

THE ISSUES OF GRANTING DIPLOMATIC ASYLUM**Zhamilya Manap**jamilyamanap@gmail.com

3rd year student of the Law Faculty

L.N. Gumilyov Eurasian National University, Nur-Sultan, Kazakhstan

Scientific adviser – A. Oinarova

The right to asylum is one of the many rights to which every person should be entitled. This is evidenced by the rule laid down in Article 14 of the Universal Declaration of Human Rights which stipulates that "Everyone has the right to seek and to enjoy in other countries asylum from persecution. It is further established that "this right shall not be exercised in the case of persecution based on the commission of a non-political crime or an act contrary to the purposes and principles of the United Nations" [1]. Oxford dictionary defines political asylum as the protection that a State gives to people who were forced to leave their home State, as a rule, due to the fear of political persecution [2]. Political asylums are commonly divided into two groups: territorial and extraterritorial. In this article, the issues of granting diplomatic asylum as the extraterritorial form of shelter will be examined.

Sazon describes territorial asylum as the right of the State to refuse extradition of an individual who is convicted for the commission of an offense on the territory of another State, thus allowing him or her to stay on its territory and granting asylum. This form of providing sanctuary is possible only if the person presents in the territory of the State granting shelter, otherwise, it is least likely that the host State would allow the individual to travel to the State which is ready to provide with the sanctuary [3]. Such a right to grant territorial asylum was considered by the International Court of Justice which elucidated that States are entitled to provide aliens with asylum by virtue of their sovereignty and an exclusive right to exercise jurisdiction over individuals present in their territory [4]. Besides, Sazon underlines the United Nations General Assembly's statement that granting asylum also derives from humanitarian purposes and that it should be respected by all other states. The legal provisions which regulate territorial asylum can be found in the Convention relating to the Status of Refugees (1951) and its supplementary protocol (1967). The question arises as to whether a State will recognize a person as a refugee in order to give him or her its protection.

According to Värk, extraterritorial asylum refers to providing shelter outside the territory of a State, i.e. in the premises of its diplomatic mission, in military facilities, and onboard military vessels and aircraft. However, Värk refers to the commentary given by the International Law Commission which held that the theory of extraterritoriality (which was first articulated by Hugo Grotius) is nothing than legal fiction and does not comply with the contemporary concept of diplomatic relations. That is why, as the author infers, the diplomatic premises of mission form a part of the territory of the sending State and are subject to the local laws, in a very limited way though. Värk continues that granting diplomatic asylum would mean an intention of the State to withdraw the individual from the jurisdiction of the territorial State, which in turn implies intervention in matters which are exclusively within the competence of that State and can be acceptable only if it has a clear basis under international law [5].

It should be emphasized that in the context of the Vienna Convention on Diplomatic Relations (VCDR) of 1961, the core universal international document regulating diplomatic relations, the questions on granting diplomatic asylum remain unanswered. However, there are regional instruments, specifically those adopted by the Latin and Central American states which include Havana Convention on Political Asylum (1928), the Montevideo Convention on Political Asylum (1933), and the Caracas Convention on Diplomatic Asylum (1954). As Greenburgh elaborate, the Havana Convention proclaims the following conditions for the diplomatic asylum to be granted: 1) only in an urgent case; 2) for the period strictly necessary to ensure the safety of the asylum seeker; 3) the refugee must leave the country as soon as it requires to do so, in turn, territorial State must ensure safely leave of the refugee, in case if State granting asylum demand so; 4) only for persons

committed a political offense and not a common crime [6]. The last point especially interesting as it is not really clear which side is entitled to decide whether an offense is a political one or is it a common crime.

One of the cornerstone cases where the International Court of Justice (ICJ) has examined the decision of the State to provide a political offender with the sanctuary is the case of Victor Raul Haya de la Torre concerning diplomatic asylum granted on January 3rd/4th, 1949, by Colombian Ambassador at Lima to a Peruvian national [4]. In that case, the Court clearly distinguished between territorial and diplomatic asylum and explained that the latter could be granted only if the institution was recognized by both parties, including the territorial sovereign. In other words, it reaffirmed that the State granting diplomatic asylum does not have the right to unilaterally qualify the nature of the crime, that is, to decide whether it is political or not. Thus, in this case, Colombia had only to make a preliminary assessment, after which such a qualification had to be considered by both of the parties. In the case of Columbia and Peru, the ICJ could not give a firm solution for the dispute and suggested seeking guidance from courtesy and good-neighborliness instead. In addition, the Court concluded that the Havana Convention neither explicitly nor implicitly recognized the right to unilateral qualification.

