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assange-cryer

An arresting issue

Professor Rob Cryer

“After nearly two months of Julian Assange being a houseguest at the Ecuadorian Embassy in London, the Ecuadorian Foreign Minister Ricardo Patiño announced on the 16th August 2012 that he had been granted “diplomatic asylum”. This was on the basis that Assange feared that were he to be extradited to the US, he would be subject to a possible capital charge, and that “We believe that his fears are legitimate and there are the threats that he could face political persecution.” Patiño also said that “We trust that that the UK will offer as soon as possible the guarantee for the safe passage of asylum for Mr Assange and they will respect those international agreements they have signed in the past.”

In a linked development, on the same day it was revealed that the UK had written to the Ecuadorian government asserting that "there is a legal base in the UK…that would allow us to take actions in order to arrest Mr Assange in the current premises of the embassy. We sincerely hope that we do not reach that point, but if you are not capable of resolving this matter of Mr Assange's presence in your premises, this is an open option for us." Both events raise interesting questions of international law, in particular whether Mr. Assange can be granted asylum, what that would mean for him, and, if he is not immune from arrest, when and where such an arrest could take place.

Let us take the issues in turn. Asylum is normally granted to those who fulfil the definition of a refugee in Article 1 of the 1951 Refugee Convention. This is someone who “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”. It might be questioned whether Assange fulfils the definition, for a number of reasons. The first is that it is not clear what political persecution he fears. The US has not requested Assange’s extradition from either the UK or Sweden. In addition the UK, and Sweden are both Parties to the European Convention on Human Rights. In a line of case-law stretching back to the 1970s, the European Court of Human Rights has consistently interpreted the Convention so that any Party to it cannot extradite someone to a State that has the death penalty unless it receives assurances that that penalty will not be sought or applied.

The second reason is that it is not clear that he is unable, or frightened to, seek the protection of his State of nationality (Australia). Even further than this, Article 1F(b) of that Convention states that asylum shall not be granted to those who have committed a serious non political offence. The sexual offences of which Assange is accused in Sweden would fall under this exemption. As the US has not indicted him or sought his extradition on any offence (yet) means that any suggestion of what may happen there is entirely speculative.

Still, Ecuador considers Assange to have a well-founded fear of political persecution has granted him diplomatic asylum. In spite of the frequent use of the term “diplomatic asylum”, such a concept is not legally different from asylum more generally. It simply refers to someone who, rather than travelling to the country in which asylum is sought to seek that status, goes into the embassy of that State in another country to make the claim. If that claim is successful, it is important to note, though, that does not give the applicant diplomatic status. This is crucial; what it means is that although he has been granted asylum, Assange is not immune from UK jurisdiction. Hence, he remains arrestable.

That does not mean that he can be arrested right away, as although he is not immune from UK jurisdiction, the Ecuadorean embassy, and its property are. This is provided for in Article 22 of the 1961 Vienna Convention on Diplomatic Relations, which provides that “1.The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission…. 3.The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution”. Hence, the police may not enter the embassy to arrest Assange, as the Ecuadorian ambassador has not consented to them doing so.

This is the reason behind the UK suggestion that the embassy could have its immunity removed. The basis in UK law for this is the 1987 Diplomatic and Consular Premises Act, section 1(3) of which allows the Secretary of State to withdraw consent for land to be used as diplomatic premises,. Such a determination would remove the immunity of the embassy from any police activity. This power is subject, however, to a considerable limitation, that consent can only be withdrawn if it is consistent with international law to do so (section 1(4)). On the other hand, Article 41 of the Vienna Convention requires the mission to respect local and international law. It reads, in relevant part “1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.…3.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 the receiving State.”

Presumably the UK argument for removing the Ecuadorean embassy’s immunity from UK jurisdiction would be that Ecuador is failing to respect local UK laws or interfering in the UK’s internal affairs by allowing Assange to stay, or is otherwise violating international law. This is a novel argument, but a perilous one, and one inconsistent with prior UK practice. It could be argued that granting diplomatic asylum is interference in the internal affairs of the UK, and a failure to respect local laws. However, that does not mean that such a violation would, in international law, be a reason for the UK to remove the immunity of the Ecuadorean embassy. There have been many cases of embassies being used in ways that could fall foul of Article 41 but it has never been considered the case that this has rendered those embassies subject to a revocation of their immunity. The traditional remedy in such circumstances is declaring diplomatic staff persona non grata or breaking off diplomatic relations. It could be the case that the UK could make the argument that removal of immunity is also possible, but it would open a Pandora’s box of similar claims by other States against UK embassies, and indeed all embassies of all States around the world. As such, the argument is problematic both as a matter of law and policy. Hence William Hague’s assertion that there will be no storming of the Ecuadorean embassy comes as little surprise. To do otherwise would, in Sir Humphrey’s terms, be “very brave”.

Assange, however, probably has no reason want to continue his residence in the Ecuadorian Embassy any more that the UK government wishes to have the issue slowly fester. The problem for Assange is that as soon a he leaves the Ecuadorian Embassy, he is liable to be arrested, as he has no immunity from UK jurisdiction. The UK has an obligation to Sweden to extradite him and Assange as an individual, has no immunity. Assange’s problem therefore is how to leave the embassy and the UK without being arrested. It is true that, pursuant to Article 22(3) of the Vienna Convention that were he to be able to leave the Ecuadorean embassy by car, that car would be immune from any attempt to search it, and only be subject to stopping if it were a danger to others. Even in the latter situation it would not be possible to remove Assange from the car.

Getting in to or out of the car, at either the embassy or the airport however is likely to be a problem for Assange, as he, rather than the car and embassy is subject to UK legal processes. There are certain prospects for him though. One is that he and the Ecuadoran embassy could place him in a diplomatic bag. Pursuant to Article 27(3) of the Vienna Convention diplomatic bags are not liable to be opened, however, it was never intended that this provision cover the transfer of persons. In 1984, when Nigeria sought to spirit Umaru Dikku, a Nigerian dissident, out of the UK in a crate that was (incompletely) marked as a diplomatic bag, UK police opened the “bag”. It was accepted that there is an overriding duty to protect life, which would justify opening even a correctly identified diplomatic bag in spite of the strictures of Article 27. Admittedly, in this case Mr Dikku had been drugged and was not seeking to leave the UK, unlike Assange. However, diplomatic bags are not intended to carry anything other than “diplomatic documents or articles intended for official use”, and the UK would have a reasonable argument for opening any bag that was thought to contain a person.

As a result, although there are possible arguments for arranging immunity for Assange, it is very unlikely that he could personally be immune from arrest when he leaves the Ecuadorian embassy. Given this, and the fact that there is no obligation on the UK to grant him safe passage to the airport his situation will now come down to political discretion. Given that strong words have been spoken on both sides about this matter, it would seem likely that the Ecuadorean ambassador may have to extend his hospitality for some time yet.

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