any circumstances, benefit from diplomatic asylum.

2. Evaluation of the Asylum Case[18]

The international approach towards diplomatic asylum can also be seen in the evaluation of the Asylum Case, which was the only decision given by the International Court of Justice (ICJ) on the matter of diplomatic asylum. In its decision, the Court did not recognize diplomatic asylum as an international legal concept; however, the Court also did not rule it out entirely.

The Court said that the granting of diplomatic asylum was a serious "derogation from the sovereignty of that State," which is a core principle of international law,[19] and that "such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."[20] This means that, although there is no general rule in international law, the State granting diplomatic asylum has to prove that it has a legal basis, which gives him the right to grant asylum and obliges the receiving State to respect it. Establishing the necessary justification is not an easy burden, since there are no international agreements on the matter, only regional ones, which have also faced problems in ratifying. Relying on the regional Conventions, mentioned before, requires also that both the sending and receiving States are signatories to the regional Conventions. Otherwise the granting State would have to depend on international custom or erga omnes obligations, which are usually humanitarian concerns.

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[16] *Jeffery*, Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights, South Africa Journal on Human Rights, 1985, p. 16.
[17] *Jeffery*, p. 14.
[18] ICJ, *Columbian-Peruvian Asylum Case (Asylum Case)*, Reports 1950, p. 266, judgment of 20/11/1950.
[19] *Shaw*, International Law, 2003, pp. 409-410.
[20] *Asylum Case,* pp. 274-275.

a) Diplomatic Asylum based on International Custom

Diplomatic asylum is not accepted as international custom and proving otherwise would be nearly impossible considering the Court's approach.

In the Asylum Case, the Court had to decide whether or not Columbia had a right to unilaterally define the nature of the crime of the person whom it had granted diplomatic asylum and if this qualification was binding on Peru. In response to Columbia's claim that regional customary law in Latin America gave the right for unilateral qualification of the offence; the Court said that as a result of Article 38 of the Statute of the International Court of Justice[21] that defines international custom as "evidence of a general practice accepted as law", Columbia had to prove that there was a "constant and uniform usage practiced by the States in question."[22]

What Columbia brought as evidence of such a custom was several conventions, which did not regulate unilateral qualification and the Montevideo Conventions of 1933 and 1939, which in fact did regulate it but were not ratified by Peru. After rejecting these arguments as proof, the Court also did not find the existence of previous cases in which diplomatic asylum was based on unilateral qualification consistent enough to establish a custom.

> *The "uncertainty and contradiction", "fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions" made it impossible for the Court to accept the existence of a "constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.*[23]

Even if a custom existed, the Court said that it could not be enforced on Peru, since it has showed its stance against unilateral qualification by not ratifying the Montevideo Convention of 1939. The refrainment of Peru would have been enough to exclude it from such a custom.[24]

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[21] United Nations, *Statute of the International Court of Justice*, 18/04/1946.
[22] *Asylum Case*, p. 276.
[23] *Ibid.*, p. 277.
[24] *Ibid.*, p. 278.

In the light of this approach to the question of unilateral qualification, it is obvious that arguing diplomatic asylum as an international custom would be an even harder task. Although there have been occasions where States granted diplomatic asylum, their refrainment from including it as a legal concept to any international convention, especially the Vienna Convention on Diplomatic Relations, shows there is no consensus and hence no international custom of diplomatic asylum.

b) Diplomatic Asylum based on Erga Omnes Obligations

In the Report on the Question of Diplomatic Asylum, States were asked to express their opinions on the matter. Many of them not only refused to recognize diplomatic asylum as an international legal concept, but also were reluctant to welcome the cases where it would be granted on humanitarian grounds. Even among the States that did welcome, there was no common perspective as what would qualify as "humanitarian concerns."[25]

This cautious attitude could be based on the concept of state sovereignty, which is a core principle in international law and carries the principle of non-intervention within its nature, which is also part of customary international law.[26]

> *If a state has right to sovereignty, this implies that other states have a duty to respect that right by, among other things, refraining from intervention in its domestic affairs. The principle of non-intervention identifies the right of states to sovereignty as a standard in international society and makes explicit the respect required for it in abstention from intervention.*[27]

That is basically the reason why the States usually tend to refuse the slightest possibility that would seem as an intervention to their internal affairs.

However, the situation in international law has changed over the years. There has been a shift towards a more humanitarian approach that gives priority to the human interest rather than the State interest. This does not only mean in the sense of protection of human rights, but also in

[25] *Behrens*, Diplomatic Interference and the Law, 2016, p. 245; "Resolution certainly suggests that States harbored widely varying ideas of what the 'humanitarian aspects' of asylum should encompass."
[26] ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14, para.202; "… the Court considers that it is part and parcel of customary international law."
[27] *Vincent*, Nonintervention and International Order, 2015, p. 14.

the interpretation of the origins of legal concepts, such as sovereignty. It is not a scenario where the State interest and human interest has to be balanced, but rather the definition of the term *sovereignty* has gained a different perspective. Tomuschat has explained this shift as following;

> *Today, the international legal order cannot be understood any more as being based exclusively on State sovereignty. As already indicated, protection is afforded by the international community to certain basic values even without or against the will of individual States. All of these values are derived from the notion that States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights. At the present time, it is by no means clear which one of the two rivaling Grundnorms will or should prevail in case of conflict. Over the last decades, a crawling process has taken place through which human rights have steadily increased their weight, gaining momentum in comparison with State sovereignty as a somewhat formal principle. The transformation from international law as a State-centered to an individual-centered system has not yet found a definitive new equilibrium… It is the great challenge for today's lawyers to define an appropriate dividing line, taking into account that State power may on the one hand become an oppressive force, but that on the other hand it operates as a protective umbrella for the human beings under its jurisdiction.*[28]

Since the existence of States is for the benefit of the people, so is the concept of sovereignty and non-intervention.[29] The principles of sovereignty and non-intervention protect the State from external disturbance, in order to provide the people with a steady and peaceful environment. The existence of these principles is to serve the people. In this view, intervention may be justified when it is for the good of people. However, not every case of human rights violation would allow intervention, considering the wide range it has gained in the recent years. The violation has to be in a nature that would give the right for a third party to intrude into the domestic legal system, which is not an easy deduction to make. Despite the

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[28] *Tomuschat*, International Law: Ensuring the Survival of Mankind on the Eve of a New Century: Course on Public International Law, Recueil des Cours/Collected Courses of the Hague Academy of International Law 1999, pp. 161-162.

[29] *Peters*, Humanity as the A and Ω of Sovereignty, The European Journal of International Law, 2009, p. 534; "Because the international system does not exist for its own sake, the prohibition on intervention is, just like sovereignty, ultimately grounded in the well-being of natural persons."

stark increase of importance given by the States to human rights protection, there is still "tension between the duty of a diplomat under Article 41 of the Vienna Convention not to interfere in the internal affairs of the receiving State and the opinion of liberal States that human rights are a matter of legitimate international concern whose active promotion is a major part of their foreign policy."[30]

The case where a third party would have "locus standi"[31] to intervene would be the consequence of obligations erga omnes, which has become more of a possible scenario with the universal promotion of human rights protection. The developments in human rights law have shown that some rights are considered as jus cogens and that they "are no longer the exclusive concern of the sovereign State, that they have become a core concern of the international community and that obligations to respect such rights are *erga omnes*."[32] Where there is obligation erga omnes, granting diplomatic asylum might be well grounded rather being just an intervention into the internal affairs of another State. Obligations erga omnes are also a problematic topic, where there are many different views on the context, but this discussion is not necessary for the purpose of this paper.