Another regional instrument dealing with the institute of diplomatic asylum is the Montevideo Convention which stipulates that the State granting asylum decides the nature of an offense (Article 2) [7]. This rule was not applied by the ICJ in the consideration of the case of Haya de la Torre due to the fact that the Montevideo Convention was not ratified by Peru and could not be invoked in a dispute with that country. The third document is the Caracas Convention on Diplomatic Asylum which codifies and clarifies earlier agreements and state practices and enjoys wider acceptance than the Montevideo Convention. It particularly declares granting diplomatic asylum as the States' right and not an obligation, reaffirms the previous point regarding the nature of an offense, and obliges territorial states to grant immediately the necessary guarantees of individual's safety as well as the safe passage to leave the country. The Caracas Convention also contemplates the issues when diplomatic relations are ruptured. In this case, it does not terminate the already granted diplomatic asylum. Diplomatic personnel should leave with the individuals who had been granted sanctuary or, if this is not possible, they should surrender these individuals to another State which is willing to extend its protection to them [8].

The case of Julian Assange is probably a perfect example of how different views on the question of diplomatic asylum, may lead to a diplomatic catastrophe. In 2012 Australian Julian Assange referred to as the co-founder of WikiLeaks⁷ with the aim of avoiding being prosecuted by the Swedish authorities who had convicted him for rape and sexual assault, found refuge in the Ecuadorian Embassy (located on the territory of the United Kingdom), of a country which recognizes the right to grant diplomatic asylum and is a party to the Caracas Convention. Ecuador found that Assange faced a situation that meant to him an imminent danger which he could not resist. The United Kingdom disagreed with the Ecuadorian decision, but Assange has remained on the premises of the Ecuadorian embassy. The situation changed rapidly when the new President of Ecuador Lenín Moreno took office in 2017. In April it was revealed that Moreno has declared withdrawal of the asylum status given to Assange. The WikiLeaks founder was arrested shortly after the decision of the Ecuadorian President [9].

As Värk elucidates, the UK had several reasons to be against the presence of Assange in the embassy. First of all, it was not a party to any legal instrument which would require it to recognize the grant of diplomatic asylum by a foreign embassy on its territory. Hence, the United Kingdom was not obliged to guarantee Assange safe passage out of the country. Moreover, the British authorities insisted that Assange was not indicted for committing political, but rather a common crime. It should be noted that the British Government after the incident happened in 1984 when the Policeman was killed by shots fired from the premises of the Libyan People's Bureau, commenced works on

⁷ an international non-profit organization that publishes classified information taken from anonymous sources or when this information is leaked.

tightening the immunities given to diplomatic premises under the Vienna Convention on Diplomatic Relations of 1961 in order to limit the extent of the premises' abuse. Consequently, the Diplomatic and Consular Premises Act (1987) was adopted which sought to remove the diplomatic status of premises when they were not used to destination [10].

The Diplomatic and Consular Premises Act stipulates that the premises of diplomatic missions may lose their inviolability under certain circumstances. Namely, if (1) the sending State ceases to use the land for the purposes of its mission, or (2) the British Secretary of State withdraws his acceptance or consent in relation to the land [11]. It is worth noting that in the Assange case, initially it was reported that the British police, on the basis of the Diplomatic and Consular Premises Act, are planning to storm the Ecuadorian embassy in order to arrest Assange, but later British Foreign Secretary William Hague said that there would be no storming of the embassy [12]. Another way to enter diplomatic premises, as Värk notes, is to break diplomatic relations with the second State, as the UK did with Libya in 1984. However, the Vienna Convention demands that even if diplomatic relations are broken off, the receiving State must respect and protect the premises of diplomatic missions [13]. But it does not specify how long the premises remain inviolable. The United Kingdom prescribes generally a period of one month. The author states that this rule could be extended to the premises of diplomatic missions by using an analogy, although the reasonable period should be longer in such cases.

