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# USING THE JULIAN ASSANGE DISPUTE TO ADDRESS INTERNATIONAL LAW'S FAILURE TO ADDRESS THE RIGHT OF DIPLOMATIC ASYLUM

## INTRODUCTION

On November 20, 2010, an international arrest warrant was issued for WikiLeaks founder Julian Assange, who was wanted in Sweden for questioning on the charges of rape, sexual molestation, and unlawful coercion.<sup>1</sup> Less than three weeks later, on December 8, 2010, Assange turned himself into the London, United Kingdom police, triggering a lengthy legal battle that played out in the English courts over the next eighteen months.<sup>2</sup> The case seemingly drew to a conclusion in May 2012, when the U.K. Supreme Court determined that Sweden's "extradition request had been 'lawfully made.'"<sup>3</sup> After a final bid to reopen his appeal was dismissed, U.K. officials were given ten days to remove Assange to Sweden.<sup>4</sup>

Rather than exhaust his legal alternatives by pursuing an appeal with the European Court of Human Rights ("ECHR"),<sup>5</sup>

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1. *Timeline: Sexual Allegations Against Assange in Sweden*, BBC NEWS (Aug. 16, 2012), <http://www.bbc.co.uk/news/world-europe-11949341>.

2. After Assange was granted bail in December 2010, both the Magistrates' Court and the U.K. High Court ruled against him prior to the U.K. Supreme Court agreeing to review the case. *Id.*

3. *Julian Assange Loses Extradition Appeal at Supreme Court*, BBC NEWS (May 30, 2012), <http://www.bbc.co.uk/news/uk-18260914>. Although Assange was not permitted to appeal directly to the U.K. Supreme Court, he won the right to petition directly to the court after judges ruled that "the case raised a question of general public importance." *Julian Assange Wins Right to Pursue Extradition Fight*, BBC NEWS (Dec. 5, 2011), <http://www.bbc.co.uk/news/uk-16027942>. The U.K. Supreme Court determined that the Swedish prosecutor who issued the European Arrest Warrant ("EAW") was a "judicial authority" within the broad meaning provided in the statutory language. *Assange v. Swedish Prosecution Authority*, [2012] UKSC 22 (appeal taken from Eng.).

4. *Supreme Court Dismisses Assange Appeal Bid*, BBC NEWS (June 14, 2012), <http://www.bbc.co.uk/news/world-18446295>.

5. *Id.* The European Court of Human Rights ("ECHR") is an international court established by the European Convention on Human Rights that rules on alleged "violations of the civil and political rights set out in the European

Assange sought refuge at the Ecuadorian Embassy in London in June 2012.<sup>6</sup> Citing his well-founded fears of political persecution and the possibility of the death penalty were he sent to the United States,<sup>7</sup> Ecuador formally granted asylum to Assange on August 16, 2012.<sup>8</sup> Sweden and the U.K. criticized Ecuador's controversial decision and vowed to prevent Assange from receiving safe passage out of the country.<sup>9</sup>

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Convention on Human Rights." *The Court in Brief*, EUROPEAN COURT OF HUMAN RIGHTS, [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf) (last visited Oct. 22, 2013).

6. *Wikileaks' Julian Assange Seeks Asylum in Ecuador Embassy*, BBC NEWS (June 20, 2012), <http://www.bbc.co.uk/news/uk-18514726>.

7. Article 1(A)(2) of the U.N. Convention Relating to the Status of Refugees defines "refugee" as any person that "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." United Nations Convention Relating to the Status of Refugees [CRSR] art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150. The Organization of American States ("OAS"), of which Ecuador is a member, has formally recognized the "relevance and fundamental importance of the 1951 Convention Relating to the Status of Refugees and/or its 1967 Protocol, as the principal universal instruments for the protection of refugees." Organization of American States [OAS], *Protection of Asylum Seekers, Refugees, and Returnees in the Americas*, ¶ 1, Gen. Assemb. Res. 2232, OAS Doc. XXXVI-O/06 (June 6, 2006), compiled in 1 PROCEEDINGS OF THE THIRTY-SIXTH REGULAR SESSION 285, OAS Doc. OEA/Ser.P/XXXVI-O.2 (Nov. 9, 2006).

8. William Neuman & Maggy Ayala, *Ecuador Grants Asylum to Assange, Defying Britain*, N.Y. TIMES (Aug. 16, 2012), <http://www.nytimes.com/2012/08/17/world/americas/ecuador-to-let-assange-stay-in-its-embassy.html>. Asylum is the "[p]rotection of usu. political refugees from arrest by a foreign jurisdiction." BLACK'S LAW DICTIONARY 144 (9th ed. 2009). A refugee is "[a] person who flees or is expelled from a country, esp. because of persecution, and seeks haven in another country." *Id.* at 1394. The fundamental relation between the two terms is that a refugee seeks to become an asylee by seeking asylum in a foreign state.

9. *Julian Assange: Ecuador Grants Wikileaks Founder Asylum*, BBC NEWS (Aug. 16, 2012), <http://www.bbc.co.uk/news/uk-19281492> [hereinafter *Ecuador Grants Wikileaks Founder Asylum*]. In its defense, Ecuador alleged that numerous offers that would have allowed Swedish officials to question Assange at the Ecuadorean embassy were denied. *Ecuador: Sweden Spurned Offer to Question Assange*, USA TODAY (Aug. 1, 2012), <http://www.usatoday.com/news/world/story/2012-08-01/assange-wikileaks-ecuador/56669276/1>.

Because Assange took refuge in Ecuador's diplomatic mission and not within its formal territory, he was the recipient of the right of "diplomatic asylum."<sup>10</sup> This distinction is notable not only because Assange's freedom of movement is limited, but also because political asylum and diplomatic asylum draw their support from different international treaties. In support of its position, Ecuador primarily relied on two treaties—the 1948 Universal Declaration of Human Rights ("UDHR") and the Organization of American States ("OAS") Declaration of the Rights and Duties of Man—as illustrative of basic human rights to which every individual is entitled.<sup>11</sup> In addition, Ecuador relied on the OAS Convention on Diplomatic Asylum, which established the principle of diplomatic asylum in Latin America for instances when these fundamental human rights were threatened.<sup>12</sup> Finally, when the U.K. allegedly threatened

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10. The U.N. broadly defined this term in 1975 as "asylum granted by a State outside its territory, particularly in its diplomatic missions . . . in its consulates, on board its ships in the territorial waters of another State . . . and also on board its aircraft and of its military or para-military installations in foreign territory." U.N. Secretary-General, *Question of Diplomatic Asylum*, ¶ 1, U.N. Doc. A/10139 (Part II) (Sept. 22, 1975) [hereinafter *Question of Diplomatic Asylum*]. This form is notably different than "territorial asylum" in that asylum is granted by a nation outside its borders. *Id.*

11. Article 14(1) of the Universal Declaration of Human Rights provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III) A, ¶ 14(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Conversely, Article XXVII of the OAS Declaration of the Rights and Duties of Man states that "[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements." OAS, American Declaration of the Rights and Duties of Man, art. 27, OEA/Ser.L/V.II.23, doc. 21, rev. 6 (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V./11.82, doc. 6, rev. 1 at 17.

12. The Convention on Diplomatic Asylum is a multilateral treaty ratified in 1955 that bound many Latin American nations to the rules and regulations surrounding the practice of diplomatic asylum. This convention notably recognizes "[a]sylum granted in legations to persons being sought for political reasons or for political offenses," and defines legations as "any seat of a regular diplomatic mission . . ." Convention on Diplomatic Asylum, art. 1, Mar. 28, 1954, O.A.S.T.S. No. 18, 500 U.N.T.S. 95. Although each American nation is a formal member of the OAS via ratification of the OAS Charter, signatories to the Convention on Diplomatic Asylum are limited to Latin American

to enter the Ecuadorian embassy and arrest Assange, Ecuador forbade entry by citing to another international treaty—The Vienna Convention on Diplomatic Relations.<sup>13</sup>

The U.K. remains steadfast in its desire to extradite Assange and provided two arguments in stating its opposition to Ecuador's involvement.<sup>14</sup> First, the U.K. asserted that Ecuador is under a legal obligation to remove Assange to Sweden after the U.K. Supreme Court ruled that the European Arrest Warrant ("EAW") against him, requiring his arrest and transfer to Sweden for prosecution,<sup>15</sup> was enforceable.<sup>16</sup> Second, the U.K. refused to recognize "the principle of diplomatic asylum."<sup>17</sup> The

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countries. *Compare Charter of the Organization of American States: General Information*, DEP'T INT'L LAW, OAS, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States\\_sign.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm) (last visited Oct. 10, 2013) (indicating that each American nation had signed the Charter by 1991), *with Convention on Diplomatic Asylum: General Information*, DEP'T INT'L LAW, OAS, <http://www.oas.org/juridico/english/sigs/a-46.html> (last visited Oct. 10, 2013) (indicating that membership excluded nations such as the United States and Canada).

13. Damien Pearse, *UK Threatened to Arrest Assange Inside Embassy, Says Ecuadorean Minister*, GUARDIAN (Aug. 15, 2012), <http://www.guardian.co.uk/media/2012/aug/15/uk-arrest-julian-assange-wikileaks-ecuador>. Article 22(1) of the Vienna Convention on Diplomatic Relations provides: "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." Vienna Convention on Diplomatic Relations, art. 22(1), Apr. 4, 1964, 500 U.N.T.S. 95.

14. *Ecuador Grants Wikileaks Founder Asylum*, *supra* note 9.

15. The EAW, adopted in 2002, "is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal persecution or executing a custodial sentence or detention order." Council Framework Decision of 13 June 2002, art. 1(1), 2002 O.J. (L 190) 1 (EU) [hereinafter Council Framework Decision]. Once Sweden (the issuing authority) issued an international arrest warrant for Assange, the system triggered the U.K.'s obligation (as the executing judicial authority) to remove Assange to Sweden, since both nations are members of the EU. *Countries*, EUROPA, [http://europa.eu/about-eu/countries/member-countries/index\\_en.htm](http://europa.eu/about-eu/countries/member-countries/index_en.htm) (last visited Jan. 18, 2013). The EAW has no binding effect on Ecuador, since it is not a member of the EU.

16. *Assange Loses Extradition Appeal*, *supra* note 3.

17. U.K. Foreign Secretary William Hague added that diplomatic asylum "is far from a universally accepted concept: the United Kingdom is not a party to any legal instruments which require us to recognise the grant of diplo-

U.K. asserted that even for countries that do accept diplomatic asylum, it should not be granted “for the purposes of escaping the regular processes of the courts.”<sup>18</sup> The U.K. claimed that Assange’s legal options had been exhausted by virtue of the fact that three separate courts in the U.K. ruled that the EAW was valid.<sup>19</sup> Thus began a lengthy standoff, pitting Ecuador and the small number of countries that recognize diplomatic asylum against the U.K.<sup>20</sup> Both sides maintain that international law supports their respective positions.<sup>21</sup>

When the right of political asylum was definitively recognized in 1948,<sup>22</sup> most nations interpreted the right to cover instances of asylum granted to an individual by a nation within its borders, or “territorial asylum.”<sup>23</sup> However, the lack of clarity of the scope of territorial asylum has led to significant uncertainty about whether the right extends to individuals seeking asylee status from a diplomatic mission.<sup>24</sup> In 1950, the International Court of Justice (“ICJ” or “Court”), in *Asylum Case*, indicated that diplomatic asylum was not protected by internation-

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matic asylum by a foreign embassy in this country.” *Foreign Secretary Statement on Ecuadorian Government’s Decision to Offer Political Asylum to Julian Assange*, GOV.UK (Aug. 16, 2012), <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=800710782> [hereinafter *Foreign Secretary Statement*].

18. *Id.*

19. *Id.*

20. *Compare Julian Assange Row: Ecuador Backed by South America*, BBC NEWS (Aug. 20, 2012), <http://www.bbc.co.uk/news/uk-19314618> (demonstrating regional support for Ecuador’s position), *with Hague Says Assange Rights Protected by Sweden, UK, EU, and International Law*, MERCOPRESS (Sept. 4, 2012), <http://en.mercopress.com/2012/09/04/hague-says-assange-rights-protected-by-sweden-uk-eu-and-international-law> (indicating that diplomatic asylum is not necessary to protect Assange’s human rights).

21. *Julian Assange: Ecuador Asylum Decision Criticized*, BBC NEWS (Aug. 17, 2012), <http://www.bbc.co.uk/news/uk-19292323>.

22. *See UDHR*, *supra* note 11 (recognizing everybody’s “right to seek and to enjoy in other countries asylum from persecution”).