II. Diplomatic Asylum in Assange's Case

In its official statement, Ecuador has cited 16 legal instruments[33] that, in the view of Ecuador, provide the authority to grant diplomatic asylum to Assange. Many of these were UN instruments. But mainly, Ecuador based its position in granting Assange diplomatic asylum on the Universal Declaration of Human Rights of 1948 (UDHR)[34], the Organization of American States (OAS) Declaration of the Rights and Duties of Man[35] and the OAS Convention on Diplomatic Asylum.[36] Article 14/1 of UDHR and Article 27 of the OAS Declaration of the Rights and Duties of Man give the right to seek asylum from persecution

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[30] *Denza*, p.11.
[31] *Willisch*, State Responsibility for Technological Damage in International Law, 1987, p.40.
[32] *Zacklin*, Beyond Kosovo: The United Nations and Humanitarian Intervention, Virgina Journal of International Law, 2001, p. 933.
[33] http://www.cancilleria.gob.ec/statement-of-the-government-of-the-republic-of-ecuador-on-the-asylum-request-of-julian-assange/, (20/06/2016).
[34] UN General Assembly Resolution 217 A (III), *Universal Declaration of Human Rights,* 10/12/1948.
[35] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man,* 02/05/1948.
[36] Organization of American States (OAS), Treaty Series No. 18, *Convention on Diplomatic Asylum (Caracas Convention)*, 29/12/1954.

and the OAS Convention on Diplomatic Asylum allows States to grant diplomatic asylum when fundamental rights are threatened.

The right to seek asylum regulated in the Conventions that Ecuador has cited, is for territorial/political asylum. The position of diplomatic asylum is much more delicate than political asylum, since it means a sacrifice from the territorial sovereignty of the receiving State. As mentioned before, "considering how much importance States and international law have always accorded to sovereignty, such an intrusion into independence is acceptable only if it has a clear basis in international law."[37] The Permanent Court of International Justice also emphasized this point in the Lotus Case;

> *International law governs relations between independent States. The rules of law binding upon States therefor emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.*[38]

Some scholars have said that the differential treatment to political refugees based on their geographical location causes problems.[39] It might be called unfair to refuse protection to one person because they have not succeeded to leave their country and arrive to the territory of which State they would seek asylum. However, political asylum stems from the very principle, which weakens the argument of diplomatic asylum: territorial sovereignty. As long as the State has not precisely waive its right, such as they do in diplomatic immunity, infringement of territorial sovereignty cannot be accepted. If the receiving State "object(s) to refuge or demand(s) surrender of the person requesting asylum, the extraterritorial state will ordinarily not be entitled to grant asylum"[40] and will have to return the person to the receiving State's authorities.

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[37] *Vark*, Diplomatic Asylum: Theory, Practice and the Case of Julian Assange, Sisekaitseakadeemia Toimetised, 2012, p. 244.
[38] PCIJ, *The Case of the SS Lotus (Lotus Case) France v. Turkey*, Judgment, Series A, No 10 (1927) 4, p. 18.
[39] *Lavander,*Using the Julian Assange Dispute to Address International Law's Failure to Address the Right of Diplomatic Asylum, Brooklyn Journal of International Law, 2014, p. 486.
[40] *Haijer,* Europe and Extraterritorial Asylum, 2011, p. 119.

Among the legal instruments Ecuador has quoted, only one of them regulates diplomatic asylum. The OAS Convention on Diplomatic Asylum is a treaty that was signed among the Latin American States. Although this Convention might show the approach towards diplomatic asylum in Latin America, it definitely does not bind any other State, who is not a signatory such as UK or Sweden. Therefore, the legal instruments Ecuador has used do not support its position in the granting of diplomatic asylum to Assange. None of them obliges UK to respect the asylum status and allow safe passage.

Since none of the legal instruments oblige UK to recognize the diplomatic asylum status, Ecuador would have to prove the existence of international custom on that does oblige UK. Proving there is a custom does not look possible considering the points mentioned above. UK, in its official statement, repeated that it does not recognize diplomatic asylum as an international legal concept.[41] The refusal of including diplomatic asylum to any international treaty and officially refusing it as a custom, obviously proves the contrary, that there is no international custom on diplomatic asylum and Ecuador cannot successfully base its position on it.

Another point in defense of Assange could be the fear that the Swedish authorities are in compliance with the US Government to deliver him to the jurisdiction of US, so he could be prosecuted for the leakage of classified documents. Although asylum cannot be granted to interfere with 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 extralegal character which a government might take or attempt to take against its political opponents."[42]

Accusation of such a kind to a State's legal authority, which has no indication of political influence, should be supported with more proof than merely an assumption. Apart from having a high level of standard in their legal system, Sweden is also bound by EU Law and European Convention on Human Rights, which it has a good reputation of abiding.[43]

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[41] Foreign Secretary Statement on Ecuadorian Government's Decision to Offer Political Asylum to Julian Assange, 16/08/2016, https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange, (21/06/2016).

[42] *Asylum Case*, p. 284.

[43] ECHR-Press Country Profile, http://www.echr.coe.int/Documents/CP_Sweden_ENG.pdf, (22/06/2016).

III. Necessity of Diplomatic Asylum

It has been established that diplomatic asylum is not an universally accepted legal concept in international law and the only situations where it might be granted and respected by the international community is when it is based on humanitarian grounds and granted not to common criminals, but only to people who are wanted for political reasons. The necessity of the institution of diplomatic asylum is questionable. It can be said that if the States have seen it as a need, they would have regulate such a concept that has caused many discussions. Or the ICJ could have clarified the issue when it had the opportunity with the Asylum Case. Apparently the Latin American States felt the need for a regulation and they have signed many conventions on diplomatic asylum. As Greenburgh said,

> *…the stability of political society in Europe testified to the rarity of the exercise of a practice, the frequent use of which in more unsettled States was an established and recognized fact.*[44]

With the exception of Latin America, the lack of any regulation or definitive answers and the different views of the States, as it is seen in the Report on the Question of Diplomatic Asylum by the UN, show that the international community does not feel a certain necessity of diplomatic asylum.

