Opinion

In the Matter of
Julian Assange and Certain Issues arising in an Application for Extradition

by

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1. Introduction

1. I have been asked to give my preliminary views on the international legal implications arising from the application by the United States of America for the extradition of Mr Julian Assange from the United Kingdom, considered in the light of certain 'information gathering' activities conducted in the Embassy of Ecuador in London at various times between 2016 and 2019.

2. Statement of Qualifications

2. I am currently Professor of Law at the University of New South Wales (UNSW) and Acting Director of the Kaldor Centre for International Refugee Law (UNSW). I am Emeritus Fellow of All Souls College, Oxford, Emeritus Professor of International Refugee Law at the University of Oxford, an Honorary Associate of Oxford's Refugee Studies Centre, and Co-Chair of the American Society of International Law's International Refugee Law Interest Group.

3. I was Rubin Director of Research in the University of Oxford Institute of European Studies from 1997-2002, held the Chair in Asylum Law in the University of Amsterdam, The Netherlands, from 1994-2000, and I have held Visiting Professorships at the Université Libre de Bruxelles, the Geneva Academy of International Humanitarian Law and Human Rights, the European University Institute and the University of Melbourne, while also lecturing widely on international refugee law in many different countries.

4. From 2002-2018, I practised as a Barrister at Blackstone Chambers, London, specialising in public international law, human rights, citizenship, and refugee and asylum law, in the course of which I appeared before the Courts of the United Kingdom, the European Court of Human Rights, and the International Court of Justice.

5. From 1976 to 1988 I served as a Legal Adviser for the Office of the United Nations High Commissioner for Refugees (UNHCR) in various posts throughout the world. I have acted from time to time as Consultant on international law to government departments in various countries, to a number of international organizations, including UNHCR, the

Inter-Parliamentary Union, the World Health Organization and the Council of Europe, and to various non-governmental organizations.

6. I am the author of, among others, *The Refugee in International Law*, Oxford: Oxford University Press, 1st edition, 1983; 2nd edition, 1996; 3rd edition (with Professor Jane McAdam), 2007; 4th edition (with Professor Jane McAdam and Emma Dunlop), forthcoming 2020; *International Law and the Movement of Persons between States*, Oxford: Clarendon Press, 1978; and many articles on refugees, refugee law and migration. I was the Founding Editor of the *International Journal of Refugee Law*, was the Editor-in-Chief from 1989 to 2001, and continue as a member of the Editorial Board.

3. Background

7. On 16 June 2016, I attended a meeting at the Ecuadorian Embassy in London to discuss the international legal aspects of the asylum accorded to Mr Julian Assange. Those attending included the Foreign Minister of Ecuador, senior Ecuadorian officials, and members of Mr Assange's legal team. Before entering the ground floor meeting room, I left my passport, phone and tablet 'at the door', together with unlocked luggage (I was en route to give lectures in Italy).

8. I naturally assumed that, given the precautions taken before entry, such a legal conference would be secure and confidential. I was therefore somewhat shocked, to say the least, to learn in late 2019 that my name featured in papers lodged in connection with legal proceedings in Spain concerning the disclosure of confidential information, that the occasion of my visit and participation had been shared with various parties, and that my 'electronic equipment' may have been copied and the contents also shared.

9. Further to these events and taking account of the context in which asylum had been granted by Ecuador to Mr Assange, I have now been asked for my opinion on (1) the international law aspects of the reported surveillance, documentation and sharing of confidential information gathered from the Ecuadorian Embassy in London, so far as the gathering of such information may have been initiated, continued, encouraged or exploited by another State; and (2) the legal impact of such activities and other

contemporaneous and continuing activities on proceedings (the extradition request) in which Mr Assange's liberty and security are in issue.

4. Issues arising

4.1 'Respect' for the institution of asylum

10. From the perspective of international law, certain general principles require and govern the 'respect' which States owe to the institution of asylum, to the asylee, and to the asylum-granting State and those representing that State.

11. Although the individual's right to be granted asylum may still be contested, there is no doubt whatsoever that every State has the right to grant asylum, that it alone is competent to evaluate the grounds for asylum, and that every other State is obliged to respect the grant of asylum as an exercise of sovereignty.

12. In discussions in the International Law Commission leading to the UN General Assembly's unanimous adoption of the 1967 Declaration on Territorial Asylum, the soundness of the principle that all States should respect the grant of asylum by another State was agreed.[1] In the Third Committee of the General Assembly there was also considerable support for the principle that the State granting asylum was alone competent to define the grounds,[2] that the grant of asylum should be respected by other States, and that it was to be seen as a 'peaceful and humanitarian act'. These basic propositions are specifically recalled in the Preamble and Article 1 of the 1967 Declaration,[3] in regional

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[1] UN doc. E/CN.4/804, paras. 94, 99-104.