23. *Question of Diplomatic Asylum*, *supra* note 10, ¶ 1. The U.N. specifically considered the right of territorial asylum when drafting Article 14 of the UDHR, despite efforts from various Latin American nations to include a provision that would extend this right to diplomatic asylum. *Id.* ¶ 192.

24. *See id.* (defining diplomatic asylum as being granted by “a State outside its territory, particularly in its diplomatic missions . . .”).

al law;<sup>25</sup> however, it also intimated that diplomatic asylum may exist on an international scale as customary law if accepted by all parties.<sup>26</sup> While the use of diplomatic asylum is concededly prevalent in nations that have explicitly recognized the principle,<sup>27</sup> it is the noteworthy instances where diplomatic asylum has been granted by nations that purportedly do not recognize the concept<sup>28</sup> that demonstrate its largely undefined role within customary international law. As it currently stands, nations such as Ecuador work within the margins of international law, quoting various multilateral treaties that allegedly support their position at the particular moment when diplomatic asylum is granted.<sup>29</sup>

This Note argues that the ICJ's intervention is necessary to redefine the right of diplomatic asylum and to clarify the protection it is owed under international law. In its current form, the vague principle of diplomatic asylum is not protected by international law and should thus be redefined to address

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25. See generally *Asylum (Colom./Peru)*, 1950 I.C.J. 266 (Nov. 20) (stating that diplomatic asylum was not protected by international law, but it may exist as customary law if accepted by all involved parties).

26. *Id.* at 277–78.

27. See *Question of Diplomatic Asylum*, *supra* note 10, ¶¶ 11–12, 155 (“[T]he practice, especially prevalent in Latin American countries, of granting asylum in legations or embassies . . . had not been accepted by the majority of European States, and by the United Kingdom Government in particular.”).

28. See, e.g., Richard Allen Greene, *Assange Embassy Gamble Follows Famous Precedents*, CNN (June 21, 2012), [http://articles.cnn.com/2012-06-21/world/world\\_embassy-defections\\_1\\_wikileaks-founder-julian-assange-vatican-embassy-ecuador](http://articles.cnn.com/2012-06-21/world/world_embassy-defections_1_wikileaks-founder-julian-assange-vatican-embassy-ecuador) (listing three cases where the United States granted asylum to those who sought refuge in their diplomatic missions).

29. In its official statement granting Assange diplomatic asylum, Ecuador cited sixteen legal instruments that provided the authority to grant Assange asylum. See *Declaración del Gobierno de la República del Ecuador sobre la solicitud de asilo de Julian Assange [Declaration of the Government of the Republic of Ecuador on the Asylum Application of Julian Assange]*, MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA [MINISTRY OF FOREIGN AFFAIRS AND HUMAN MOBILITY: ECUADOR] (Aug. 18, 2012), <http://cancilleria.gob.ec/declaracion-del-gobierno-de-la-republica-del-ecuador-sobre-la-solicitud-de-asilo-de-julian-assange/> [hereinafter *Declaración del Gobierno*]. Amongst them were the Charter of the United Nations, the Universal Declaration of Human Rights of 1948, the Declaration of the Rights and Duties of Man, the Geneva Convention of 1949, the Convention on Diplomatic Asylum, and the Vienna Convention on the Law of Treaties. *Id.*

modern concerns.<sup>30</sup> An important part of this transformation is establishing specific guidelines as to how the right of diplomatic asylum will be administered—specifically with regards to its scope within international law, the requisite conditions for when it may be granted, and its provisional nature. Such a resolution must also seek to address how the protection of regional interests is to be reconciled with the promotion of global cooperation.

Part I of this Note provides background information on how the debate surrounding diplomatic asylum is framed within instruments of international law. Part II shows how geopolitical differences on whether the right to diplomatic asylum exists makes resolution of the Assange dispute under the current standard unlikely, and illustrates why enforcement of diplomatic asylum has been nearly impossible to administer internationally. Part III proposes three solutions—establishing the scope of diplomatic asylum, outlining specific conditions that are applied to all individuals requesting diplomatic asylum, and determining how it would be terminated if no resolution is reached after a period of time—and discusses how they should be achieved, consequently defining diplomatic asylum's role within international law.

## I. BACKGROUND

At its most fundamental level, the Assange case illustrates the conflicting viewpoints regarding the right of diplomatic asylum and its basis in international law.<sup>31</sup> However, the dispute

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30. *Asylum Case* is the lone ruling by the International Court of Justice (“ICJ” or “Court”) on the legitimacy of diplomatic asylum, and although the Court refused to recognize diplomatic asylum as a universal legal concept, the ruling permitted nations to regulate diplomatic asylum on a case-by-case basis. See *Asylum*, 1950 I.C.J. at 266. The ICJ advised the parties to resolve their dispute through negotiation, a resolution that is utilized to this day. Jovan Kurbalija, *The Assange Asylum Case: Possible Solutions and Probable Consequences*, DIPLOFOUNDATION (Aug. 16, 2012), <http://www.diplomacy.edu/blog/assange-asylum-case-possible-solutions-and-probable-consequences>.

31. These conflicting viewpoints are encapsulated in statements made by Ecuador and the U.K. in the weeks following Assange being granted diplomatic asylum. Ecuador defended its decision to grant diplomatic asylum by first discussing the potential dangers of extradition and then appealing for



also demonstrates that the debate surrounding diplomatic asylum often involves case-specific legal issues not directly related to the right of asylum.<sup>32</sup> While the contentious issue of diplomatic asylum in the Assange dispute has received the most international attention, there are too many elements of this particular case for it to be cast only as a “diplomatic asylum” case.<sup>33</sup> The complexity of the diplomatic asylum issue is often clouded by tensions between regional interests and global commitments, as is the case when it is allowed to flourish regionally in the name of international human rights.<sup>34</sup> While these incongruous responsibilities are often limited to a national scale, questions about the legitimacy of diplomatic asy-

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international recognition by presenting various international agreements in support of its position. *Id.* The U.K.’s response made it clear that it finds itself under no legal obligation to recognize diplomatic asylum by any foreign embassy. *Foreign Secretary Statement, supra* note 17. To the contrary, the U.K.’s desire to extradite Assange results from a binding legal obligation that arises from its responsibilities to EU member states under the EAW system. *See Foreign Secretary Statement, supra* note 17; Council Framework Decision, *supra* note 15, art. 31(1) (indicating that the EAW “replace[s] the corresponding provisions of the . . . conventions applicable in the field of extradition in relations between the Member States”).

32. Factors to consider in the context of a diplomatic asylum case may include, but are not limited to: the relationship between the interested nations, the crime for which the individual is sought, and the length of time for which the individual has been pursued.

33. The Assange case specifically brings into question the applicability of diplomatic asylum in cases where an individual faces impending political persecution and the death penalty, as Ecuador alleges Assange would face if surrendered to Swedish authorities. Neuman & Ayala, *supra* note 8. The EAW system raises separate questions about whether extradition to another member country is appropriate if the allegations made by the issuing country do not constitute a crime in the executing country. Although English courts twice rejected Assange’s specific contention that the allegations would not have constituted rape in the U.K., the issue remains largely unresolved. David Allen Green, *Legal Myths about the Assange Extradition*, NEWSTATESMAN BLOG (Aug. 20, 2012), <http://www.newstatesman.com/blogs/david-allen-green/2012/08/legal-myths-about-assange-extradition>.

34. These obligations may be legal or nonlegal. Legal obligations between nations, such as extradition, are often dictated by treaties and typically have a limited scope. Nonlegal obligations, such as foreign relations, exist on a larger scale and often have an indeterminate scope.

lum result in a difficult analysis when issues of preexisting commitments between countries arise.<sup>35</sup>

*A. Extradition and the European Arrest Warrant*

In a typical diplomatic asylum case, the individual seeking asylee status often stands accused of crimes perpetrated in the nation seeking the individual's apprehension. It stands to reason that the nation seeking apprehension would request cooperation from other nations to assist in the individual's capture. In this manner, one legal issue that is not specific to the Assange dispute is the widely recognized international obligation known as the extradition process.<sup>36</sup> The practice of extradition originated in early civilizations, but has seen its scope expand as "[g]lobalization has brought about increased mobility for persons across national borders, greater opportunities for transnational crimes, and significantly more knowledge about international crimes."<sup>37</sup> Despite its increased acceptance, it is commonly understood that there is no general obligation for a state to extradite an individual to a foreign government.<sup>38</sup>

As a result, extradition finds its legal basis almost exclusively in a vast number of bilateral and multilateral treaties. Most common law countries require formal treaties with respect to extradition, including the United States and the U.K.<sup>39</sup> As of October 2011, the United States was a party to 114 bilateral

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35. These international obligations may be outlined in near-universally recognized pieces of international law, such as documents adopted by the U.N. or multilateral treaties between nations.

36. Extradition is defined as "[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged." BLACK'S LAW DICTIONARY, *supra* note 8, at 665.

37. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 34 (4th ed. 2002).

38. An increasing number of states may now be engaged in extradition due to their perceived "need for increased international cooperation" as a result of recent international developments such as globalization and terrorism. *Id.* at xi–xii. Although one line of thinking holds that an affirmative legal duty does have a basis in international law, this view is adopted only "with respect to international crimes." *Id.*

39. *Id.* at 36. Contrary to common law countries, civil law countries typically do not observe formal obligations and instead grant extradition "on the basis of reciprocity or comity." *Id.*

extradition treaties as well as the Multilateral Convention on Extradition.<sup>40</sup> Though beneficial to a certain extent, the lack of international uniformity regarding the rules of extradition can pose significant problems with respect to enforcement and compliance.<sup>41</sup> In addition, a consequence of exclusive reliance on bilateral extradition treaties is that it necessitates “a burdensome practice of treaty-making.”<sup>42</sup> The result of this continuously evolving system of regulation is that the extradition process is more efficient between “states which have closer political relations and similar legal systems.”<sup>43</sup>

While some nations have expressed a reluctance to engage in extradition, based in part on national sovereignty concerns, the process is generally recognized as necessary to facilitate the prosecution of both domestic and international crimes.<sup>44</sup> Due to its importance, adherence to the treaties that make up extradition law is the primary means by which nations can enhance international cooperation.<sup>45</sup> The international community supplements this piecemeal approach by imposing an affirmative

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40. See 1 WILLIAM S. HEIN & CO., EXTRADITION LAWS AND TREATIES, UNITED STATES v–ix (2011). The United States is also a party to a number of multilateral treaties relating to extradition, namely aviation, genocide, narcotic drugs, terrorism, and torture. See 2 WILLIAM S. HEIN & CO., EXTRADITION LAWS AND TREATIES, UNITED STATES 1150.1–1150.36 (2011).

41. One benefit to such a structure is “more detailed laws and more effective administration and judicial procedures,” which often result in “a tendency to facilitate extradition.” BASSIOUNI, *supra* note 37, at xii. The process also allows nations to condition their compliance on certain issues, such as the possibility of certain forms of punishment, the political nature of the alleged crime, and jurisdiction. In this manner, national legislation and specifically-tailored extradition treaties provide a legitimate and effective means by which nations can protect their sovereignty or any other values they believe are worth protecting within the context of international law.

42. *Id.* at 86. The lack of uniformity may also mean newcomers to the process are “less forthcoming as well as less effective in their extradition practices,” as well as more reluctant to turn their back on national sovereignty. *Id.* at xii.

43. *Id.* at xii.

44. Bassiouni describes many developing countries as having “a residue of sensitivity with respect to their national sovereignty,” although he notes that such concerns are slowly disintegrating. *Id.* He also notes that the development of the bilateral system was based partly on the preference of developing nations to emphasize their sovereignty. *Id.* at 46.

45. *Id.* at xii.

legal obligation to extradite individuals alleged to have participated in certain international crimes.<sup>46</sup> However, in an effort to create a more effective and transparent system on a smaller scale, some regions have undertaken to improve the extradition process by effectively replacing the treaty-based system with a system based on more explicit legal obligations.<sup>47</sup>

A notable instance of a region that has made extraordinary efforts to supplement bilateral treaties on extradition and improve coordination between member states is the European Union.<sup>48</sup> Prior to 2001, the EU had a treaty on extradition in place that exceeded what was required of it under international law.<sup>49</sup> Despite this, the EU felt increasing pressure to improve cooperation between member states following the terrorist attacks that took place in the United States on September 11, 2001.<sup>50</sup> The primary result of the EU's renewed interest was the adoption of the EAW in 2002, which replaced the extradition system in place at the time.<sup>51</sup> The principle of "mutual recognition," which allows for the harmonization between the

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46. Bassiouni lists twenty types of multilateral conventions that establish the duty to extradite, including, but not limited to war, apartheid, torture, slavery, and genocide. *Id.* at 913–24.