There might be special circumstances where the protection of people can only be ensured through the granting of diplomatic asylum. For example during the Second World War many diplomatic missions in Europe have granted asylum to people prosecuted for political reasons and took them under their protection.[45] United States has also opened its diplomatic missions in some situations, protecting people seeking protection from political persecution.[46]

These incidents from the past show that although the States do not officially recognize diplomatic asylum, they have used it under some circumstances they have found necessary in order to ensure protection, which indicates a slightly different *unofficial* approach. It might take a long time until the international community would regulate diplomatic asylum, or even

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[44] *Greenburgh*, Recent Development in the Law of Diplomatic Asylum, Transactions for the Year 41, 1955, p. 107.
[45] *Ibid.* p. 108.
[46] *Greene*, Assange Embassy Gamble Follows Famous Precedents, http://edition.cnn.com/2012/06/21/world/embassy-defections/, (20/07/2016).

that time might not come at all. However, when States find upon themselves the responsibility to protect people from serious violations and the will to do so, they take action by other means, even if they do not call it "diplomatic asylum" explicitly.

The necessity of diplomatic asylum specifically in Julian Assange's case is another matter. Although Assange faces a risk of political persecution, which is not an imminent threat, there are other safeguards that would ensure protection for Assange from his fear of extradition. This point will be explained in more depth later.

C. Human Rights Issues

I. "Arbitrary Detention" of Assange by UK

1. Summary of the Opinion No. 54/2015 Concerning Julian Assange[47]

In December 2015, the Working Group on Arbitrary Detention[48] gave its opinion about Julian Assange's stay in the Ecuadorian Embassy and whether or not this stay qualified as arbitrary detention.

Assange claimed that he would face the risk of extradition to US, where he feared political persecution, inhumane treatment and physical harm, if he were to return to Sweden for questioning. Not receiving any guarantee, he sought refuge in the Ecuadorian Embassy. Sweden's failure to guarantee that there would be no such extradition and to recognize the asylum status granted by Ecuador was unjust. Diplomatic asylum was the only way to secure him from refoulement and to ensure his inalienable right to security.

Another point made by Assange was that there was no prosecution against him in Sweden, but only a preliminary investigation that required the questioning. The Swedish prosecutor did

[47] Human Rights Council, Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November – 4 December 2012, Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland), from here on The Opinion.

[48] The Human Rights Council, in order to make investigation and give opinions in cases of arbitrary detention, established Working Group on Arbitrary Detention. Although the opinions given by the Working Group are not binding, being a part of the United Nations gives a significant level of importance. For further information see; http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

not consider any other alternative way to question Assange such as doing the questioning in the Ecuadorian Embassy himself or through mutual assistance protocols, although Assange has expressed his willingness to cooperate with the Swedish authorities at all time. This was also a denial to give him the opportunity to defend himself against the accusations. Assange's stay at the Ecuadorian Embassy was not recognized by Sweden or UK as detention, as they claimed that they were not forcing Assange to stay there and it was his own choice to remain in the Embassy. Since his stay in the Embassy was not recognized as detention, Assange could not seek judicial remedy against it, and if he were to be convicted from the allegations in Sweden, it would be a violation of the *ne bis in idem* principle.[49]

In response, Sweden emphasized that it did not recognize diplomatic asylum as a legal institution and Assange was wanted for non-political crimes, which had no acceptance within diplomatic asylum even if Sweden had have recognized the concept. The Swedish government could not interfere in to the prosecutor's investigation, as only the prosecutor knew the best way to pursue an investigation. If the prosecutor thought the presence of Assange in Sweden was necessary, the government had no right to seek other methods.

Sweden's response for not giving a guarantee to Assange against extradition was that they could not give any guarantee about non-refoulement without an official request made by the US. In such a case where the US government did make an official request for extradition of Assange, there were many safeguards available that would protect Assange from the feared human rights violations. Under the EAW, Sweden also needed UK's approval before extraditing Assange to US. Assange's stay in the Embassy was his own choice and his inconvenient situation was the consequence of that. Sweden could not be held responsible for the violations Assange has claimed.

UK responded with the refusal of the diplomatic asylum status as well and said that by opening its diplomatic mission to Assange, Ecuador was violating its obligations under the Vienna Convention on Diplomatic Relations. UK, having an obligation under EU Law, had to follow the European Arrest Warrant and extradite Assange to Sweden. It repeated the

[49] Also known as *double jepordy*, "ne bis in idem is a fundamental principle of law, which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act or facts." *Bockel*, The Ne Bis In Idem Principle in EU Law, 2010, p. 2.

argument that UK could not be held responsible for any violations claimed, since it was Assange's choice to remain in the Embassy.

Another issue raised was that UK had changed its domestic law on extradition after the decision on Assange was given. Requests for extradition made only by a judicial authority would be accepted and a prosecutor did not qualify as a judicial authority in this sense. Also extradition requests had to be made based on an indictment, which is not the case with Assange either. Most importantly, EAW would be subject to a proportionality control by the court. The new stance taken towards extradition and the EAW could have been in favor of Assange, however, UK has claimed that these changes did not apply to Assange, as they did not have retrospective applicability.

The Working Group found violations of Article 9 and 10 of the Universal Declaration of Human Rights and Articles 7, 9/(1), 9/(3), 9/(4), 10 and 14 of the International Covenant on Civil and Political Rights. First; the Working Group repeated the definition of *arbitrary detention*.

> *Placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.*[50]

Later, attention was drawn to the importance of proportionality.

> *The notion of "arbitrary" stricto sensu includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary. The drafting history of article 9 of the International Covenant on Civil and Political Rights "confirms that 'arbitrariness' is not to be equated with 'against the law', but most be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."*[51]

[50] Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24/12/2012, para. 59.
[51] *Ibid.*, para. 61.

The EAW issued by Sweden was based only on a preliminary investigation and not an indictment. The decision was not given by a judge, a judicial authority, but by a prosecutor. However, the Swedish courts upheld the EAW when Assange had appealed. Considering that the basis for the EAW was only a preliminary investigation and that the actions taken by both States throughout the process were not proportional[52], the Working Group has decided that Assange's situation was *a state of arbitrary deprivation of liberty*.

2. Evaluation of the Opinion No. 54/2015 Concerning Julian Assange

The Opinion of the Working Group has caused controversy among scholars and States. UK and Sweden declared right away that they were not bound by this decision and it would not have any influence on their actions. Especially UK refused the decision with a more powerful reaction, saying that the findings of the Working Group were "frankly ridiculous."[53]

The Working Group was established by the United Nations, which was founded by the States and is respected internationally. One of its core mandates is,

> *(a) To investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned*[54]

Such a rapid and firm reaction from UK and Sweden was criticized as undermining the value of UN and its division. They have also damaged their reputation as States that have a strong

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[52] When evaluating the proportionality, the Working Group made reference to the proportionality description in a UK Supreme Court decision;
"It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the later." UK Supreme Court, *Bank Mellat v Her Majesty's Treasury*, No.2, UKSC 39, 19/06/2013, para. 74.

[53] The UK Foreign Secretary Philip Hammond, http://www.itv.com/news/update/2016-02-05/hammond-assange-remains-a-fugitive-from-justice/, (26/07/2016).

[54] Fact Sheet No. 26, The Working Group on Arbitrary Detention, http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf, (28/07/2016).

respect towards international agreements and responsibilities,[55] by not taking in to consideration the recommendations made by the Working Group.[56]

Why has this opinion cause so much reaction and why were both States so quick to dismiss it? The Opinion on Julian Assange, in fact, might be questionable on some points. First of all, as Sweden mentioned, there is no official request from the US government for the extradition of Assange to its territory. Sweden does not want to adjust itself according to Assange's fear, which does not have a solid ground in the eyes of Sweden and could be seen as merely hypothetical.