[2] UN doc. A/C.3/SR.1195, para. 18; UN doc. A/C.3/SR.1196, para. 1.

[3] UNGA resolution 2312 (XXII), 1967 UN Declaration on Territorial Asylum, Preamble: 'the grant of asylum by a State... is a peaceful and humanitarian act and... as such, it cannot be regarded as unfriendly by any other State...'; Article 1(1): 'Asylum granted by a State, in the exercise of its sovereignty... shall be respected by all other States.' Article 1(3): 'It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.'

and other instruments dealing with both territorial and diplomatic asylum,[4] and in various international judicial rulings.[5]

13. Besides reflecting the sovereign competence of every State, the institution of asylum is concerned with protecting human rights. This provides a parallel context in which *all* States are obliged to respect human rights, and to ensure their protection and effective exercise.[6]

14. Of course, neither the fact of sovereignty nor human rights obligations have always succeeded in restraining certain States from trying to challenge the grant of asylum, as in the *Asylum/Haya de la Torre* cases; or from trying to circumvent refugee protection by resorting to extradition, as in the Hakeem Al-Araibi case;[7] or from resorting, in extreme cases, to assassination and attempted assassination, as in the 1978 UK case of Georgi Markov and the nerve agent attacks in Shrewsbury in 2018.

15. Leaving aside such overt examples, the sovereignty of an asylum-granting State (and the security and well-being of asylees) can clearly be compromised in other ways, of which Australia's actions against Timor-Leste are illustrative. These included the bugging of Timor-Leste government offices during treaty negotiations in the early 2000s regarding the exploration and exploitation of the resources of the Timor Sea, which ultimately led to the denunciation of the treaty for want of good faith. The parties entered into arbitration with a view to a new agreement, but were then interrupted when the Australian Federal Police raided the Canberra offices of lawyers representing Timor-Leste and seized a body of documents and correspondence, including legal advice.

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[4] See Articles 1, 2, 1954 Caracas Convention on Territorial Asylum: OAS Official Records, OEA/Ser.X/1. Treaty Series 34; Article 1, 1954 Caracas Convention on Diplomatic Asylum: OAS Official Records, OEA/Ser.X/1. Treaty Series 34; Conclusion III(4), 1984 Cartagena Declaration on Refugees; Article II(2), 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa: 1000 UNTS 46.

[5] International Court of Justice, *Asylum Case (Colombia v. Peru)* [1950 ICJ *Reports* 266, 276; Judge Read, diss., 318; Inter-American Court of Human Rights, *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*, Advisory Opinion OC-25/18, 30 May 2018, para. 167.

[6] Inter-American Court of Human Rights, *Advisory Opinion*, above note, para. 169.

[7] Hakeem Al-Araibi, recognized as a refugee in Australia, was detained in Bangkok, Thailand, after an Interpol Red Notice was issued by his country of origin; he was released and returned to Australia after a public outcry and intervention by the Australian Government. For an example, of disguised extradition, see *R v. Governor of Brixton Prison, ex parte Soblen* [1963] 2 Q.B. 243.

16. As the International Court of Justice remarked in proceedings begun in 2013, Timor-Leste's 'right to communicate with its counsel and lawyers in a confidential manner... might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order...'[8]

17. The Court added that Timor-Leste's right, 'to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm', if the confidentiality of the seized material was not safeguarded; that any breach of confidentiality might not be capable of remedy or reparation; and that there was an 'imminent risk of irreparable harm', given the Australian Government's less than comprehensive assurance that it would not make use of the material seized.[9]

18. This particular case involved one State's unlawful interference – spying – in the sovereign affairs of another, with a view to advancing its own national and commercial interests.[10] In my view, the same legal restraints apply by analogy, and in principle, no less a wrong would be done, were the target instead to be an individual within the embassy of a State, whom the interfering State hoped and intended to prosecute. The violation of one State's sovereignty would then be joined by the likely violation of the individual's fundamental rights to due process and equality of arms, if confidential, privileged information were to be used in trial.

19. What is less clear from the preliminary outline provided to me is whether the change of circumstances in 2016 and various events and activities thereafter are sufficient to indicate either, (a) that one State has coerced another to act contrary to international law, including those obligations *erga omnes* which protect human rights; or (b) that two or more States, acting together, are responsible for one or more violations of international law.

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[8] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, [2014] ICJ *Reports*, para. 24. At this stage of an application for provisional measures, the Court was not required to decide exactly what was the source or extent of the right claimed by Timor-Leste.