47. Multilateral Regional Arrangements are often the by-products of such efforts and serve as "a mechanism to harmonize legal systems, if not unify them with respect to the practice." *Id.* at 42.

48. These efforts are possibly the result of the EU's desire "to harmonize policies among its members in the area of 'justice and home affairs.'" KRISTIN ARCHICK, CONG. RESEARCH SERV., ORDER CODE RS22030, U.S.-EU COOPERATION AGAINST TERRORISM 1 (Apr. 22, 2013).

49. The European Convention on Extradition was a multilateral treaty instituted in 1960 between member states that intended to regulate extradition by creating affirmative legal obligations between nations for certain crimes. Council of Europe, European Convention on Extradition, *opened for signature* Dec. 13, 1957, E.T.S. No. 24.

50. This concern was based partly on the fact that "at the time of the 2001 attacks, most EU member states lacked anti-terrorist legislation, or even a legal definition of terrorism." ARCHICK, *supra* note 48. The situation was aggravated by the fact that the EU had "largely open borders and . . . different legal systems [which] enabled some terrorists and other criminals to move around easily and evade arrest and prosecution." *Id.*

51. Article 31(1) provides that "this Framework Decision shall . . . replace the corresponding provisions of the . . . conventions applicable in the field of extradition in relations between the Member States." Council Framework Decision, *supra* note 15, art. 31(1).

member states in the absence of national legislation,<sup>52</sup> was also introduced to the new legislation.<sup>53</sup> Expansion of this widely observed economic principle into transnational criminal law, along with the undeniable purpose of the decision to both harmonize and expand extradition obligations through the EAW, demonstrates that national sovereignty has taken a back seat to “police and judicial cooperation” between member states.<sup>54</sup>

### *B. Instruments of International Law*

While the EAW provides useful guidelines on extradition for EU member states, its scope is limited by international law.<sup>55</sup> The EU has authority over its member states, but each member state also has responsibilities as a result of their membership in the U.N.<sup>56</sup> For the instances in which conflicting obligations exist, the U.N. Charter states that responsibilities to the U.N. shall take precedence over “any other international

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52. *Commission Communication to the Council and the European Parliament—Mutual Recognition in the Context of the Follow-up to the Action Plan for the Single Market*, at 3, COM (1999) 299 final (June 16, 1999).

53. “Member States shall execute any European arrest warrant on the basis of *the principle of mutual recognition* and in accordance with the provisions of the framework decision.” Council Framework Decision, *supra* note 15, art. 1(2) (emphasis added). The EU described the new system as “the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the cornerstone of judicial cooperation.” *Id.* ¶ 6.

54. Although the EU describes itself as “a unique economic and political partnership . . .,” *Basic Information on the European Union*, EUROPA, [http://europa.eu/about-eu/basic-information/index\\_en.htm](http://europa.eu/about-eu/basic-information/index_en.htm) (last visited Jan. 18, 2013), this cooperation in the legal arena falls under the broad “justice and home affairs” umbrella, which encompasses various policies that are neither political nor economic. ARCHICK, *supra* note 48.

55. Article 21 is specifically entitled “Competing international obligations,” and outlines the responsibilities of nations in various circumstances where this issue may arise. *Id.* art. 21.

56. The Treaty on European Union, also known as the Maastricht Treaty, was signed by the members of the former European Community and formally created the EU. Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 1992 O.J. (C 191) 1. This treaty has since been amended to reflect both the increased role of the EU and its new membership. *Treaty of Maastricht on European Union*, EUROPA: SUMMARIES OF LEGISLATION (Oct. 15, 2010), [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_maastricht\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm).

agreement.”<sup>57</sup> The U.N. lays out clearly defined consequences for violating this supremacy, emphasizing the importance of its involvement in resolving diplomatic asylum disputes.<sup>58</sup> However, issues of supremacy arise in instances where multilateral agreements that potentially conflict with other international treaties cause nations to disagree about the extent of their responsibilities under international law. With regard to the U.N. specifically, various international agreements continue to have a noteworthy impact on the treatment of refugees and asylees, especially those residing in diplomatic premises.

Assange’s indefinite stay in the Ecuadorian diplomatic premises creates a significant hurdle for any party attempting to capture him against his will. The Vienna Convention on Diplomatic Relations places significant limitations on the ability of the U.K. to honor the EAW issued by Sweden. It is a fundamental premise of diplomatic law that “[t]he premises of the mission shall be inviolable[] [and that] [t]he agents of the receiving State may not enter them, except with the consent of the head of the mission.”<sup>59</sup> Although Assange has taken refuge inside a place that is physically accessible to the relevant authorities, the U.K. is left with no means of apprehending Assange until he leaves the embassy.<sup>60</sup> Failure to observe this clearly-defined limitation would have a drastic effect on the relationship between the U.K. and Ecuador and on diplomatic relations around the world.<sup>61</sup> Therefore, international law of-

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57. See U.N. Charter art. 103 (obligations under the U.N. Charter prevail over “obligations under any other international agreement”); Council Framework Decision, *supra* note 15, art. 21.

58. See U.N. Charter art. 6 (“A member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.”).

59. Vienna Convention on Diplomatic Relations, *supra* note 13, art. 22.

60. The U.K. has gone so far as to allegedly bring into question the inviolability of the Ecuadorian embassy in London, but eventually retreated from this position. Pearse, *supra* note 13.

61. Although the relationship between Ecuador and the U.K. may be irretrievably broken based on the threats exchanged between the countries, Ecuador is currently the sole recipient of the lucrative Andean Trade Preferences from the United States, which provide preferential tariff treatment for certain products. Nicholas Kozloff, *Ecuador Comes Out Winner as UK Overreaches with Assange Threats on Likely Behalf of US*, BUZZFLASH (Aug. 19,

fers near limitless protection to Assange as long as he stays within Ecuador's embassy.<sup>62</sup>

Ecuador's status as a member of the OAS poses another problem for the U.K., one that was first recognized by the U.N. in 1975.<sup>63</sup> The root of diplomatic asylum is traced back to Europe in the sixteenth and seventeenth centuries, when ambassadors in newly-designated permanent missions were provided with inviolability of their dwellings to supplement "the personal inviolability that he had traditionally enjoyed in order to remove him from the influence of the receiving State."<sup>64</sup> However, by the time the principle had all but disappeared in nineteenth century Europe, it had been earnestly adopted and frequently utilized in Latin American countries.<sup>65</sup> Following the ratification of the OAS Convention on Diplomatic Asylum by Latin American countries in 1954, some scholars even went so far as to argue that the UDHR provided that diplomatic asylum is a human right.<sup>66</sup> Although the U.N. report on the *Question of Diplomatic Asylum* was published more than forty years ago,

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2012), <http://www.truth-out.org/buzzflash/commentary/item/11685-ecuador-comes-out-winner-as-uk-overreaches-with-assange-threats-on-likely-behalf-of-us>. Ecuador may find its trade benefits terminated or reduced when the preferences go up for renewal, as its preferential status was already unsettled as the result of another dispute that put pressure on relations between Ecuador and the U.K. As some commentators have noted, Ecuador's role in the Assange affair "was not 'a move destined to win many new friends in Washington.'" *Id.*

62. The Diplomatic and Consular Premises Act does offer a legal basis for withdrawing recognition of diplomatic status under certain circumstances. Diplomatic and Consular Premises Act, 1987, c. 46, § 1(3), (Eng.). However, withdrawing such a status must be "permissible under international law," a highly disputed proposition that does not unequivocally support the U.K.'s position. *Id.* § 1(4).

63. See generally *Question of Diplomatic Asylum*, *supra* note 10 (discussing the history and growth of diplomatic asylum, most notably in Latin America).

64. *Id.* ¶ 2. Shortly thereafter, "ambassadors acquired the habit of receiving persons sought by the authorities of the territorial State." *Id.*

65. *Id.* ¶¶ 10–11. The report indicated that many Latin American nations gained independence around this time, and the growth of diplomatic asylum likely came as a natural result. *Id.* ¶ 11.

66. *Id.* ¶ 297.

the reality that diplomatic asylum is viewed differently in Latin America than it is internationally has not changed.<sup>67</sup>

International law stands at the heart of these dissonant views on diplomatic asylum. The supremacy of the U.N. as an organization, the scope and binding nature of its various agreements, and its vast membership make the U.N. the only international body that can decisively determine whether the granting of diplomatic asylum was appropriate in the case of Julian Assange.<sup>68</sup> While there are ultimately a number of different manners by which the U.N. could address the issue, the ICJ, as the “principal judicial organ of the United Nations,”<sup>69</sup> is the most appropriate body to resolve such a dispute.

### *C. The Influence of the International Court of Justice*

The importance of the ICJ’s role in resolving diplomatic asylum disputes is based on two important factors. First, the Court’s self-defined role is specifically tailored to hear the dispute between Ecuador and the U.K.<sup>70</sup> Individuals are not permitted to appear in front of the Court as “[o]nly States may be

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67. See Jovan Kurbalija, *Frequently Asked Questions about Diplomatic Asylum*, DIPLOFOUNDATION (Aug. 20, 2012), <http://www.diplomacy.edu/blog/frequently-asked-questions-about-diplomatic-asylum> (“While it is not globally accepted as a legal concept, diplomatic asylum exists as regional law in Latin America”); *Julian Assange Row: Ecuador Backed by South America*, *supra* note 20.

68. Of the sixteen legal instruments Ecuador provided as the basis for granting Assange asylum, five of them were either U.N. documents or required U.N. enforcement. *Declaración del Gobierno*, *supra* note 29. These are the U.N. Charter, UDHR, Geneva Convention, CRSR, and Vienna Convention on the Law of Treaties. *Id.*

69. U.N. Charter art. 92.

70. The Court has broad jurisdiction over “all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; the existence of any fact which . . . would constitute a breach of an international obligation; d. the . . . reparation to be made for the breach of an international obligation.” Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. The Court is also able to “give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” *Id.* art. 65(1).



parties in cases before the Court.”<sup>71</sup> Further, these states must be a party to the Statute of the International Court of Justice.<sup>72</sup> Most importantly, the judgments of the Court are binding on all concerned parties, final, and non-appealable.<sup>73</sup> The strict guidelines of the ICJ provide the ideal forum to not only resolve the Assange dispute, but to also examine the validity of diplomatic asylum in general.<sup>74</sup> The four other principle organs are ill-equipped to resolve disputes on international law because such disputes fall outside their intended responsibilities and are thus not intended to resolve conflicts of this magnitude.<sup>75</sup>

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71. *Id.* art. 34(1). This procedural exclusivity ensures that the Court hears only those cases deemed sufficiently important for sovereign governments to pursue, and not those pertaining to private parties. In this respect, the ICJ is unique from each of the other three international courts (European Court of Justice, ECHR, and Inter-American Court of Human Rights), which are able to consider claims brought by individuals. *Frequently Asked Questions*, INT'L COURT OF JUSTICE (ICJ), <http://www.icj-cij.org/information/index.php?p1=7&p2=2> (last visited Jan. 19, 2013). Further, the Court is not permitted to “deal with a dispute of its motion” and “can only hear a dispute when requested to do so by one or more States.” *Id.*

72. *See* U.N. Charter art. 93 (indicating that “[a]ll members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice,” but also providing non-U.N. members with a means by which they can become a party to the ICJ Statute).

73. “The judgment is final and without appeal.” ICJ Statute, *supra* note 70, art. 60. “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” U.N. Charter art. 94, para. 1. Failure to conform to the obligations required by an ICJ judgment may result in further measures taken by the U.N. Security Council against the offending country to the extent necessary to effectuate the judgment. U.N. Charter art. 94, para. 2.

74. Ecuador has vowed to “pursue every legal means to bring Assange to Ecuador,” and acknowledged that an appeal to the ICJ would be considered as a last resort. *Ecuador May File Appeal to ICJ If UK Refuses Assange Safe Passage*, RUS. TODAY (Aug. 19, 2012), <http://rt.com/news/ecuador-icc-assange-asylum-942/>.

75. The U.N.’s responsibilities are divided amongst five principal organs: the General Assembly, the Security Council, the Economic & Social Council, the International Court of Justice, and the Secretariat. U.N. Charter art. 7, para 1. The sixth organ listed in the Charter, a Trusteeship Council, “suspended operation on 1 November 1994, with the independence of Palau, the last remaining United Nations trust territory,” and now meets only “as occasion require[s].” *Trusteeship Council*, U.N., <http://www.un.org/en/mainbodies/trusteeship/> (last visited Sept. 21, 2013).

