NOTE

Chen Guangcheng and Julian Assange: The Normative Impact of International Incidents on Diplomatic Asylum Law

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ABSTRACT

The practice of diplomatic asylum, by which countries grant asylum within the walls of their embassies abroad, is not widely recognized in international law. Outside of Latin America, no multilateral treaty accepts a right to grant diplomatic asylum and the International Court of Justice rejected the practice decades ago. Yet countries continue to accept high-profile individuals into their embassies in contravention of these international legal authorities.

The United States' acceptance of Chinese political dissident Chen Guangcheng into its embassy in Beijing and Ecuador's grant of diplomatic asylum to WikiLeaks founder Julian Assange at its embassy in London represent two recent examples. This Note argues that these incidents demonstrate a norm that certain elements of diplomatic asylum practice are actually accepted components of international law. Furthermore, it seeks to show that failure to recognize this norm undermines international legal practice more generally. This Note also examines the implications of the norm generated by these incidents within the context of current foreign relations practice.

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Introduction

Blind political dissident Chen Guangcheng drew the ire of the Chinese Communist Party through his opposition to forced abortions and sterilizations that were used in his region to enforce China's one-child policy.[1] A self-taught lawyer, Chen sued the government and,

[1] Hannah Beech, *Heroes and Pioneers: Chen Guangcheng*, Time, May 8, 2006, at 115, 115. In place since 1980, China's one-child policy intends to control population growth by penalizing couples for having more than a single child, though many exceptions are available. *See* Edward Wong, *Pressure Grows in China to End One-Child Law*, N.Y. Times, July 23, 2012, at A1. "[C]ritics say that enforcement of the policy leads to widespread abuses, including forced abortions, because many local governments reward or penalize officials based on how well they keep down the population." *Id.*

for more than a year and a half, remained under an informal house arrest enforced by local thugs who prevented anyone from entering or exiting his home.[2] One night, after weeks of planning, he executed a daring escape[3] and traveled to Beijing, where an action film-style car chase ensued when he entered an American diplomatic vehicle that ultimately brought him to the United States' embassy compound.[4]

In contrast to Chen's home confinement, which did not directly result from formal legal charges,[5] Swedish authorities sought WikiLeaks founder Julian Assange for questioning related to accusations of rape, sexual molestation, and unlawful coercion made by two women in Stockholm.[6] An Australian national, Assange had been undergoing extradition proceedings[7] in the United Kingdom before Ecuadorean President Rafael Correa granted him asylum in Ecuador's London embassy.[8] Assange remains in the Ecuadorean embassy today, which is surrounded by British police to prevent his flight from the United Kingdom's territorial boundaries.[9]

The Chen and Assange incidents provide evidence that diplomatic asylum[10] is an international norm, despite currently accepted in-

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2 *See* Beech, *supra* note 1, at 115; Isaac Stone Fish, *Citizen Chen*, FOREIGN POL'Y (May 2, 2012), http://www.foreignpolicy.com/articles/2012/05/02/chen_guangcheng_supporters.

3 James Fallows, *Brave Thinkers: Chen Guangcheng*, ATLANTIC MONTHLY, Nov. 2012, at 52, 53 ("Chen . . . showed physical courage . . . in climbing over walls and feeling his way along roadsides for miles.").

4 *See* SUSAN V. LAWRENCE & THOMAS LUM, CONG. RESEARCH SERV., R42554, U.S.-CHINA DIPLOMACY OVER CHINESE LEGAL ADVOCATE CHEN GUANGCHENG 3 (2012) ("U.S. Ambassador Gary Locke described the operation to retrieve Chen as 'almost a maneuver out of Mission Impossible.'").

5 *See Chen Guangcheng: His Case, Cause, Family, and Those Who Are Helping Him: Hearing Before the Subcomm. on Afr., Global Health & Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 1 (2012) (statement of Rep. Christopher H. Smith, Chairman, H. Subcomm. on Afr., Global Health & Human Rights) ("Mr. Chen was sentenced to 51 months in prison on trumped-up charges and then subjected to extralegal house arrest where the beatings continued.").

6 Ravi Somaiya, *Assange Accuses U.S. of 'Witch Hunt' Against WikiLeaks*, N.Y. TIMES, Aug. 20, 2012, at A7.

7 Ravi Somaiya, *WikiLeaks Founder Loses in Court Again*, N.Y. TIMES, June 15, 2012, at A8.

8 *Ecuador and Julian Assange: An Ecuadorean History of the World*, ECONOMIST, Aug. 25, 2012, at 26, 26 [hereinafter *Ecuador and Julian Assange*].