It is also debatable whether Assange could even be prosecuted under the Espionage Act, since he is neither a government worker nor a US citizen. Such a prosecution faces many obstacles, one of which would be the first amendment right. Being the editor in chief of Wikileaks, Assange would enjoy the freedom of press. There has not been any case in the US, where civilians or the press were successfully prosecuted under the Espionage Act.[57]

On one hand, such a scenario of political persecution seems highly unlikely to succeed. But on the other hand the example of Chelsea Manning and the US government's enthusiasm to punish people risking its national security supports the fear of Assange. Scholars and lawyers have been discussing alternative ways how the US government could successfully prosecute Assange. Although Sweden has no legal obligation to give Assange guarantee against extradition, it could have evaluated the unique circumstances of him and perhaps find a middle ground that would benefit both parties.

The second point why the Opinion was criticized as mush is that the Working Group did not take into consideration the international situation of diplomatic asylum and that it was not recognized by most of the States. UK and Sweden are under no obligation to ensure safe passage to Assange from the Embassy to Ecuadorian territory. Assange remains in the Embassy merely on the inviolability of diplomatic missions. He is wanted by Sweden on

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[55] https://www.hrw.org/news/2016/02/05/assange-following-rules-or-flouting-them, (26/07/2016).

[56] Although they are not legally binding, the Human Rights Council encourages the States "to give due consideration to the recommendations of the Working Group." Report of the Human Rights Council on its twenty-forth session, Resolution 24/7 on Arbitrary Detention of 26 September 2013, A/HRC/24/2, 27/01/2014.

[57] http://www.alternet.org/rss/breaking_news/1003054/does_the_us_have_a_case_against_julian_assange, (31/07/2016).

accusations of sexual assault, which is a common crime and no diplomatic protection could be provided against. However, the Working Group considered Assange's stay in the Ecuadorian Embassy as "a prolongation of the already continued deprivation of liberty that had been conducted in breach of the principles of reasonableness, necessity and proportionality."[58]
In its dissenting opinion, Vladimir Tochilovsky defined Assange's stay in the Ecuadorian Embassy as "self-confinement" and pointed out the fact that this did not fall into the mandate of the Working Group.[59]

Either Assange has confined himself to resist extradition to Sweden from a common crime or he has legitimate grounds to fear political persecution by the US government and he sought refuge against extradition to US. Whichever approach is taken towards the definition of Assange's stay in the Ecuadorian Embassy, it is clear that neither one of the States have evaluated the facts of the case to its fullest.

Both States have failed to consider the special situation of Assange and the sincerity of his fears. Although there is no official request for extradition by US, Sweden could have easily given Assange the guarantee from political persecution. Resting his fears, Sweden would have been able to continue with the process. Even if such a guarantee was not legally possible, the Swedish prosecutor could have pursued other methods to question Assange, such as questioning him in the Ecuadorian Embassy or via the cooperation of UK authorities. Assange's situation is an exceptional one and therefore finding a middle ground would have been more beneficial for all the parties and for the operation of justice.

UK, on the other hand, has been so determined to carry out the EAW; it has failed to apply the proportionality principle to Assange's case. The importance of the proportionality test has been emphasized in the Report of the Council of the European Union;

> *The application of a proportionality test in issuing an EAW was a recurrent issue during the evaluation exercise. Basically, this proportionality test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case. The idea of appropriateness in this context*

[58] *The Opinion*, para. 90.
[59] *The Opinion, Individual Dissenting Opinion of WGAD Member Vladimir Tochilovsky, The Appendix I*, para. 3-5.

encompasses different aspects, mainly the seriousness of the offence in connection with the consequences of the execution of the EAW for the individual and defendants, (…) the possibility of achieving the objective sought by other less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.

The findings of the evaluation show that the way this issue is dealt with in the Member States varies greatly. Some Member States apply a proportionality test in every case, whereas others consider it superfluous. Even in those Member States where a proportionality test exists, there is often uneven practice concerning the circumstances to be taken into consideration and the criteria to be applied.

The expert team widely considers that, in principle, the proportionality test was the right approach and that some provisions, guidelines or other measures should be put in place at European level to ensure coherent and proportionate use of the EAW. There seemed to be a wide consensus (although not unanimity) that no proportionality check should be carried out at the level of the executing authorities.[60]

Even though there is mutual trust among the EU member states, UK has had a change of jurisprudence on the extradition conditions, where it would apply a proportionality test in order to evaluate the necessity of the EAW. This new jurisprudence has not been applied to Assange. If it were, maybe the UK Courts would decide that an EAW issued by a prosecutor at the stage of preliminary investigation might not be proportional after all.

Without any doubt, such an exceptional case like Assange's had to be handled accordingly. This does not necessarily mean a special treatment for Assange, but perhaps an approach that was more considerate would have promoted the application of justice for both Assange and the alleged victims of the sexual assault charges.

II. Safeguards Against Extradition to US

In order to have better judicial cooperation among States, there have been many

[60] Final report on the fourth round of mutual evaluations – The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, 8302/2/09 REV 2, 18/05/2009, pp. 13-14.

multilateral or bilateral treatments made on the subject of extradition. The most important one concerning Assange is the European Arrest Warrant. "However, with these developments come concerns about safeguards for the rights of the accused, particularly whether greater efficiency in extradition comes at the cost of respect for the human rights of the accused. As extradition is always based on some form of international measure, whether a European Union Framework Decision in the case of the European Arrest Warrant (EAW), or international treaties, domestic courts face the challenge of how to interpret domestic law based which is based on international measures. This challenge includes the question of how international human rights commitments should be integrated into such an interpretation process."[61] In the past, States would find it as an intervention to the other States sovereignty to evaluate their domestic law and procedures. However, after the Second World War, States have defeated this perspective and gave more importance to human rights protection.[62]

The human rights instruments that are applicable to Assange's case could provide the protection that was intended by the granting of diplomatic asylum. Since diplomatic asylum is not a universally accepted concept and has many controversies on it, the human rights instruments would establish stronger safeguards.

UK, Sweden, Ecuador and US are all signatories to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, which establishes the principle of non-refoulement. Apart from that, UK and Sweden, being members of the European Union are subject to the Charter of Fundamental Rights of EU. The European Convention on Human Rights provides another level of protection, obliging UK and Sweden to follow. There are other instruments that were quoted by the Ecuadorian government, however; only the 1951 Convention relating to the Status of Refugees and the European Convention on Human Rights will be examined in this paper. As the European Union, specifically the Court of Justice follows the case law of the European Court of Human Rights; the Charter of Fundamental Rights of EU will not be evaluated.

1. Principle of Non-Refoulement

[61] *Cullen, Burgess*, Extradition From A to Z: Assange, Zantai and the Challenge of Interpreting International Obligations, University of Western Australia Law Review, 2015, p. 209.
[62] *Ibid.*, p. 211.