Further, the ICJ is the only body that is capable of rectifying the uncertainty following its ruling in *Asylum Case*, the last instance in which it heard a case regarding diplomatic asylum.<sup>76</sup> *Asylum Case*, the first ruling on the Haya de la Torre dispute,<sup>77</sup> involved a Peruvian national who was granted diplomatic asylum in the Colombian embassy in Lima, Peru, after a warrant was issued for his arrest by the Peruvian government.<sup>78</sup> When Peru refused Colombia's request to allow Haya de la Torre safe passage into Colombia, Colombia brought suit against Peru in the ICJ.<sup>79</sup> Colombia invoked "American international law in general" and "regional or local custom peculiar to Latin-American States" to argue that Haya de la Torre was a proper recipient of diplomatic asylum.<sup>80</sup> In response, Peru argued that Colombia's decision to grant asylum was in violation of multiple articles of the Havana Convention on Asylum, and

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The secretariat is primarily responsible for carrying out the daily tasks of the U.N. and servicing the other principal organs. It is not designed to effectuate a resolution based on analysis of international law. See U.N. Charter arts. 97–101. The Economic and Social Council is responsible for "international economic, social, cultural, educational, health and related matters," and is ill equipped to resolve a dispute with significant political ramifications. *Id.* art. 62, para. 1. The Security Council is conferred the "primary responsibility for the maintenance of international peace and security," *id.* art. 24, para. 1, but the standoff between the parties appears to be limited to political posturing and threats. The General Assembly ("G.A.") has broad discretion to consider "any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter." *Id.* art. 10.

76. The only sources that have addressed (or notably failed to address) the concept of diplomatic asylum have been the Vienna Convention on Diplomatic Relations (where it was not included despite efforts by Latin American countries), *Asylum Case*, and the OAS Convention on Diplomatic Asylum. Kurbalija, *supra* note 67.

77. See *Asylum (Colom./Peru)*, 1950 I.C.J. 266 (Nov. 20).

78. Haya de la Torre was a controversial figure throughout Latin America based on his political involvement fighting for democracy and labor rights. *Victor Raúl Haya de la Torre*, U.N. HIGH COMM'R FOR REFUGEES ("UNHCR"), <http://www.unhcr.org/3b72551038.html> (last visited Jan. 18, 2013).

79. *Asylum*, 1950 I.C.J. at 272–73.

80. *Id.* at 270, 276. Colombia argued that as a result of this customary law, Peru was bound "to give 'the guarantees necessary for the departure of the refugee, with due regard to the inviolability of his person, from the country.'" *Id.* at 268.

that Colombia had no right to grant asylum to Haya de la Torre as a means of avoiding Peru's laws.<sup>81</sup> To resolve the dispute, the Court had to determine whether Colombia was "competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru."<sup>82</sup>

To determine the binding nature of Colombia's decision to grant Haya de la Torre diplomatic asylum, the Court applied the rule that conduct that has been established as custom in a country is considered binding law in that country.<sup>83</sup> The Court first determined that Colombia had not proven that the rule of diplomatic asylum had a binding effect on Peru.<sup>84</sup> The Court considered "a large number of particular cases in which diplomatic asylum was in fact granted and respected,"<sup>85</sup> but held such evidence did not conclusively demonstrate that the custom existed in Latin America.<sup>86</sup> It found that even if custom were proven in Colombia, it would also have to exist in Peru to have a binding effect on both parties, and this was not the case.<sup>87</sup>

The Court next posited that, although "asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population," this issue was not in dispute

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81. *Id.* at 270.

82. *Id.* at 274.

83. *Id.* at 276.

84. *Id.* at 277-78.

85. *Id.* at 277.

86. *Id.*

The facts . . . disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum . . . and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

*Id.*

87. *Id.* at 277-78. The Court demonstrated that Peru had actively avoided adopting diplomatic asylum as custom by virtue of not ratifying two Montevideo Conventions. *Id.* at 278.

between the parties.<sup>88</sup> The ICJ then considered the confining language of the Havana Convention to hold that “asylum cannot be opposed to the operation of justice.”<sup>89</sup> The Court elaborated by stating “the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals.”<sup>90</sup> In adding that such vast protection “would . . . become the equivalent of an immunity,”<sup>91</sup> the Court’s final disposition gives a clear indication that diplomatic asylum is not recognized by international law.<sup>92</sup> However, the ICJ also recognized that diplomatic asylum in Latin America was “an institution which . . . owes its development to extra-legal factors” and could continue to exist in customary international law via “agreements between interested governments inspired by mutual feelings of toleration and goodwill.”<sup>93</sup>

The impact of the ICJ’s open invitation to engage in diplomatic asylum within the context of customary law was felt immediately. On June 13, 1951, the ICJ made a second ruling on the Haya de la Torre matter, the *Haya de la Torre Case*.<sup>94</sup> The Court ruled that, although the asylum granted to Haya de la Torre should have been terminated, “Colombia [was] under no obligation to surrender Victor Rutilo Haya de la Torre to the Pe-

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88. *Id.* at 282–83. The Court later discounted the possibility that the term “urgent cases” was intended to encompass “the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country.” *Id.* at 284.

89. *Id.* at 284. The Court specifically cited Article 2, paragraph 2 of the Havana Convention, which provided that “[a]sylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure some way his safety.” *Id.* at 282. This was taken in conjunction with Article I, paragraph 1, which provided that states could not grant asylum “to persons accused or condemned for common crimes . . .” *Id.* at 281.

90. *Id.*

91. *Id.*

92. *See id.* at 286. The ICJ specifically struggled to find where diplomatic asylum found its legal basis, as “considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.” *Id.*

93. *Id.*

94. *Haya de la Torre Case (Colom./Peru)*, 1951 I.C.J. 71, 71 (June 13).

ruvian authorities.”<sup>95</sup> Less than three years after this ruling, in 1954, several American countries adopted the OAS Convention on Diplomatic Asylum—fourteen countries would eventually ratify the agreement.<sup>96</sup> In 1961, many Latin American nations made a strong push for the Vienna Convention on Diplomatic Relations to recognize diplomatic asylum, but were forced to settle for limited recognition under Article 41(3).<sup>97</sup> The general recognition of diplomatic asylum remains unique to Latin America.<sup>98</sup> Likely as a result of Ecuador’s membership amongst this small group of signatories to the OAS Convention on Diplomatic Asylum, The Union of South American Nations has pledged its support for Ecuador’s decision to grant asylum to Assange.<sup>99</sup>

*D. The United States: Paying Attention, but from a Distance*

The United States has publicly voiced support for the U.K., asserting that it “does not recognize the concept of diplomatic asylum as a matter of international law.”<sup>100</sup> The United States’

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95. *Id.* at 83. The Court added “there is no contradiction between these two findings,” and encouraged the parties to seek “a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighborliness. . . .” *Id.* at 82, 83.

96. *Convention on Diplomatic Asylum: General Information*, *supra* note 12. Because diplomatic asylum was technically administered on an *ad hoc* basis following the *Haya de la Torre* case, a system between Latin American nations developed over the years without regulation or interference by an international body. *See generally Question of Diplomatic Asylum*, *supra* note 10 (discussing the immense growth of diplomatic asylum in Latin America and whether it has a place within international law).

97. Kurbalija, *supra* note 67. Article 41(3) of the Vienna Convention on Diplomatic Relations provides, in relevant part, that “[t]he premises of the mission must not be used in any manner incompatible with the functions of the missions as laid down in the present Convention or by other rules of general international law or by any special agreement in force between the sending and the receiving State.” Vienna Convention on Diplomatic Relations, *supra* note 13, art. 41(3).

98. Matthew Happold, *Julian Assange and Diplomatic Asylum*, EUR. J. INT’L L. BLOG (June 24, 2012), <http://www.ejiltalk.org/julian-assange-and-diplomatic-asylum/>.

99. *Julian Assange Row: Ecuador Backed by South America*, *supra* note 20.

100. *Wikileaks: US Dismisses Calls for “Diplomatic Asylum” for Julian Assange*, DAILY TELEGRAPH (Aug. 17, 2012),

role in the process is notable, as both its longstanding interest in Assange and its use of the death penalty for espionage are well known.<sup>101</sup> The apparent willingness of the United States to grant diplomatic asylum under rare circumstances frames both sides of the conflict in a distinct manner because Ecuador is able to use these instances to support its argument that diplomatic asylum has been recognized as customary law outside Latin America for many years.<sup>102</sup>

## II. THE INTERNATIONAL SIGNIFICANCE OF THE ASSANGE DISPUTE

There are countless features of the Assange case that have lent themselves to scrutiny by the international community. One of the primary reasons for this scrutiny is that Julian

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<http://www.telegraph.co.uk/news/worldnews/wikileaks/9484176/Wikileaks-US-dismisses-calls-for-diplomatic-asylum-for-Julian-Assange.html>. In an interesting historical note, perhaps one of the most famous cases of diplomatic asylum was that of Cardinal József Mindszenty, a Hungarian who sought refuge from Hungary's communist government at the U.S. embassy in Budapest in 1956. Martin Auster Muhle, *Refuge or Refusal: How Easy Is It to Get Asylum at U.S. Missions?* WASH. DIPLOMAT (May 31, 2012), [http://173.201.242.50/index.php?option=com\\_content&view=article&id=8351:refuge-or-refusal-how-easy-is-it-to-get-asylum-at-us-missions&catid=1488:june-2012&Itemid=500](http://173.201.242.50/index.php?option=com_content&view=article&id=8351:refuge-or-refusal-how-easy-is-it-to-get-asylum-at-us-missions&catid=1488:june-2012&Itemid=500). After he was granted asylum, Mindszenty spent the next fifteen years in the U.S. embassy before he was permitted to leave in 1971. *Id.*

101. The U.S. Justice Department has launched a criminal investigation into Assange and Wikileaks regarding the release of classified information Wikileaks allegedly received from American soldier Bradley Manning. Details of the investigation were requested by Assange's attorneys to determine the nature of the allegations. Kevin Gosztola, *Lawyers for Julian Assange & WikiLeaks Seek Details on Justice Department's Criminal Investigation*, FIREDOGLAKE (Oct. 11, 2012), <http://dissenter.firedoglake.com/2012/10/11/lawyers-for-julian-assange-wikileaks-seek-details-on-justice-departments-criminal-investigation/>. For its part, Sweden has stated that Assange will not be extradited if he were to face the death penalty in the United States. Adam Taylor, *Sweden Says It Will Not Extradite Assange to US If He Faces Death Penalty*, BUS. INSIDER (Aug. 21, 2012), <http://www.businessinsider.com/sweden-says-it-will-not-extradite-assange-to-us-if-he-faces-death-penalty-2012-8>.

102. See, e.g., Greene, *supra* note 28 (listing key international precedents for diplomatic asylum).

Assange is a well-respected journalist.<sup>103</sup> In his position as the editor-in-chief of WikiLeaks, Assange has achieved notable international recognition for his role in disseminating information not otherwise available to the public.<sup>104</sup> As a result of his efforts to create greater transparency in the media and expose numerous human rights transgressions, he has become something of an international celebrity, albeit under unusual circumstances.<sup>105</sup>

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103. Amongst the awards Assange has received in recent years are: the 2009 Amnesty International UK Media Award (New Media), *Amnesty International Media Awards 2009: Full List of Winners*, GUARDIAN (June 3, 2009), <http://www.guardian.co.uk/media/2009/jun/03/amnesty-international-media-awards>; the 2011 Sydney Peace Foundation's gold medal for his "exceptional courage in pursuit of human rights," *Julian Assange Awarded Australian Peace Prize*, GUARDIAN (May 11, 2011), <http://www.guardian.co.uk/world/2011/may/11/julian-assange-australian-peace-prize-wikileaks>; the 2011 Martha Gellhorn Prize for Journalism for his work that "penetrated the established version of events and . . . expose[d] established propaganda," *Julian Assange Wins Martha Gellhorn Journalism Prize*, GUARDIAN (June 2, 2011), <http://www.guardian.co.uk/media/2011/jun/02/julian-assange-martha-gellhorn-prize>; and the 2011 Walkley Award for Most Outstanding Contribution to Journalism for taking "a brave, determined and independent stand for freedom of speech and transparency that has empowered people all over the world." *2011 Walkley Award Winners*, WALKLEY FOUND., <http://www.walkleys.com/2011winners#most-outstanding-contribution-to-journalism> (last visited Jan. 18, 2013).