To sum up, everything that has been stated so far, the Vienna Convention on Diplomatic relation being the fundamental and universal instrument governing diplomatic relations between states does not envisage the issues of diplomatic asylum. Nevertheless, it should be pointed out that the Convention neither precludes the possibility of granting sanctuary by diplomatic agents to asylum seekers. The particular reason for this can be explained by the fact of continuation of the operation of customary rules which regulate the issues that were not covered under the VCDR (the Preamble). Furthermore, the Convention establishes that the premises of diplomatic missions cannot be employed "in any manner incompatible with the diplomatic functions" (Article 41), however, the Convention does not specify the meaning of the term "incompatible". That is why, from a legal point of view, granting diplomatic asylum cannot be said to contradict the provisions of the Vienna Convention. Besides, every State has a duty to respect the inviolability of diplomatic premises which means that officials of the territorial State may not enter the buildings of diplomatic mission without consent of the head of the mission (even if the officials want to arrest an offender). Hence, every State is under the duty to follow the rule of the inviolability of the premises of diplomatic missions even in the case of non-recognition of the institute of diplomatic asylum. At the same time, the State providing diplomatic shelter removes an individual from the jurisdiction of the receiving State, which consequently may lead to the indictment for interfering in internal affairs of that State. Such circumstances may give rise to clashes between countries. Even in case if a receiving State does not declare granting sanctuary as an illegal act, it may consider it politically unacceptable resulting in declaring members of diplomatic mission persona non grata. Thus, a political aspect may also play its role in deciding to provide diplomatic asylum to the political offender. Diplomatic asylum may be granted between member States of relevant international treaties or those that recognize the right as a regional custom.

References

1. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). Retrieved March 26, 2021, from <https://www.refworld.org/docid/3ae6b3712c.html>
2. Oxford Learner's Dictionary. (n.d.). Asylum. *Oxford Learner's Dictionary.com*. Retrieved March 26, 2021, from <https://www.oxfordlearnersdictionaries.com/definition/english/asylum>
3. Sazon, K. (2012). Ubezhishe kak pravovaya kategoriya [Asylum as a legal category]. *Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia*. Retrieved March 26, 2021, from <https://cyberleninka.ru/article/n/ubezhishe-kak-pravovaya-kategoriya>
4. Asylum (Colombia v Peru), Judgment, ICJ Reports (1950) 226, p 274.

5. Värk, R. (2012). Diplomatic asylum: Theory, Practice and the Case of Julian Assange. University of Tartu.
6. Greenburgh, R. (1955). Recent Developments in the Law of Diplomatic Asylum. Transactions of the Grotius Society, 41, 103-122. Retrieved March 27, 2021, from <http://www.jstor.org/stable/743293>
7. Organization of American States (OAS), Convention on Political Asylum, 26 December 1933. Retrieved March 27, 2021, from <https://www.refworld.org/docid/4f3d180a2.html>
8. Organization of American States (OAS), Convention on Diplomatic Asylum, 29 December 1954, OAS, Treaty Series, No. 18. Retrieved March 27, 2021, from <https://www.refworld.org/docid/3ae6b3823c.html>
9. BBC (2020, September 23). Julian Assange: Campaigner or attention seeker? Retrieved March 28, 2021, from <https://www.bbc.com/news/world-11047811>
10. Kampmark, B. (2021, March 14). Inviolability, Ecuador and the Julian Assange case. Retrieved March 28, 2021, from <https://theconversation.com/inviolability-ecuador-and-the-julian-assange-case-8885>
11. Diplomatic and Consular Premises Act (1987), www.legislation.gov.uk/ukpga/1987/46 (29.9.2012), Section 1(3).
12. Лондон Опроверг возможность штурма ПОСОЛЬСТВА Эквадора из-за Ассанжа. (2013, January 15). Retrieved March 28, 2021, from <https://lenta.ru/news/2012/08/16/assange3/>
13. United Nations, Vienna Convention on Consular Relations, 24 April 1963, available at: <https://www.refworld.org/docid/3ae6b3648.html> [accessed 28 March 2021]