Article 14 of the Universal Declaration of Human Rights gives everyone the "right to seek and enjoy in other countries asylum from persecution." However, this does not oblige the State to grant asylum, "the Declaration only authorizes the individual to seek asylum in another country and to enjoy it, if it is granted to him by a State. The fugitive, however, has no and cannot have a legal title against a State to have the asylum granted, that is to say, he cannot arrogate asylum from any State."[63] It is not a right that an individual could claim against a State. It only gives the right to seek asylum, and if it is granted, to enjoy that status. Whether or not the State would grant asylum status, is in the State's discretion.[64]

The 1951 Convention and the principle of non-refoulement within, stem from the right to asylum. Although the right to asylum is not an obligation on the States, the principle of non-refoulement is.[65]

Principle of non-refoulement is laid out in Article 33 of the 1951 Convention relating to the Status of Refugees (from now on the 1951 Convention),

> *No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

The purpose of the principle of non-refoulement is "to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person."[66] This stems out from the willingness and cooperation of States to observe human rights and raise the level of protection. States have also renewed their commitment to the 1951 Convention in 2001,

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[63] *Haraszti*, Right of Asylum, Acta Juridica, 1960, p. 365.

[64] "...there is no such right in the legal sense without a treaty or convention. It is only when there is a treaty or convention on the subject that the right really exists for then there is the obligation to grant refuge on the part of the state requested to extend protection as well as the duty to recognize the right on the part of the territorial government. As in the Saulo case, where there exists no treaty or convention, the provision of Article 14 of the Declaration has been invoked as the basis of the right. It is significant to note, however, that this provision has no legal binding force. Moreover, it has not been included among the human rights and fundamental freedoms embodies in the draft covenant on civil and political rights. In view of this, even under the assumption stated earlier, the recognition of the right is still dependent upon the sole will of the states." *Balbastro*, Comments: The Right of Diplomatic Asylum, Philippine Law Journal, 1959, p. 364.

[65] *Roman*, State of the Right of Asylum in International Law, Duke Journal of Comparative and International Law, 1994-1995, p. 16.

[66] UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

especially declaring that the principle of non-refoulement was "embedded in customary international law."[67]

The scope of the principle of non-refoulement does not cover all asylum seekers, it is only applicable to people who qualify as a *refugee* under Article 1 of the 1951 Convention. Relevant to the case, Article 1(A)/2 says,

> *…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

This definition in Article 1(A)/2 has became universally accepted and "continues to constitute the *bedrock of international refugee law* not only with regard to the 1951 Convention and its contracting parties, but also with regard to customary law notwithstanding the fact that the chapeau of Art. 1 A refers to said definition being used 'for the purposes of the present Convention' only."[68] Both the definition of refugee and the principle of non-refoulement has universal acceptance and is seen as part of customary law.

In the definition for refugee, it uses the phrase "the country of his nationality." Assange is an Australian citizen, but Assange does not face any risk of persecution from the country of his nationality. However, Australia has not shown any sign of support or intention of protecting its own citizen towards the risks he would face in US and both States known to be close allies. It could be interpreted as Assange being protected from the lack of protection afforded by its own country, which might seem to be a stretch. But the purpose of the 1951 Convention and its 1967 Protocol is protecting human rights violations without any kind of discrimination. This was emphasized in the Explanatory Note to the 1951 Convention,

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[67] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Document HCR/MMSP/2001/09 16 Jan 2002, welcomed by the UN General Assembly in Resolution A/RES/57/187, 18/12/2001, para. 4.

[68] *Zimmerman, Dörschner, Machts*, The 1951 Convention relating to the Status of Refugees and its 1957 Protocol: A Commentary, 2011, Oxford, p. 298.

The Convention is both a status and rights-based instrument and is under- pinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement. Convention provisions, for example, are to be applied without discrimination as to race, religion or country of origin. Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination.[69]

The fact that Assange is seeking protection from a State other than his State of origin should not, on its own, be an obstacle for him to receive refugee status, in the light of the aim and purpose of the 1951 Convention.

Whether or not Assange would receive refugee status would be the decision of the State, to whichever the US made its extradition request. Than Assange's status and the allegations against him would be evaluated, determining whether or not he qualifies as refugee under Article 1(A)/2 of the 1951 Convention. Until this decision is made, Assange would be safe from extradition.

In this connection, particular regard should be had to the fact that a determination of refugee status is only of a declaratory nature. The absence of formal recognition as a refugee does not preclude that the person concerned possesses refugee status and is therefore protected by the principle of non-refoulement.

In fact, respect for the principle of non-refoulement requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established.[70]

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[69] Introductory Note by the Office of the United Nations High Commissioner for Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly, 16/12/1966, p. 3.

[70] *Op. cit.* 59.

Assange's current situation is as the receiver of diplomatic asylum and Ecuador has guaranteed him that he would enjoy territorial asylum once he arrives in Ecuador. Although his diplomatic asylum status is not recognized, the fact that he has been granted asylum from a State that is party to the 1951 Convention, should suffice for an evaluation of his refugee status.[71]

2. European Convention on Human Rights

The development of the human rights protection in the ECHR system relating to extradition cases has been gradual. The European Court of Human Rights (the Court) has established a level of protection in extradition and deportation cases step by step. Although there is no explicit article in the ECHR that prohibits an individual's extradition on grounds of violation of a Convention right, the Court filled in the gap with its interpretation of the existing Convention articles.

This part will evaluate first the development of the case law by the Court and second, how this evaluation in the interpretation could perhaps benefit Assange.

a) Development of the Case Law

The Soering Case[72] was defined as a *landmark* judgment on extradition. The applicant, whose extradition was requested by the US on the grounds of first degree murder, claimed that in case he was extradited to the US, he would face death penalty and the situation of being on death row, *the death row phenomenon*, was inhuman and degrading treatment,

[71] It has been argued by some scholars that principle of non-refoulement should also apply to diplomatic asylum situations. In this case, Assange would have enjoyed non-refoulement protection from the moment he received the diplomatic asylum status. "While these provisions were conceived with frontier-crossing refugees in mind, nonrefoulement should also apply to the asylum seeker fleeing from political persecution within his own country onto the premises of a foreign mission. Similarly, such persons should be awarded at least a temporary stay to guarantee their safety. The principle of nonrefoulement can now be considered a conventional international practice. Inherent in nonrefoulement is the idea of a temporary stay until safe conduct to a third country can be worked out. This idea is crucial to diplomatic asylum. There are numerous examples of missions having granted such temporary haven on their premises to persons persecuted for political, religious, racial, and other reasons. Therefore, the source of an obligation upon states to offer safe haven in their diplomatic mission to persons fleeing persecution in the receiving country arguably flows from international law on refugees codified in the Geneva Convention and Protocol." *Riveles*, Diplomatic Asylum as a Human Right: The Case of the Durban Six, Human Rights Quarterly, The John Hopkins University Press, 1989, p.152.