104. Wikileaks achieves its goal of "bring[ing] important news and information to the public" by "provid[ing] an innovative, secure and anonymous way for sources to leak information to our journalists." *About: What Is Wikileaks*, WIKILEAKS, <http://wikileaks.org/About.html> (last visited Jan. 18, 2013). Amongst the stories the website has broken about the United States are classified U.S. reports on the war in Iraq and Guantanamo Bay's main operations manuals. *Id.*

105. A number of high-profile supporters of Assange have forfeited £300,000, which was offered as sureties and securities after Assange skipped bail. *Celebrity Backers Are £300,000 Down But Still Supporting Assange Despite His Decision to Skip Bail*, DAILY MAIL ONLINE (Oct. 9, 2012), <http://www.dailymail.co.uk/news/article-2215373/Celebrity-backers-300-000-supporting-Assange-despite-decision-skip-bail.html>. Michael Moore, Oliver Stone, and Noam Chomsky are three of the many "celebrities" who signed a letter to President Correa on June 25, 2012, urging him to grant asylum to Assange. *Moore, Glover, Stone, Maher, Greenwald, Wolf, Ellsberg Urge Correa to Grant Asylum to Assange*, JUSTFOREIGNPOLICY.ORG (June 22, 2012), <http://www.justforeignpolicy.org/node/1257>.

From a legal perspective, however, the convergence of interests in the Assange dispute is perhaps the most alluring. At the heart of the conflict is Ecuador, a country that has chosen to protect Assange's "human rights" while its president, Rafael Correa, continues to suppress freedom of speech and press within Ecuador.<sup>106</sup> The Ecuadorian government's seemingly contradictory positions have led some to question whether Ecuador's instrumental role in the process is the result of its legitimate human rights concerns, or President Correa making a calculated political gamble.<sup>107</sup> On the other side of the dispute is the U.K., which is now faced with the daunting task of monitoring Assange's every move in the Ecuadorian embassy in order to uphold its duty to execute the EAW.<sup>108</sup>

Three other parties have a vested interest in the case for distinctly different reasons: Sweden, the United States, and Australia. The root of the conflict is Assange's alleged misconduct in Sweden, which finds itself at the center of controversy as to whether they have their own ulterior motives for Assange de-

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106. "Research by numerous international human rights defenders . . . has concluded that the Correa administration does not brook dissent and is engaged in a campaign to silence its critics in the media." Carlos Lauría, *As It Backs Assange, Ecuador Stifles Expression at Home*, COMM. TO PROTECT JOURNALISTS (Aug. 16, 2012), <http://cpj.org/blog/2012/08/as-it-backs-assange-ecuador-represses-free-express.php>. In his defense, President Correa has stated that his approach "was necessary to rein in private [media] who had enjoyed too much power for too long." Jonathan Watts, *Rafael Correa Hits Back over Ecuador's Press Freedom and Charge of Hypocrisy*, GUARDIAN (Aug. 24, 2012), <http://www.guardian.co.uk/world/2012/aug/24/rafael-correa-assange-ecuador-press>.

107. One prevailing thought is that Ecuador's position is largely motivated by President Correa's desire "to settle old scores" with the United States, as well as to "display his political prowess in the run-up to the Ecuadorian presidential elections next year." Anita Isaacs, *It's Not about Assange*, Op-Ed., N.Y. TIMES (Aug. 19, 2012), <http://www.nytimes.com/2012/08/20/opinion/why-correa-lets-assange-stay-in-ecuador-embassy.html>.

108. "Scotland Yard confirmed it costs £11,000 day to ensure the Australian does not flee . . . the Ecuadorean Embassy." Chris Greenwood, *Police Stake-out Bill for Assange Tops £11,000 a DAY to Ensure He Doesn't Flee Ecuadorian Embassy*, DAILY MAIL (Oct. 1, 2012), <http://www.dailymail.co.uk/news/article-2211530/Police-stakeout-Assange-tops-1m-costs-11-000-DAY-ensure-doesnt-flee-Ecuadorian-Embassy.html>.



spite their guarantees to the contrary.<sup>109</sup> Next, despite the United States' compelling interest in how the Assange case is handled, the country appears content to leave "Assange's immediate fate . . . in the hands of Britain, Sweden, and Ecuador."<sup>110</sup> Finally, despite Australia's status as Assange's birthplace, it has conspicuously distanced itself from the Assange controversy, prompting some citizens and politicians to wonder why Ecuador was willing to protect Assange when his own government was not.<sup>111</sup>

The international attention given to the Assange standoff has served to force Ecuador's hand.<sup>112</sup> The scrutiny has compelled Ecuador to defend its position vociferously on an international stage, an undoubtedly different strategy than that which is typically utilized when diplomatic asylum is granted amongst Latin American nations. For example, the case would likely receive little attention if Assange sought refuge at an Ecuadorean embassy located in a nation that had ratified the OAS Conven-

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109. See Taylor, *supra* note 101. Deputy Director of the Service for Criminal Cases and International Cooperation of Sweden's Justice Ministry, Cecelia Riddselius, stated that Sweden "will never surrender a person to the death penalty." *Id.*

110. Mark Hosenball, *Julian Assange, Wikileaks Founder, Faces No Criminal Charges in U.S., Sources Say*, HUFFINGTON POST (Aug. 22, 2012), [http://www.huffingtonpost.com/2012/08/22/julian-assange-wikileaks-no-criminal-charges-in-us\\_n\\_1823159.html](http://www.huffingtonpost.com/2012/08/22/julian-assange-wikileaks-no-criminal-charges-in-us_n_1823159.html) ("[S]ources say the United States has issued no criminal charges against [Assange] and has launched no attempt to extradite him [to the United States]."); Philip Dorling, *US Calls Assange 'Enemy of State'*, SYDNEY MORNING HERALD (Sept. 27, 2012), <http://www.smh.com.au/opinion/political-news/us-calls-assange-enemy-of-state-20120927-26m7s.html>. It was reported on September 27, 2012, that Assange and Wikileaks were "designated as enemies of the United States," a designation which "ha[s] serious implications for [Assange] if he were to be extradited to the U.S." *Id.*

111. Monica Attard, *Ecuador Gives Assange Asylum, but for Australia 'Nothing Has Changed'*, CNN (Aug. 17, 2012), <http://www.cnn.com/2012/08/17/world/asia/australia-assange-asylum-ecuador/index.html>.

112. Ecuador insinuated that the attention being given to Assange is not only the result of "persecution in different countries [as a result of exposing] corruption and severe human rights abuses of citizens around the world," but also the desire of various nations to cater to the desires of the United States. *Declaración del Gobierno, supra* note 29.

tion on Diplomatic Asylum.<sup>113</sup> However, the U.K. is not a party to that convention and it does not otherwise recognize the concept of diplomatic asylum.<sup>114</sup> Therefore, the protection available to Ecuador if asylum were granted in another Latin American country does not apply.<sup>115</sup>

Ecuador, aware of its dilemma, looked for guidance from an international organization in which membership is nearly universal: the U.N.<sup>116</sup> Since diplomatic asylum was not formally recognized at the 1961 Vienna Convention,<sup>117</sup> Ecuador supported its position by demonstrating that political asylum was a universally recognized principle<sup>118</sup> and by citing to the inviolability of the diplomatic mission.<sup>119</sup> In demonstrating universal recognition of two separate concepts that, taken together, offer some support for diplomatic asylum, Ecuador established that Assange is safe from extradition while he remains in its em-

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113. See *Convention on Diplomatic Asylum: General Information*, *supra* note 12 (indicating that membership consists exclusively of Latin American nations).

114. *Foreign Secretary Statement*, *supra* note 17. See also *Question of Diplomatic Asylum*, *supra* note 10, ¶¶ 155–56 (proposing to the Internal Law Commission “that the words ‘in its territory’ should be added after the word ‘asylum’” because “that practice had not been accepted by the majority of European States, and by the United Kingdom Government in particular”).

115. *Id.* Of the legal documents that Ecuador cites as support for its position, some are binding on the U.K. and some are not. See *Declaración del Gobierno*, *supra* note 29.

116. See Press Release, Dept. of Pub. Info., United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006) (listing the 192 member states after Montenegro was admitted on June 28, 2006).

117. The Vienna Convention on Diplomatic Relations is the treaty that regulates diplomatic relations between countries; it notably excludes any language that would have recognized the concept of diplomatic asylum. See Vienna Convention on Diplomatic Relations, *supra* note 13, art. 41(3).

118. Article 14(1) of the Universal Declaration of Human Rights, Article 27 of the Declaration of the Rights and Duties of Man, and the Geneva Convention provide the most relevant support on this issue. See sources cited *supra* note 11; see generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (although this document does not explicitly reference the right of asylum, the articles discuss at length the rights of parties taken as prisoners during international conflicts, whose status may eventually become that of an asylee).

119. See Vienna Convention on Diplomatic Relations, *supra* note 13.

bassy.<sup>120</sup> In addition, Ecuador has put the onus on Sweden to guarantee that Assange will not face subsequent extraditions to a “third country . . . that would put at risk Mr. Assange’s life and freedom.”<sup>121</sup> However, up to this point, all appearances are that Ecuador has found Sweden’s response unsatisfactory in that it has not been able to guarantee Assange will not face extradition to a third country.<sup>122</sup>

The problems demonstrated by the Assange case are illustrative of the lack of regulation surrounding diplomatic asylum that has existed on an international scale for more than a century.<sup>123</sup> On one hand, widespread recognition of diplomatic asylum has been limited to Latin America since the nineteenth century.<sup>124</sup> In theory, Latin American nations are able to grant diplomatic asylum freely amongst other parties to the OAS

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120. See *Ecuador President Correa Wants ‘Guarantee’ Over Assange*, BBC NEWS (Aug. 18, 2012), <http://www.bbc.co.uk/news/uk-19309183>. Given the fact that Assange’s stay has extended to seven months, with no sign of an impending resolution, the U.K. appears resigned to the protection afforded to Assange within the embassy. Meanwhile, Assange has also realized his unique status and continues to make “public appearances” from the embassy. See Alexander Rankine, *Oxford Students to Protest at Assange ‘Visit,’* GUARDIAN (Jan. 10, 2013), <http://www.guardian.co.uk/education/2013/jan/10/oxford-students-to-protest-at-assange-talk>.

121. *Ecuador President Correa Wants ‘Guarantee’ over Assange*, *supra* note 120.

122. Although Deputy Director of the Service for Criminal Cases and International Cooperation of Sweden’s Justice Ministry, Cecelia Riddselius, has stated “that they would demand strict assurances from the US that ‘the prisoner will not be executed in any case,’” she admitted that it was impossible to guarantee whether Assange would be extradited without a formal extradition request. Taylor, *supra* note 101.

123. This lack of regulation is likely the result of an international community that has failed to recognize the problems that accompany widespread use. Despite the issues discussed in detail in the U.N. Secretary-General report, no significant steps were taken by the U.N. to clarify the right of asylum established in numerous agreements. See *supra* note 63. A 1967 protocol made small changes to diplomatic asylum, specifically with regards to temporal and geographic limitations, but it did not take the opportunity to redefine the right of asylum generally. See Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 606 U.N.T.S. 267.

124. See *supra* note 65.

Convention on Diplomatic Asylum.<sup>125</sup> On the other hand, because diplomatic asylum draws numerous fundamental similarities to political asylum, countries such as Ecuador are able to support their arguments on an international scale with numerous universally recognized documents that non-OAS parties are unable or unwilling to challenge.<sup>126</sup> It is not in the best interests of the U.K. and the United States, long-standing and integral members of the U.N., to challenge treaties that have been in force for decades and are of fundamental importance to the development of human rights.<sup>127</sup>

Foreign-relations law introduces another complication in addressing diplomatic asylum.<sup>128</sup> Each party involved in the Assange case occupies a unique role within the controversy. Ecuador's position on asylum has been widely criticized, but regional support appears to have strengthened the country's resolve.<sup>129</sup> Ecuador now appears fully prepared to let the

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125. Although exact figures are unavailable, there is evidence that Latin American nations have granted diplomatic asylum on a frequent basis since it became prevalent in the nineteenth century. The U.N. report lists seven instances over a period of forty-one years when diplomatic asylum was granted, and acknowledges that the "list is purely illustrative" of "[m]any other examples . . . mentioned in the records in the asylum case and in various publications." *Question of Diplomatic Asylum*, *supra* note 10, ¶ 12. The ICJ acknowledged that the "Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected." *Asylum (Colom./Peru)*, 1950 I.C.J. 266, 277 (Nov. 20).