[9] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste. Australia)*, Provisional Measures, Order of 3 March 2014, [2014] ICJ Reports, 157-9, paras. 42-8. At this stage in the proceedings, the Australian Government had indicated that, notwithstanding any claim of lawyer-client privilege or sovereign entitlement, it envisaged the possibility of making use of that material in certain circumstances involving national security. The issues between the parties were eventually settled by agreement.

[10] 'Witness K and the "outrageous" spy scandal that failed to shame Australia': *Guardian*, 9 August 2019.

20. The rules are clear in both cases, and if the evidential threshold is met for either (a) or (b) above, then one or more breaches of international law will follow.[11] On the basis of the outline of evidence provided so far, it appears to me that the threshold may have been met, but I would wish to have further information in respect of this aspect.

4.2 Impact of extra-legal activities on the request for extradition

21. In light of the above, a further question concerns the possible impact of the surveillance, copying and sharing of confidential and privileged information, as well as other contemporaneous and continuing activities, on the forthcoming extradition proceedings against Mr Assange.

22. As a preliminary matter, it may be noted that Mr Assange is not a citizen of the United States of America and that most of the charges levelled against Mr Assange are drawn from the US Espionage Act. Espionage is not defined in international law; it is neither an international crime nor a serious crime of international concern, and it is commonly considered to be a 'purely' political offence, which either would not be listed as an extradition offence, or is one for which surrender would be refused.[12]

23. In addition to the political offence as a bar to extradition, the bases of protection also now reflect principles having their solid foundation in international refugee law. Thus, it is now common to find that extradition and mutual assistance in criminal matters may be declined where the request has been made for the purpose of prosecuting or punishing a

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[11] See International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts: UNGA res. 56/83, 12 December 2001, Annex, Article 16, 'Aid or assistance in the commission of an internationally wrongful act'; Article 17, 'Direction and control exercised over the commission of an internationally wrongful act'; Article 18, 'Coercion of another State'.

[12] Cf. *Bourke v Attorney General* 107 Ir. L.T.R. 33 (1973): The Irish Supreme Court held that the escape of a Soviet spy, George Blake, from an English prison was a political offence, and that Bourke's assistance in that escape was an offence connected with a political offence. See also M. R. García-Mora, 'Treason, Sedition and Espionage as Political Offenses under the Law of Extradition', (1964-1965) 26 *University of Pittsburgh Law Review* 65. Castel & Edwardh note that, 'The term political crime embraces two categories of offences. The first category includes *purely political offences* such as treason, sedition and espionage. These offences are readily identifiable and are classified as *purely political* because they are directed against the political organization or government of the state, injuring only public rights and containing no element of common crime' (emphasis added): J-G. Castel & M. Edwardh, 'Political Offences: Extradition and Deportation: Recent Canadian Developments', (1975) 13 *Osgoode Hall Law Journal* 89, 92; C. L. Cantrell, The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland', (1977) 60 *Marquette Law Review* 777, 780.

person on account of their race, religion, nationality or political opinion, or if their position may be prejudiced for any of these reasons.[13]

24. This protection approach is reflected in section 81 of the Extradition Act 2003, within the rubric of 'extraneous considerations'; a person's extradition is barred if it appears that –

> (a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or
> (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.[14]

25. It is against this background and the political opinions involved, therefore, that the evidence of surveillance and the sharing of confidential, privileged information needs to be considered, and an assessment made of whether these factors indicate more clearly the political motivation, intent and purpose of the extradition request, or otherwise indicate the likelihood of prejudice, punishment, detention or other restrictions on liberty by reason of extraneous circumstances, as described above in paragraphs 23 and 24. The preliminary outline of evidence before me suggests that this appears to be the case.

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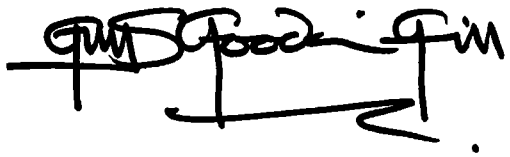
[13] See, for example, Article 3(2), 1957 European Convention on Extradition: ETS No. 24; Article 5, 1977 European Convention on the Suppression of Terrorism: ETS No. 90. Cf. Article 1A(2), 1951 Convention relating to the Status of Refugees – a refugee is someone who, among other factors, has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

[14] This exception is also expressly included in the USA's treaties with other countries, including Jamaica, Bahamas, Cyprus and France; see Congressional Research Service, 'Extradition To and From the United States: Overview of the Law and Contemporary Treaties', Report no. 98-958, 2016, 7-8, n. 37: **https://www.everycrsreport.com/reports/98-958.html**.

Statement of Truth

I confirm that insofar as the facts stated in my Report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.



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