[72] ECtHR, application no. 14038/88, *Soering v. The United Kingdom*, judgment of 07/07/1989.

violating his Article 3 right. Article 2 does not prohibit death penalty under certain circumstances and the requested State, UK, had not ratified the 6th Additional Protocol that abolishes death penalty. However, the terms of how the penalty would be carried out and the process the applicant had to go through was under the spotlight,[73] which the Court did find to be inhuman and degrading treatment.

Since Article 3 did not mention any obligation of the State in cases of extradition, the question was whether UK had to ensure the applicant's Convention right in this case also. The Court said,

> *The question remains whether the extradition of a fugitive to another state where he would be subjected to or likely to be subjected to torture or to inhuman and degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 ... It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman and degrading treatment or punishment proscribed by that Article.*[74]

Even though there was not any referral to an obligation in cases of extradition, the Court found it to be against the Convention's aim for a State not to bear that responsibility.

In the following paragraph, the Court immediately drew attention to the importance of international cooperation and extradition, considering the "larger international dimension" of

[73] *Soering Case*, para. 61.
[74] *Soering Case*, para. 88.

crimes. The Court pointed out the significance of finding a balance between the public interest, battling of crime and human rights protection.[75]

The importance of international cooperation against crimes is undeniable, however, the Court has started a new phase, with the Soering case, that would oblige States to oversee human rights protection in a broader area. "No longer can governments remove aliens from their territories without appreciation of the individual's fate; and no longer remains the process of extradition and expulsion outside the grip of international human rights obligations."[76]

The most important paragraph in the judgment, for the purpose of this thesis, opens the gate for further developments by saying,

> *As results from Article 5 § 1 (f) (art. 5-1-f), which permits "the lawful ... detention of a person against whom action is being taken with a view to ... extradition", no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee.*[77]

With this paragraph, the Court has hinted that in cases of extradition or deportation, the States might have the obligation to look out for the rights of the individual in the State that he or she will be sent. And this obligation might also go beyond Article 3, covering other rights in the Convention as well. However, the Court was very cautious not to let the judgment be interpreted as such. In the next paragraph, the Court emphasized the territorial application of the Convention and how it could not require non-member States to comply with the Convention standards. Overall, the Court had to find a balance between upholding the spirit of the Convention and not to overstep the limits of its application. It can be seen how this balance shifted in favor of human rights protection throughout the case law.

The Court, in its following judgments, has broadened the scope of this application into other aspects, for example the Chahal principle.

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[75] *Soering Case*, para. 89.
[76] *Zühlke, Pastille*, Extradition and the European Convention – Soering Revisited, 1999, pp. 750-751.
[77] *Soering Case*, para. 85.

In the Chahal case[78], despite the guarantees given by the Indian government that the person, whose extradition was requested, would not be subject to inhuman and degrading treatment, the applicant claimed that he feared from the individuals' actions in the security forces. The Court expanded its view in the Soering case from the State's treatment to non-state actors' treatment.

> *Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem (see paragraph 104 above). Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety."*[79]

Even though the guarantees given by the Indian government could be trusted, since the Indian government does not have full control on every individual in the security forces, the Court found the applicant's fear acceptable and found a violation of Article 3 of the Convention, if he was extradited.

However, the Chahal case was not unanimous as the Soering case, because the applicant was suspected of terrorism. The controversial point was, despite the absolute nature of Article 3, where the indirect application of the Convention was the issue, the States should have more space to "strike a balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination."[80] In fact the Court has been stricter with the application and interpretation of the Convention rights in cases concerning terrorism. In spite of the strict evaluation, the Court reaches a conclusion promoting the aim and purposes of the Convention in protecting human rights for all individuals.

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[78] ECtHR, application no. 22414/93, *Chahal v. The United Kingdom*, judgment of 15/11/1996.
[79] *Chahal Case*, para. 105.
[80] *Chahal Case*, Joint Partly Dissenting Opinion, para. 1.

The Othman judgment[81] was the first case that the Court found that the deportation of the applicant would be a breach of the right to fair trial, expanding its view for Article 3 to Article 6. Article 6/1 of the Convention says,

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

Abu Katada was a Jordanian national, residing in UK at that time as an asylum seeker, whose deportation was wanted based on the conviction in absentia given in Jordan. Abu Katada claimed that if he were to be deported to Jordan, his right to a fair trial would be violated, since the witness testimonies against him were obtained under torture.

The Court found that evidence obtained by torture would be a violation of Article 6, saying,

> *… the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial.*[82]

The Court than explained what would be a 'flagrant denial of justice' and amount to a violation of Article 6, when concerning non-member States.

> *A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6, which is so fundamental as to amount to a*

[81] ECtHR, application no. 8139/09, Othman (Abu Qatada) v. The United Kingdom, judgment of 9/05/2012.
[82] *Othman Case*, para. 267.

nullification, or destruction of the very essence, of the right guaranteed by that Article.[83]

It held the level for a breach higher, since the deportation was to a non-member State.

The Othman case was certainly a judgment that caused many controversies and was not welcomed by UK.[84] The judgment puts a new burden on the States to observe right to fair trial of the individual they would wish to extradite or deport. The judgment is

…remarkable in that it explicitly extended the scope of the non-refoulement to encompass the risk of a flagrant denial of justice under Article 6 of the ECHR. The Court found that the admission of evidence obtained by torture amounted to such a denial. The decision provides a welcome additional barrier for governments in expulsion (and extradition) cases. At the same time, it raises the question of whether this hurdle can be overcome.[85]

It might be seen as a never ending diplomatic communications in order to ensure that the rights of the individual would be kept intact and this much procedure might not be received very gladly by the States.

The Court's stance on diplomatic assurances were summarized by a judge at the Court as following,

In the jurisprudence of the European Court of Human Rights it is essential that assurances are not part of a trade off in balancing national security interests, human rights protection and international cooperation. Whether such assurances can be accepted as relevant facts for the assessment of a risk is a delicate exercise. As it was stated in Abu Qatada vs. the UK, it is not for the Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill- treatment.[86]

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[83] *Othman Case*, para. 260.

[84] *Martyniuk*, Case Note: Othman (Abu Katada) v. the United Kingdom, Edinburgh Student Law Review, 2013-2015, p. 94.

[85] *Michealson*, Renaissance of the Non-Refoulement – The Othman (Abu Katada) Decision of the European Court of Human Rights, The International and Comparative Law Quarterly, 2012, p. 764.

[86] Presentation by Johannes Silvis, Judge at the European Court of Human Rights, Extradition and Human Rights – Diplomatic Assurances and Human Rights in the Extradition Context, 20 May 2012, pp. 17-18, reached at: http://www.coe.int/t/dghl/standardsetting/pc-

Article 3, prohibition on torture, inhuman or degrading treatment and Article 6, right to fair trial, provide absolute rights, which cannot be limited. Did the Court give any judgment relating to the non-absolute rights of the Convention, as a limitation for extradition or deportation?

Some scholars have made a deduction from the Court's case law and its approach to Article 3 and 6 cases that the violations resulting from the extradition would have to be a manifest in nature to prohibit the removal of the individual.