126. *See, e.g., supra* note 29.

127. Not only were the U.K. and the United States members of the U.N. when the Charter was ratified in 1945, but both nations have maintained permanent membership status on the U.N. Security Council since that time. U.N. Charter art. 110; U.N. Charter art. 23.

128. The term "foreign-relations law" has come to encompass the modern definition of "international law," BLACK'S LAW DICTIONARY, *supra* note 8, at 720, which is defined as "the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes)." *Id.* at 892.

129. Although the ministers pledged their general support for Ecuador, they have also taken a diplomatic stance on the dispute, urging that both parties "continue the dialogue and negotiation to find a mutually acceptable solution." *Julian Assange Row: Ecuador Backed by South America*, *supra* note 20; *see discussion supra* Part II.

Assange situation run its course.<sup>130</sup> Although Sweden's interest in questioning a man who allegedly committed crimes of a sexual nature has not been challenged, speculation is rampant as to whether Sweden is a conduit for the United States to gain possession of Assange to try him in the U.S. legal system.<sup>131</sup> Even if a party were to disregard the potential risks that accompany drastic measures against Ecuador, each nation must also consider the risks of going against the Latin American nations that have pledged their support for Ecuador.<sup>132</sup>

Smaller regional international organizations, such as the OAS, further strain the balance between the protection of regional interests and the promotion of global cooperation.<sup>133</sup> Up to this point, Ecuador's membership in the OAS has caused manifest problems because of the tacit support Ecuador has received from other OAS members as well as the legal basis the

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130. Ecuador has stated that Assange could remain inside its embassy for "two centuries" if necessary. Luke Harding, *Julian Assange Can Stay in Embassy for 'Centuries', Says Ecuador*, GUARDIAN (Aug. 23, 2012), <http://www.guardian.co.uk/media/2012/aug/23/julian-assange-ecuador-embassy>.

131. Some believe Sweden's continued role has been dictated by the fact that it is easier for the United States to extradite Assange from Sweden than it would be from the U.K., although in reality this may be more difficult. Green, *supra* note 33. The United States and Sweden have enjoyed a strong relationship over the years, as evidenced by their military cooperation during the Cold War. Peter Vinthagen Simpson, *Research Reveals Depth of Sweden-US Cold War Relations*, LOCAL (Mar. 17, 2009), <http://www.thelocal.se/18262/20090317/#.UPLzW6HjIH8>.

132. The U.K. has sought to improve its trade relations with Latin America in recent years, an effort that may be severely hampered as a result of its declining reputation in the region. *Julian Assange Row: Ecuador Backed by South America*, *supra* note 20.

133. The OAS is the "world's oldest regional organization," which dates back to the First International Conference of American States in 1890. The First International Conference of American States also established "the inter-American system, the oldest international institutional system." *Who We Are*, OAS, [http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp) (last visited Jan. 19, 2013). It was created "to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." Charter of the Organization of American States art. 1, para. 1, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

binding regional treaties under the OAS provide.<sup>134</sup> However, membership to the OAS should not affect Ecuador's responsibilities to the U.N.<sup>135</sup> The OAS exists as a regional agency *within* the U.N. and provides that one of the principal responsibilities of the OAS General Assembly is "[t]o strengthen and coordinate cooperation with the United Nations and its specialized agencies."<sup>136</sup> Although the OAS predates the U.N.,<sup>137</sup> its charter recognizes the authority of the U.N. and relies upon the recognition and protection provided by the U.N.<sup>138</sup>

A party's membership to the U.N. is conditioned upon its acceptance and execution of the various binding U.N. agreements.<sup>139</sup> However, there are significant obstacles to enforcing a commitment of such large proportions. For one, smaller organizations, such as the OAS, are typically more effective in addressing the needs of their constituent member nations.<sup>140</sup>

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134. All members of the OAS have supported Ecuador's decision to grant Assange asylum, except for the United States and Canada. Jason Reed, *Latin America, Caribbean Unite to Support Ecuador over Assange*, REUTERS (Aug. 22, 2012), available at <http://rt.com/news/oas-support-ecuador-assange-529/>.

135. See Charter of the Organization of American States, *supra* note 133, art. 1 ("Within the United Nations, the Organization of American States is a regional agency."); *id.* art. 140 ("None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.")

136. *Id.* art. 54(c).

137. Although the origins of the OAS may date back to 1889, the U.N. Charter was signed three years before the OAS signed their charter. *Who We Are*, *supra* note 133; U.N. Charter, *opened for signature* June 26, 1945; Charter of the Organization of American States, *supra* note 133 (signed in Bogotá, Colombia in 1948).

138. See Charter of the Organization of American States, *supra* note 133, art. 1 ("The Organization of American States has no powers other than those expressly conferred upon it by this Charter . . ."); *id.* art. 131.

139. See U.N. Charter art. 2 (discussing the obligations of members to "act in accordance with the following Principles"); *id.* arts. 5–6 (detailing the penalties for member states that do not comply with the principles outlined in Article 2).

140. Regional organizations are better equipped to address the concerns of their member states. The effectiveness of such organizations is contingent upon smaller membership, specifically tailored purposes, and a larger voice for each of its members. See Johannes F. Linn & Oksana Pidufala, *The Experience with Regional Economic Cooperation Organizations: Lessons for Central Asia* 6 (Wolfensohn Ctr. for Dev. at Brookings, Working Paper No. 4, 2000), available at

For this reason, the U.N. may find that adherence to the principles espoused by various U.N. instruments is lacking on issues where a regional organization provides exceptional support.<sup>141</sup> Although the U.N. encourages such regional agreements,<sup>142</sup> a hierarchy amongst the numerous U.N. treaties naturally emerges in relation to these regional agreements depending on various factors, including the stability of the government, the system of government in place, and the level of discretion allowed for interpretation of the U.N. treaties.<sup>143</sup>

Ecuador has attempted to manipulate its dual membership in the OAS and the U.N. by arguing that diplomatic asylum is supported by an OAS regional treaty, as well as by U.N. treaties that have protected human rights for many years.<sup>144</sup> Although the validity of diplomatic asylum is reasonably questioned, the U.N. treaties Ecuador references in the dispute are not easily dismissed.<sup>145</sup> Assange presents an ideal opportunity

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[http://www.brookings.edu/~media/research/files/papers/2008/10/carec%20integration%20linn/10\\_carec\\_integration\\_linn.pdf](http://www.brookings.edu/~media/research/files/papers/2008/10/carec%20integration%20linn/10_carec_integration_linn.pdf). Implicit amongst these regional organizations is a willingness to address issues that would otherwise not be addressed by larger international organizations. *Id.* at 4.

141. Ecuador's relationship with the OAS and other Latin American nations, as demonstrated by its ratification of the Convention on Diplomatic Asylum, is emblematic of this concern.

142. See U.N. Charter art. 52, para. 1 ("Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.").

143. See generally U.N. SCOR, 68th Sess., 7015th mtg., U.N. Doc. S/PV.7015 (Aug. 6, 2013) (discussing how "different perspectives" resulting from diverse membership pose challenges to cooperation between the U.N., regional, and subregional organizations in peacefully resolving disputes).

144. Although Ecuador cites various pieces of international law, the primary basis for its hardline stance is the existence of diplomatic asylum as customary law in Latin America, as established by the Convention on Diplomatic Asylum and the *Haya de la Torre* decision. See *supra* note 12 and text accompanying note 93.

145. Given the lack of precedent of taking over "the sovereign territory of another country," the U.K.'s threat to invade the Ecuadorean embassy and thus violate the Vienna Convention on Diplomatic Relations was seen by many as a "huge mistake." *'UK Made a Huge Mistake Threatening Ecuador'*—*Analyst*, RT (Aug. 17, 2012), <http://rt.com/news/uk-ecuador-threat-mistake->

for the U.N. to resolve the ambiguities surrounding diplomatic asylum that should have been addressed many years ago.<sup>146</sup> The popularity of Julian Assange, the foreign-relations implications of the issue, and the unlikelihood of an amicable resolution to the conflict demonstrate the need for a recognized international body to take a leadership role to develop a uniform international standard for diplomatic asylum.

### III. WHY ASSANGE PRESENTS AN AMPLE OPPORTUNITY TO END THE UNCERTAINTY SURROUNDING DIPLOMATIC ASYLUM

#### *A. The International Court of Justice is Best Qualified to Hear the Dispute*

In order to maintain their preeminence, it is important for the ICJ to demonstrate that it is in control and continues to act in the best interests of the international community.<sup>147</sup> The ICJ is empowered by judicial authority that extends beyond that of any other international court.<sup>148</sup> Since membership to the ICJ

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assange-894/. This threat likely portrayed Ecuador's position in a more favorable light to the international community by demonstrating that attempts to negotiate in good faith were met with aggressive behavior from the U.K. and Sweden. *Id.*

146. Several notable steps could have been taken before the U.N. Secretary-General report that could have curbed the use of diplomatic asylum in such a manner that future conflict would have been avoided. One example of such a step is placing certain limits on U.N. membership. *See, e.g., supra* note 125 (discussing the development of diplomatic asylum in Latin America in the years leading up to the U.N. Report on Diplomatic Asylum).

147. Along with its indisputable international nexus, the Assange dispute is also unique in that it implicates each of the purposes stated for the U.N.'s existence. *See* U.N. Charter art. 1 (establishing the four broad purposes of the U.N.: maintaining peace and international security; developing friendly relations; achieving international cooperation; and harmonizing of actions, all of which are implicated by the Assange dispute).

148. This can be implied from the fact that "[a]ll members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice," as well as from the broad discretion the ICJ is permitted to exercise as part of its role. U.N. Charter art. 93, para. 1; ICJ Statute, *supra* note 70, art. 36(2) (the Court has authority to rule on "all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which . . . would constitute a breach of an international obligation; [and] d. the . . . reparation to be made for the breach of an international obligation").



is exclusive, and both Ecuador and the U.K. are *ipso facto* parties to the Statute of the International Court of Justice by virtue of their membership in the U.N.,<sup>149</sup> the Court should take advantage of an opportunity to resolve a dispute between two parties that are bound to its rulings.

An essential aspect of the ICJ's involvement in the Assange dispute is whether either Ecuador or the U.K., each of which stands to lose a great deal if they do not prevail, is willing to allow the ICJ to intervene.<sup>150</sup> Although Ecuador's controversial position has already placed its international reputation at risk—at least amongst Sweden, the U.K., and the United States—an adverse ruling by the ICJ would seemingly bring an end to a situation that Ecuador is content to allow resolve itself.<sup>151</sup> However, the leverage that the U.K. has in the negotiations as a result of their geographical and geopolitical advantages over Ecuador would be at risk if the ICJ were to make an adverse determination.

Although the outcome will primarily impact Assange's future, the ramifications of the case also extend to the various pieces of international law that will be affected by a definitive ruling on diplomatic asylum.<sup>152</sup> The ICJ's role as the U.N.'s judicial organ illustrates that this authority must be exercised in the context of the entire U.N. organization.<sup>153</sup> The fact that the ICJ was established by the U.N. Charter and owes its existence to the very document it has been entrusted to protect demonstrates that an ICJ determination should seek to reach a fair determination, while still promoting the stated purposes of the U.N.<sup>154</sup>

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149. See U.N. Charter art. 93.

150. Prevailing thoughts on diplomatic asylum support the belief that Ecuador would be the underdog in a formal legal proceeding. See Julian Ku, *Ecuador Has Got to Be Bluffing About Its ICJ Case for Assange*, OPINIO JURIS (Aug. 24, 2012), <http://opiniojuris.org/2012/08/24/ecuador-has-got-to-be-bluffing-about-its-icj-case-for-assange/> (stating that Ecuador's potential claim to the ICJ is so preposterous as to "be blown out of the water by the ICJ").

151. See Harding, *supra* note 130.

152. See generally *supra* note 29 (five of the sixteen legal instruments cited by Ecuador as supporting their position were either U.N. documents or were instruments that required U.N. enforcement).