> *In light of the ECtHR's case law in this specific area and of its Article 8 compliance test, it is clear that the ECtHR is reluctant to identify breaches of Article 8 in cases where prisoners are kept at a great distance from their families for extended periods. It is also clear that only extreme personal circumstances, or cases where the procedure is manifestly disproportionate to the seriousness of the offence and the penalty that is likely to be passed, will lead to a violation of Article 8 ECHR in this context.*[87]

It would be expected for the Court's evaluation of a non-absolute right in cases of extradition would be much more stricter, in the sense that the violation should be very serious, or according to the principle of proportionality, the violation is manifestly unjustified.

b) Application of the Court's Case Law to Julian Assange

The European Court of Human Rights has been cautious with its interpretation of the Convention relating to its indirect effect on non-member States. While it does not have jurisdiction over the States, which are not signatories to the Convention, the protection of the individuals already within the member States concerns the Court. To this regard, the Court has made a gradual interpretation of the Convention to both protect these individuals and not to overstep its jurisdictional limits. That is why the Court has brought higher burden of proof or amount of breach, in order to rule for a violation of a Convention right.

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oc/PCOC_documents/Documents%202014/Special%20session%20Extradition%20-%20Extradition%20and%20human%20rights%20-%20Silvis.pdf, (04/08/2016).

[87] *Janssens*, The Principle of Mutual Recognition in EU Law, Oxford Studies in European Law, 2013, pp. 225-226.

Nevertheless, there is an evolving level of protection of human rights in extradition cases that has started with the Soering case and continued to develop throughout the Court's case law. The Court tries to find a balance between the public interest in the extradition of the individual and the possible violations of his rights if he is extradited. Many of the cases the Court has decided are on terrorism. The applicants were affiliated with terrorist groups and accused of being part of terrorist attacks. Public interest would be expected to overweigh any other interest, however, when there is a clear and certain risk of a violation of an absolute right, the Court denied the extradition of these individuals.

When the level of protection and the balancing of public interest and individual interest are as such in cases related to terrorism, the interpretation and evaluation in Assange's case would be expected to be more favorable towards the individual interest. The public interest the Court would take into account is not as high as in terrorism cases.

In case there was an extradition request from the US for Assange, and if Assange would apply to the Court, what would the judgment likely be?

This is a difficult assumption to make. It requires a thorough examination of the extradition request and the merits of Assange's case, what he is accused of. The Court has not given a similar decision that would be an example for Assange.

The main point in Assange's case would be the freedom of expression, which is protected under Article 10 of the Convention.
Article 10 says,

> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the*

prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of expression is not an absolute right as Article 3 or 6. However, the Court has given much importance to it,

Where there has been an interference in the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established.[88]

If the case concerns journalism and freedom of press, the Court tends to be stricter with its evaluation of the necessity of interference to Article 10 rights.[89] The role and value of the press has been emphasized several times by the Court. The importance of a free and developed press in a democratic society is a well established and understanding in the Convention system, which continues to evolve.[90]

The Strasbourg Court has repeatedly emphasized that the press act as a 'public watchdog' in a democratic society. Although they must not overstep certain bounds and may be regulated, they have a duty nevertheless to impart information

[88] ECtHR, application no. 12726/87, *Autronic AG v. Switzerland*, judgment of 22 May 1990, para. 61.

[89] See Council of Europe Publishing, Freedom of Expression in Europe, Case-law concerning Article 10 of the European Convention on Human Rights, Human Rights Files, No. 18, Updated Edition March 2007.

[90] "However, surveying the Court's jurisprudence of the last years shows that the Court's case law related to Article 10 of the Convention is still maintaining high standards of freedom of expression, media pluralism and protection of journalists, hence obliging member states to secure within their jurisdictions a higher threshold of freedom of expression and information. The Grand Chamber judgments of 7 February 2012 in *Axel v. Springer AG* v. *Germany* and in *Von Hannover (n° 2)* v. *Germany*, the recent findings of violations of Article 10 in several cases of protection of journalistic sources and in a series of judgments in relation to critical reporting by media and investigative journalism clearly illustrate the awareness of the European Court regarding the importance of freedom of expression and information in a democratic society. Especially the multiple references in the Court's recent case law to the danger of a "chilling effect", and its impact on the finding of unjustified interferences with media and journalists, help to secure a higher standard of freedom of expression and information through the interpretation and the application of Article 10 of the Convention. In *Kaperzyński* v. *Poland* (3 April 2012) the ECtHR emphasized that it "must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern (..). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident (..). This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals"." *Voorhoof*, The Right to Freedom of Expression and Information under the European Court of Human Rights System: Towards a more Transparent Democratic Society, RSCAS, 2014, pp. 3-5.

and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas, the public also has a right to receive them. As a result, the national margin of appreciation is limited when the author of the expression in question is a journalist, fulfilling his social duty to impart information and ideas on matters of public concern. Journalists should even be free to use a degree of exaggeration and provocation.[91]

Assange has published classified documents on the actions of the US military and government on Wikileaks. These documents have caused so much reaction from the public and also the government because of their nature. Videos show US soldiers shooting unarmed civilians are the biggest example.

Would the Court find public interest in the revealing of these documents? This is a balance that has to be decided by the Court by considering all the merits. How much danger to they cause to the national security of US is a question that must be answered. The identities of the soldiers have been revealed also. Whether or not this would put them under serious danger is another matter to be dealt with.

Assange, being a journalist, benefits from freedom of press. The Court in these situations considers whether the government involvement would be proportional to the information published and the risk that would occur on the national security through this information.

The Sürek case[92] gives some insight to the Court's approach in a similar situation. In the news report published in the weekly review of the applicant, identities of two officials, who were fighting terrorism in east Turkey, were revealed. Once their identities were public, this information put them under danger, making them possible terrorist targets. The applicant was convicted for this publication.

[91] *Rainey, Wicks, Ovey*, Jacob, White and Ovey: The European Convention on Human Rights, 2014, p. 444.
[92] ECtHR, application no. 24122/94, *Sürek v. Turkey (No. 2)*, judgment of 8/07/1999.

Interference on freedom of expression is allowed by paragraph 2 of Article 10[93], when it is found necessary to pursue legitimate aims. However, the Court has a strict interpretation on these restrictions.

The Court repeated its principles regarding Article 10;

> *(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.*
>
> *(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.*
>
> *(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in*

[93] Article 10/2 of the ECHR: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.[94]

Article 10 is an essential part of a democratic society and despite the margin of appreciation the States enjoy when deciding if interference is necessary, the final say on the matter belongs to the Court.

After evaluating the situation in east Turkey, the Court found the interference justifiable under Article 10/2, however, it emphasized that the information disclosed was already published before in other newspapers, so the interest of keeping the identities of the two officials was no longer viable. Adding to this, the Court found the interference "discouraging the contribution of the press to open discussion on matters of public concern."[95] On these bases, the Court decided there was a violation of Article 10, freedom of expression.

Another case that could shed some light on the Assange situation would be the Bucur and Toma case[96], which concerns a whistle-blower. Although Assange is not a whistle-blower and only a journalist who has published the documents provided to him, the case could be helpful to understand better the Court's approach to these kinds of cases.