153. See *supra* note 69 and accompanying text.

154. Even though the statute does not specifically provide that the ICJ should consider principles espoused by the U.N., the structure and compe-

If the ICJ is requested to hear<sup>155</sup> the Assange case, the proceeding will provide an opportunity for the ICJ to revisit its inconclusive ruling in *Haya de la Torre* and establish definitive guidelines as to the availability of diplomatic asylum within customary international law.<sup>156</sup> Since the enactment of the OAS Treaty on Diplomatic Asylum, there has not been a definitive ruling by a recognized international body on the availability of diplomatic asylum.<sup>157</sup> As a result, an inevitable conflict has developed over the last fifty years, where the practice of diplomatic asylum has been allowed to flourish in certain areas, and thus become regional custom, while it has fallen into disuse in other regions.<sup>158</sup> As the result of numerous high-profile disputes that highlight the inconsistent law in this field, the ICJ's failure to institute a universal standard for diplomat-

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tence of the Court make it difficult to imagine a case in which the Court is not at least encouraged to take into account such concerns. *See generally* ICJ Statute, *supra* note 70 (setting forth the Court's organization, competence, procedure, advisory opinions, and amendments).

155. The ICJ cannot hear a dispute "of its own motion" and can only review a case when a nation requests them to do so. *See Frequently Asked Questions, INT'L COURT OF JUSTICE (ICJ)*, <http://www.icj-cij.org/information/index.php?p1=7&p2=2> (last visited Jan. 19, 2013). While Ecuador has threatened to pursue such an appeal, there is no evidence that either party has requested that the ICJ resolve the dispute. *Ecuador May File Appeal to ICJ If UK Refuses Assange Safe Passage*, *supra* note 74. Although it is possible that the Court would be asked to give an advisory opinion under Article 65, the Assange dispute is more aptly described as a legal dispute between Ecuador and the U.K. than a legal question to be determined without the two parties' involvement. ICJ Statute, *supra* note 70, art. 65.

156. *See generally* *Asylum (Colom./Peru)*, 1950 I.C.J. 266, 266–89 (Nov. 20) (stating that diplomatic asylum was not protected by international law, but it may exist as customary law if accepted by all parties involved); *Haya de la Torre Case (Colom./Peru)*, 1951 I.C.J. 71, 82 (June 13) (where the Court acknowledged that even though "asylum must cease . . . the Government of Colombia [was] under no obligation to bring this about by surrendering the refugee to the Peruvian authorities").

157. *See* *Kurbalija*, *supra* note 67 (indicating that the issue of diplomatic asylum has not been addressed since the *Haya de la Torre* decision).

158. *See Question of Diplomatic Asylum*, *supra* note 10, ¶ 12 (the seven instances over a period of forty-one years when diplomatic asylum was granted were "purely illustrative" of the "[m]any other examples . . . mentioned in the records in the asylum case and in various publications."); *Asylum*, 1950 I.C.J. at 277 (the "Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected").

ic asylum in the *Haya de la Torre* decision can no longer be ignored.<sup>159</sup>

The urgent nature of the Assange dispute lends itself to review by the ICJ, which should have the opportunity to review both parties' arguments before the situation becomes untenable, which may come either as the result of Assange's declining health or from the mounting adverse implications for foreign relations.<sup>160</sup> The numerous diplomatic missions in foreign countries are undoubtedly affected by the legitimacy of the action taken by Ecuador. In particular, these diplomatic missions have a compelling interest in a definitive ruling on whether diplomatic asylum occupies a role within customary international law.<sup>161</sup> The ICJ's inconclusive resolution to *Haya de la*

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159. While the *Haya de la Torre* decision was binding only on Colombia and Peru, the ICJ should have been aware that its decision would extend beyond the immediate parties. See ICJ Statute, *supra* note 70, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."); *id.* art. 36(2) (establishing the jurisdiction of the Court in most international matters); *id.* art. 38(1) (listing factors that should be considered by the ICJ when making their determination, which include international custom and "the general principles of law recognized by civilized nations").

160. Ecuador has had some concerns about Assange's health, and the U.K. has vowed not to prevent Assange from receiving medical care if it becomes necessary. *Julian Assange 'Has Lung Infection,'* BBC NEWS (Nov. 29, 2012), <http://www.bbc.co.uk/news/uk-20537157>. Furthermore, it is difficult to imagine a scenario in which the U.N. will continue to allow Assange to make public attacks on the United States—as he has done via satellite to the U.N.—without some type of intervention, especially after a U.N. report in March 2012 indicated that Wikileaks ally Bradley Manning "may have been treated inhumanely." See Ashley Fantz, *Assange Speaks via Satellite from London, Calls for End to 'Persecution,'* CNN (Sept. 27, 2012), <http://edition.cnn.com/2012/09/26/world/assange-un-address/index.html>.

161. Resolution of this case would have a significant impact on international relations. On one hand, nations will likely have some guidance as to whether diplomatic asylum is a recognized extension of political asylum within international law. On the other hand, "[m]ost countries are fiercely protective of their embassies" and have a vested interest in the level of protection extended to their embassies under the right of diplomatic asylum. Timothy McDonald, *Assange Case Could Have Wider Impact on Diplomacy*, ABC (Aug. 16, 2012), <http://www.abc.net.au/worldtoday/content/2012/s3569084.htm>. At the very least, most observers agree that the bar to revoking such diplomatic immunity is extremely high, considering both the context and the legislation in place. *Id.*

*Torre* can no longer be seen as a viable option since neither party in the present dispute has shown signs of conceding.<sup>162</sup> The ICJ should take responsibility for mitigating an international crisis of indeterminate proportions by redefining customary international law to address diplomatic asylum, while also addressing the conflicting pieces of international law that have formed the basis for the arguments on both sides of the dispute.<sup>163</sup>

*B. A New Standard Must Provide Clear Guidelines in Order to Ensure Cooperation and Prevent Confusion*

1. Ambiguous Language Has Doomed Application of Diplomatic Asylum on an International Scale

In order to ensure the attention to detail that creating a definitive standard requires, the ICJ must undertake a multi-step process in presenting a solution to the question of diplomatic asylum. The Court must first develop a new standard for diplomatic asylum that incorporates precise language as to how diplomatic asylum will be analyzed in the context of customary international law. A broad rule addressing international human rights, such as the one established by the ICJ in the *Asylum Case*, is inappropriate in that it exhibits significant deference to principles of sovereignty.<sup>164</sup> Further, such sovereign principles are likely to be closely aligned to regional beliefs.<sup>165</sup>

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162. Fittingly, South American ministers encouraged the parties to continue the negotiation process despite voicing public support for Ecuador. *See supra* note 129.

163. *See generally supra* note 29 (listing the numerous legal instruments cited by Ecuador in support of its decision to grant Assange diplomatic asylum); note 31 (illustrating the “conflicting viewpoints” between Ecuador and the U.K. regarding the countries’ international obligations).

164. The consequence of a deferential resolution may be perceived as the Court’s acquiescence to subsequent events in the regions that are affected, such as the events that transpired after the *Haya de la Torre* cases. *See generally Question of Diplomatic Asylum, supra* note 10 (discussing the history and growth of diplomatic asylum, most notably in Latin America).

165. *See supra* note 139 (stating that regional organizations are specifically designed to address issues that would otherwise go unresolved in the larger international community).

While regional customs and sovereign principles are important in determining the context in which a dispute arises, the function of an international dispute resolution body is to provide a solution "in accordance with international law."<sup>166</sup> Thus, even when a regional dispute such as *Haya de la Torre* comes before the ICJ, the ICJ has broad discretion to determine what canons of international law apply.<sup>167</sup> Since the U.N. Charter and international treaties merely provide guidelines for member states, and not a binding body of law, the ICJ is entrusted to interpret ambiguous international standards for disputes that often result from a basic lack of conformity amongst different legal systems.<sup>168</sup>

The ICJ's ruling in *Asylum Case* was notably lacking in its effort to define absolute terms that would bind the parties to customary international law. The Court's broad statement that "asylum cannot be opposed to the operation of justice"<sup>169</sup> provided an opportunity for nations to adopt their own interpretations on when this would be implicated.<sup>170</sup> The custom that resulted from the OAS Convention on Diplomatic Asylum ap-

166. ICJ Statute, *supra* note 70, art. 38(1).

167. Within its broad responsibility "to decide in accordance with international law," the ICJ is to apply,

- a. international conventions . . . establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; [and] d. . . . judicial decisions and the teachings . . . of the various nations, as subsidiary means for the determination of rules of law.

*Id.*

168. The International Criminal Court is a reflection of an attempt to codify certain aspects of criminal law in international law, although the court's efforts up to this point have concentrated on crimes committed on a large scale. For instance, it has attempted to "reach[] a consensus on definitions of genocide, crimes against humanity and war crimes." *About the Court*, INT'L CRIM. CT., <http://www2.icc-cpi.int/Menu/ICC/About+the+Court/> (last visited Jan. 19, 2013).

169. *Asylum (Colom./Peru)*, 1950 I.C.J. 266, 284 (Nov. 20).

170. The Court's attempt to qualify this term, by stating that "[t]he safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals[.]" *id.*, missed the mark by failing to limit the subjectivity of the term "justice."

pears to comport with the ICJ's general advice to observe customary law and undertake good faith efforts to come to a negotiated settlement.<sup>171</sup> Although the *Haya de la Torre* model has survived for more than fifty years, it is apparent that a new standard must emerge that better takes into account globalization and the importance of uniformity regarding fundamental human rights.

The *Asylum Case* standard initially failed in its effort to specify whether different standards would apply to political asylum and diplomatic asylum.<sup>172</sup> Specific conditions relating to the "urgency" and duration of diplomatic asylum must not only define asylum in general terms, but also address whether political asylum and diplomatic asylum will be treated differently in the future.<sup>173</sup> The urgency of a case is dependent on numerous factors and thus almost entirely reliant on a subjective determination by the nation granting asylum.<sup>174</sup> A modern determination should therefore seek to establish an objective standard that is not subject to the fanciful interpretations that accompany illusive terms such as "reasonable fear of political persecution."

## 2. A Clearly Defined Role for Diplomatic Asylum

In defining the standard for diplomatic asylum, the ICJ should proceed with various goals in mind. First, the Court

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171. See Convention on Diplomatic Asylum, *supra* note 12, art. 9 ("[t]he official furnishing asylum shall take into account the information furnished to him by the territorial government in forming his judgment as to the nature of the offense or the existence of related common crimes"). Although the precise usage patterns amongst OAS members remain unknown, the absence of any recent dispute that has garnered international attention appears to indicate that the concept is widely accepted and rarely challenged, or at least resolved amicably between the interested nations.

172. The Court itself acknowledged that the two parties' arguments "reveal[ed] a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other." *Asylum*, 1950 I.C.J. at 274.

173. From the Havana Convention, the ICJ held that diplomatic asylum "can be granted only to political offenders who are not accused or condemned for common crimes and only in urgent cases and for the time strictly indispensable for the safety of the refugee." *Id.* at 278.

174. In determining that *Haya de la Torre's* case was not of an "urgent character," the Court did not establish a helpful standard for future use, but implied that the determination was almost entirely contextual. *Id.* at 283–87.

should firmly establish the scope of diplomatic asylum within international human rights law.<sup>175</sup> In an effort to monitor its use, the ICJ should recognize diplomatic asylum as a subset of political asylum within customary international law.<sup>176</sup> A significant reason behind the international failure to regulate diplomatic asylum is the divergent paths that were taken after *Asylum Case*.<sup>177</sup> By broadening the applicability of diplomatic asylum law, the ICJ would thereby eliminate disputes about what constitutes "international custom," defined by the Court "as evidence of a general practice accepted as law."<sup>178</sup> This would preclude the Court from engaging in fact-intensive investigations of past use, such as whether diplomatic asylum is a part of U.S. custom as a result of its sporadic but infamous use of the right over the past century.<sup>179</sup> The expanded scope of

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175. Within pieces of recognized international law, the formal international stance on the incident is that diplomatic asylum is not officially recognized by most countries. See *Question of Diplomatic Asylum*, *supra* note 10, ¶ 155 (arguing that diplomatic asylum "had not been accepted by the majority of European States, and by the United Kingdom Government in particular"). However this dispute, along with the prevalence of diplomatic asylum in Latin America, and notable instances of use by the United States over the past fifty years, has certainly raised questions as to how nations view diplomatic asylum unofficially. See, e.g., Greene, *supra* note 28 (listing three cases where the United States granted asylum to those who sought refuge in its diplomatic missions).

176. In retaining the right to differentiate between political and diplomatic asylum, the ICJ should determine that the broad protection offered by Article 14 of the UDHR only applies in cases of political asylum, so as to not restrict human rights any more than necessary. Article 14(1) of the Universal Declaration of Human Rights provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." See UDHR, *supra* note 11.

177. See generally *Question of Diplomatic Asylum*, *supra* note 10 (discussing how a system had developed amongst Latin American countries whereby ad hoc administration of diplomatic asylum had become sufficiently prominent so as to become an important part of regional human rights law, while the right had all but ceased to be granted in all other parts of the world).