The applicant was convicted of revealing allegedly illegal phone tapping by the Romanian authorities. The Court found that the information revealed concerned the public and the people had a right to know. Also "the information was related to abuses committed by high-ranking officials, and to the democratic foundations of the State. These were highly important issues, which were a matter for political debate in a democratic society, where the public had a legitimate interest in being informed."[97]

Later in 2014, the Committee of Ministers of the Council of Europe adopted a Recommendation relating to whistle-blowers. The Recommendation drew attention to *transparency and democratic accountability*. It clarified the value of whistle blowing by

[94] *Sürek Case*, para. 33.
[95] *Sürek Case*, para. 41.
[96] ECtHR, application no. 40238/02, *Bucur and Toma v. Romania*, judgment of 8/01/2013, (only available in French).
[97] Council of Europe, *European Court of Human Rights, National Security and European case-law*, Report prepared by the Research Division and not binding on the Court, covering the Court's case-law up to November 2013, 2013, p. 34.

saying,

> *The Council of Europe recognizes the value of whistleblowing in deter- ring and preventing wrongdoing, and in strengthening democratic account- ability and transparency. Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and is important in the fight against corruption and tackling gross mismanagement in the public and private sectors.*[98]

This is important to see the value of whistleblowers in Europe, because it affects the perspective on Assange. The approach towards Bradley Manning in Europe would obviously be different than the approach in US. Comparing to Bradley Manning, the approach towards Assange would be much softer since he was the one publishing the information in the role of the press.

The case of Assange is much more comprehensive than the Sürek and Bucur and Toma cases. The classified documents published contain extensive amount of information, which the Court would have to see through. The information revealed, its effect on US national security and the necessity of the prosecution of Assange would all have to be evaluated simultaneously in order to strike a balance. The interest of the public in receiving this information would be under examination, together with the concept of democratic society and the need of transparency.

> *According to the famous language repeatedly invoked by the Strasbourg Court, a "democratic society" is based on pluralism, tolerance and open-mindedness – in short, an entire set of cardinal values. While it is natural that these values permeate the exercise of freedom of expression, the latter comprises a vehicle that concomitantly concretizes these same values. An essential element of "democratic" society, according to the Strasbourg Court's jurisprudence, is the existence of public confidence in public institutions and authorities. Yet, confidence cannot exist without transparency. It is not surprising, then, that freedom of expression has been utilized in the democratic control of public powers.*[99]

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[98] Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, adopted by the Committee of Ministers of the Council of Europe, 30/04/2014, p. 11.

[99] *Flauss*, The European Court of Human Rights and the Freedom of Expression, Indiana Law Journal, 2009, p. 814.

D. Conclusion

Julian Assange still remains in the Ecuadorian Embassy in London. He has received diplomatic asylum status and Ecuador will grant him political asylum as well, once Assange arrives to its territory. However, diplomatic asylum is not recognized in international law as a legal concept and many States have been very cautious on the matter.

There is no international agreement that obliges UK to respect the asylum status granted to Assange by the Ecuadorian government. The only international agreements on diplomatic asylum that have binding effect are regional, among Latin American States. The application of these agreements has not been without problems either.

The ICJ, in the Asylum Case, has not been clear with its decision on diplomatic asylum. However, the lack of definitive answers in the case is a strong indication that there is consensus among States recognizing diplomatic asylum. The interpretation on Peru's refrainment to ratify the Montevideo Convention gives a picture on how international custom is established and determined. This refrainment of Peru was seen, in the eyes of the ICJ, as an *opt-out* from the custom of determining the nature of the crime when granting diplomatic asylum, if such a custom were to exist. Moving from this point, it is safe to say the refusal of States to regulate diplomatic asylum or to include it in the Vienna Convention on Diplomatic Relations clearly shows that diplomatic asylum does not exist in international law.

It would be an opportunity for the ICJ to make an up-to-date decision on diplomatic asylum if the case came in front of it. With the developments in international law and the higher value given to human rights protection perhaps the ICJ would come to a more accepting decision towards diplomatic asylum. At least, the decision would be clarifying and would rest the controversies on diplomatic asylum among scholars. However, it does not seem very likely that the ICJ would openly accept diplomatic asylum as a legal concept and oblige the States to respect it. There are no legal instruments that provide such an obligation, and if the ICJ could come to this conclusion through international customs and erga omnes obligations is very doubtful.

Article 41 of the VCDR, the inviolability of diplomatic missions, protects Julian Assange in the Ecuadorian Embassy. UK does not have any obligation to allow him safe passage out of the country. However, UK does have the obligation to carry out the EAW issued by Sweden.

The proportionality of carrying out the EAW is questionable under the circumstances of Assange's unique case. He has been staying in the Ecuadorian Embassy since 2012 and no improvement has been made until January 2016, when Ecuador has agreed with the Swedish authorities about the questioning of Assange within the Embassy. Till this moment, the Swedish prosecutor did not seek for alternative methods in order to pursue justice with a total disregard of the special circumstances.

Assange's fear from extradition to US does have basis. Having the example of Bradley Manning before him, Assange fears persecution. However there are many safeguards that would protect his rights and freedoms from being violated and that would prohibit extradition if necessary.

The 1951 Convention on Refugees and the European Convention on Human Rights could provide Assange the protection he is seeking from the Ecuadorian Embassy through diplomatic asylum. The 1951 Convention provides the principle of non-refoulement, which puts the States under an obligation not to return people where they would face persecution. Although it is the decision of the State whether Assange qualifies as a refugee and whether he would benefit from the principle of non- refoulement, he would not be extradited until the final decision is made. He also has an option to go to the European Court of Human Rights. The Court has a developing case law on extradition for the benefit of the applicants, expanding its interpretation of the Convention in favor of human rights protection. With such a high profile case like Assange's, the decision given by the Court would be a substantial one.

There are many aspects the Court would have to evaluate with the Assange case. Most importantly the decision will show the importance given to freedom of expression and information and freedom of press in the European level. The Court would also have a chance to address Bradley Manning and perhaps give a deeper insight on the approach to whistleblowers.

After almost 5 years of uncertainty with Assange's situation, Sweden and Ecuador had made a deal to question him within the Embassy. Assange has been deprived of his liberty, staying in the Ecuadorian Embassy for a very long time. The cooperation between the States is necessary to solve the problem quicker and without further delay. The importance of diplomatic communications has become clearer. States have to work together for the promotion of human rights protection and the achievement of justice. The determination to find a common ground is crucial and sometimes this will require compromises. International law and human rights law depend upon the idea of striking a balance.

"It is a blessing to be given opportunity to improve ourselves by taking warning from the mistakes of others, and in all the chances and changes of this mortal life to be free to copy the successes of the past instead of being compelled to make a painful trial of the present."

Arnold Joseph Toynbee

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Student Declaration

I hereby declare that I have written the thesis with the title of "Julian Assange's Allegedly Illegal Detention by the United Kingdom and Sweden in the Ecuadorian Embassy in London" independently and that the thesis has not yet been published or used for any other purposes other than this examination. I further assure that I have not used any sources and materials other than those listed in the bibliography.