178. ICJ Statute, *supra* note 70, art. 38(1)(b). The *Haya de la Torre* case demonstrates that even evidence of past practice does not necessarily signify the existence of custom in a specific country. See *Asylum (Colom./Peru)*, 1950 I.C.J. 266, 277 (Nov. 20) (holding that the evidence failed to demonstrate that the right of diplomatic asylum existed as custom in Colombia).

179. See Austerhuhle, *supra* note 100 (recalling the infamous U.S. diplomatic asylum case involving József Mindszenty); Greene, *supra* note 28 (citing to an article discussing key international precedents involving diplomatic

diplomatic asylum would also result in each U.N. member being bound by the same terms, so as to enable each nation to tailor its other international responsibilities around a uniform principle of diplomatic asylum.

Having addressed to whom diplomatic asylum will apply, the Court should then move on to its most important role: establishing the requisite conditions for when diplomatic asylum may be granted. As it currently stands, the OAS Convention on Diplomatic Asylum provides that nations have wide discretion in situations where diplomatic asylum is available.<sup>180</sup> The only qualification to this unfettered discretion appears to be that there must be a good faith effort by a nation to “take into account the information furnished to [it] by the territorial government in forming [its] judgment as to the nature of the offense or the existence of related common crimes.”<sup>181</sup> The expansive language of the UDHR provides no further instruction as to *when* asylum should be granted.<sup>182</sup> The absence of a tem-

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asylum). In February 2012, the United States notably chose not to grant diplomatic asylum to Wang Lijun. Wang Lijun ended the rein of Chongqing Communist Party Chief, Bo Xilai, due in large part to “his role in a widening political scandal inside China.” Jay Solomon & Devlin Barrett, *U.S. Saw Top Cop as Risky Asylum Candidate*, WALL ST. J., (Apr. 24, 2012), <http://online.wsj.com/article/SB10001424052702303459004577362360212353368.html>.

180. Article IV of the OAS Convention on Diplomatic Asylum provides that “[i]t shall rest with the State granting asylum to determine the nature of the offense or the motives for the persecution.” Convention on Diplomatic Asylum, *supra* note 12, art. 4.

181. *Id.* art. 9. In this regard, however, the Dominican Republic did make a reservation to the applicability of diplomatic asylum in certain situations, specifically “to any controversies that may arise between the territorial State and the State granting asylum, that refer specifically to the absence of a serious situation or the non-existence of a true act of persecution against the asylee by the local authorities.” *Convention on Diplomatic Asylum: General Information*, *supra* note 12.

182. Article 14 provides only that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” Universal Declaration of Human Rights, *supra* note 11. Article II of the OAS Convention on Diplomatic Asylum additionally provides that “[e]very State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it.” Convention on Diplomatic Asylum, *supra* note 12, art. 2. However, Guatemala and Uruguay both made reservations to this provision, arguing that states



poral element may have symbolized an effort to allow countries to make subjective determinations in constantly evolving political times.<sup>183</sup>

A specific standard for when diplomatic asylum applies should first seek to place a time limit on the duration of a grant of diplomatic asylum. The lack of a fixed duration has proven problematic for both OAS nations and the United States.<sup>184</sup> Although the United States does not depart from its stated policy against diplomatic asylum, the instances in which the United States has granted diplomatic asylum have signaled its willingness to allow asylees to remain in U.S. missions for long periods of time.<sup>185</sup> While cooperation amongst OAS nations has generally facilitated this process, Latin America has encountered difficulties with regard to extended grants of diplomatic asylum.<sup>186</sup>

An established duration would reflect a compromise between the complete elimination of diplomatic asylum and the OAS'

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did have an affirmative obligation to grant asylum in certain circumstances. *Convention on Diplomatic Asylum: General Information*, *supra* note 12.

183. The decision to institute such expansive language may similarly reflect an effort to allow the U.N. flexibility to determine the validity of individual asylum cases, rather than risk the possibility of individual nations infringing on human rights. This possibility is supported by the creation of the United Nations High Commissioner for Refugees, which was established in 1950 to "lead and coordinate international action to protect refugees and resolve refugee problems worldwide." *About Us*, UNHCR, <http://www.unhcr.org/pages/49c3646c2.html> (last visited Jan. 19, 2013).

184. *See generally* Angela Rossitto, *Diplomatic Asylum in the United States and Latin America: A Comparative Analysis*, 13 BROOK. J. INT'L L. 111, 118–27, 130–34 (1987) (providing "analysis of the limited United States practice of granting asylum" and of "controversial events . . . that demonstrate the ways in which Latin America's rather liberal policy has proven to be problematic").

185. *See id.* at 118–20. Although the Soviets did not appreciate that the United States had granted diplomatic asylum to Mindszenty, the United States was similarly upset that the ordeal lasted fifteen years. *Id.* Seven Russian Pentecostal dissidents remained in the U.S. embassy in Russia for more than three years. *Id.* at 120–21.

186. *See id.* at 130–31. Safe-conducts were provided to military prisoners after approximately five months in the Peruvian embassy in Caracas, Venezuela. *Id.* Haya de la Torre remained in the Colombian embassy in Lima from 1949 to 1954, before he was permitted to leave. *Victor Raúl Haya de la Torre*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/257669/Victor-Raul-Haya-de-la-Torre> (last visited Feb. 18, 2013).

standard “for the time strictly indispensable for the safety of the refugee.”<sup>187</sup> Such broad language places exclusive reliance on a negotiated solution, since it is difficult to imagine a scenario in which the “safety of a refugee” is ensured without an amicable resolution between parties.<sup>188</sup> Thus, a short duration permits both parties sufficient time to engage in good faith efforts to reach a negotiated solution before the parties become subject to consequences that accompany a failure to reach a mutually agreed upon resolution.<sup>189</sup>

Conflicts without an established date for resolution also raise the important question of how diplomatic asylum should be terminated if no amicable resolution is reached between the parties. This is the precise issue that the ICJ considered in its *Haya de la Torre* judgment when the ICJ refused to compel Haya de la Torre’s surrender to Peru because such an action would reward Peru with custody of Haya de la Torre.<sup>190</sup> The consequences of failing to come to an agreement prior to the expiration of the six-month duration of asylum that should be implemented in all future cases of diplomatic asylum should have repercussions that both parties will acknowledge as legitimate, but only to the extent that it encourages good faith negotiation.<sup>191</sup>

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187. Asylum (Colom./Peru), 1950 I.C.J. 266, 278 (Nov. 20). This language was later changed to “the period of time strictly necessary for the asylee to depart from the country with the guarantees granted by the Government of the territorial state . . . .” Convention on Diplomatic Asylum, *supra* note 12, art. 5.

188. Such reliance lends credence to Ecuador’s refusal to budge on its stance, as the *de facto* position permits them to keep Assange indefinitely. See *supra* note 130 (stating Ecuador’s willingness to allow Assange to remain in its embassy for “two centuries” if necessary).

189. While a fixed duration would not necessarily encourage an expeditious result, it would give both parties ample opportunity to explore various avenues for a settlement. It also shows that diplomatic asylum cases are often illustrative of larger political differences that take time to resolve.

190. *Haya de la Torre Case* (Colom./Peru), 1951 I.C.J. 71, 81–82 (June 13). The court inexplicably provided no further guidance as to how Haya de la Torre’s asylum should be terminated, alleging that such advice would require the Court to “depart from its judicial function.” *Id.* at 83.

191. As it currently stands, whether a party is willing to make a good faith effort in negotiation is affected by the strength of its bargaining position. See *supra* note 185 (arguing that Ecuador has the superior bargaining position at

The ICJ should thus mandate that all unresolved disputes be referred to an independent international body that would definitively rule on the validity of a diplomatic asylum case. Since the primary purpose of such an international body would be to encourage a negotiated resolution and discourage the pursuit of independent judicial review, this review body would ideally be the creation of an organization that deals with human rights cases, such as the United Nations High Commissioner for Refugees ("UNHCR").<sup>192</sup> For parties that do not want to face the uncertainty that accompanies a judicial proceeding, a negotiated settlement within the fixed time period provides the only alternative.

When the independent tribunal is called upon to resolve a diplomatic asylum dispute, it is important that a specific legal standard is applied to the individuals that have been granted asylum. First, the tribunal should defer to the penal system in the nation bringing the charges in determining whether the asylee is sought for a "common crime."<sup>193</sup> The tribunal's interpretation of this term provides a safeguard to ensure that poor foreign relations between nations will not impact whether specific misconduct is classified as a "common crime." Next, the tribunal should make the conclusive determination whether the asylee faces a "reasonable fear of political persecution." It is only at this point that the tribunal will determine which of two courses of action is appropriate: surrender the party to the nation seeking prosecution, or recognize the party's permanent political asylee status and allow for safe passage into the nation that has granted diplomatic asylum.<sup>194</sup>

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this point because the de facto position is that Assange remains in its embassy, and history has demonstrated that such standoffs can last for long periods of time).

192. Judicial review led by the UNHCR would be ideal, not only for UNHCR's history of dealing with asylum and refugees, but also because its authority is granted by the U.N. *About Us*, *supra* note 180.

193. *See* *Asylum (Colom./Peru)*, 1950 I.C.J. 266, 278 (Nov. 20) (holding that, under the Havana Convention, diplomatic asylum "can be granted only to political offenders who are not accused or condemned for common crimes . . .").

194. The importance of the only two potential outcomes is that both outcomes present a natural conclusion to the temporary status of diplomatic asylum, which should be the primary goal.

While this proposed proceeding is assuredly a fact-intensive determination that rests upon the subjective determination of a third party, it only comes at the end of a process that has presented numerous opportunities for both sides to resolve the dispute amicably without judicial interference. Further, the subjective determination is entrusted to a judicial body intrinsically qualified to make determinations on sensitive human rights matters in an efficient manner that reflects the magnitude of the proceedings.<sup>195</sup> A judicial body that has adhered to the process outlined above will offer substantial clarity to a system that has led some to question whether diplomatic asylum is recognized by international law.

#### CONCLUSION

Julian Assange's stay in the Ecuadorean embassy has provided the international community an opportunity to address an area of law that has needed clarification since it was first recognized more than sixty years ago.<sup>196</sup> As the role of asylum law has changed in conjunction with increased international interest in human rights, the uncertainty surrounding the right of diplomatic asylum has been largely disregarded in favor of guaranteeing widespread protection from persecution.<sup>197</sup> The result has been nearly unfettered limits to a principle that has grown within the right of political asylum, providing pro-

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195. The ability to make such determinations in a competent manner is perhaps the most important role of this independent tribunal, since such expertise has a significant impact on the parties' willingness to resolve their dispute in front of this judicial body.

196. Although the right of asylum draws aspects from various pieces of law, the *Asylum Case* and *Haya de la Torre* decisions and the OAS Convention on Diplomatic Asylum provide the necessary foundation for diplomatic asylum law. See *supra* notes 12 (stating that the OAS Convention on Diplomatic Asylum provides the framework for how diplomatic asylum will be administered amongst parties to the treaty), 69 (*Asylum Case* addressed whether diplomatic asylum was recognized by international law, while the *Haya de la Torre* case centered upon whether Colombia was compelled to surrender Haya de la Torre to the Peruvian government).

197. This increased interest in human rights is perhaps best illustrated by the history of the UNHCR. This organization has grown from thirty-four staff members in 1954, to more than 7,000 members in 2012, and has been awarded two Nobel Peace Prizes, most recently in 1981 for "worldwide assistance [of] refugees." *About Us, supra* note 180.

tection within diplomatic premises to individuals fleeing persecution by sovereign nations.

While the availability of political asylum is an important tool in the protection of human rights on a global scale, definitive limits must be placed on a tool with such expansive reach. Geopolitical differences have allowed definitions of asylum to diverge, resulting in the growth of diplomatic asylum in Latin America.<sup>198</sup> Notably, this unprecedented growth has seemingly coincided with an increased lack of acceptance of diplomatic asylum amongst most other countries. The Assange dispute has demonstrated that separate treatment for political refugees based on their geographic location can result in contentious disputes that extend beyond the question of human rights. As the supreme international organization, the U.N. should not allow the Assange dispute to dissipate before definitively providing a binding international standard on the permissibility of the concept of diplomatic asylum. Failure to take such decisive action may have drastic consequences for the future, when additional disputes over the right of diplomatic asylum under an imprecise standard could have a disastrous effect on foreign relations.

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198. See *Question of Diplomatic Asylum*, *supra* note 10, ¶ 12 (noting famous instances where diplomatic asylum had been granted in Latin America from 1850 to 1891).

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