9 Sarah Ellison, *The Man Who Came to Dinner*, VANITY FAIR, Oct. 2013, at 300, 302.

10 Diplomatic asylum is the grant of refuge by an "embassy or legation to a political refugee who has incurred the disfavor of the government of the territorial state. Its effectiveness results from the inviolability of the embassy rather than from immunity of the individual in question." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 77 n.2 (1965); *see also* Susanne Riveles, *Diplomatic Asylum As a Human Right: The Case of the Durban Six*, 11 HUM. RTS. Q. 139, 143 (1989). Diplomatic asylum differs from territorial asylum, where asylum is sought

ternational legal opinion that it is not.[11] Chen and Assange received admission into embassies.[12] The United States and Ecuador, respectively, determined the nature of the asylees'[13] purported offenses, believed the offenses' nature provided sufficient support for granting refuge in an embassy, and judged that urgency required immediate acceptance.[14] Neither China nor the United Kingdom, however, agreed to provide Chen or Assange safe passage outside of its borders based on a sense of obligation.[15] In Chen's case, the United States and China negotiated a resolution.[16] Assange remains in Ecuador's London embassy and U.K. officials do not seem ready to allow him to leave.[17]

Outside of Latin America, the principle of diplomatic asylum is not generally accepted as international law.[18] No widely accepted multilateral treaty governing this practice exists and the International Court of Justice rejected it as customary law decades ago.[19] Additionally, most major international actors outwardly reject diplomatic asylum.[20]

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within the territorial boundaries of the granting state. Anthea J. Jeffrey, *Diplomatic Asylum: Its Problems and Potential As a Means of Protecting Human Rights*, 1 S. AFR. J. ON HUM. RTS. 10, 12 (1985). Importantly, diplomatic asylum is generally recognized only for political offenders and does not extend to common criminals sought through the ordinary judicial process of the host country. *Id*. at 14.

11 *See Ecuador and Julian Assange*, *supra* note 8, at 26 ("The right to grant asylum in embassies is not recognised by international law or the Vienna Convention on Diplomatic Relations of 1961."); Maarten den Heijer, *Diplomatic Asylum and the Assange Case*, 26 LEIDEN J. INT'L L. 399, 407–09 (2013) (indicating "successive efforts . . . to establish a universal basis for diplomatic asylum have all failed" and diplomatic asylum practice is not "sufficiently extensive and uniform to belong to international customary law").

12 *See infra* Part IV.A.

13 This Note attempts to use uniform terminology. "Asylee" refers to the person allowed to enter the embassy for the purpose of obtaining diplomatic asylum—Chen and Assange in these incidents. "Host country" refers to the nation in which the asylum request occurs—China and the United Kingdom in these incidents. The country whose embassy is used by the asylee to obtain refuge will, more generically, be referred to as the country granting asylum or refuge. In these incidents, those countries were the United States and Ecuador.

14 *See infra* Part IV.B.

15 *See infra* Part IV.C.

16 *See China and America: A Sigh of Relief*, ECONOMIST, May 26, 2012, at 45.

17 *See* William Hague, U.K. Foreign Sec'y, Statement on Ecuadorian Government's Decision to Offer Political Asylum to Julian Assange (Aug. 16, 2012), http://www.fcogov.uk/en/news/latest-news/?view=News&id=800710782.

18 Riveles, *supra* note 10, at 158; *Ecuador and Julian Assange*, *supra* note 8, at 26.

19 *Ecuador and Julian Assange*, *supra* note 8, at 26.

20 *See, e.g.*, Hague, *supra* note 17 ("The [United Kingdom] does not accept the principle of diplomatic asylum."); Office of the Spokesperson, U.S. Dep't of State, Conventions on Diplomatic Asylum and OAS Permanent Council Meeting: Taken Question (Aug. 17, 2012), http://www.stategov/r/pa/prs/ps/2012/08/196663htm ("The United States . . .does not recognize the con-

Despite lacking global acceptance, granting asylum in embassies is relatively common, even among certain countries that purportedly reject it.[21] Examination of two recent incidents—the United States' acceptance of Chinese political dissident Chen Guangcheng into its Beijing embassy and Ecuador's acceptance of WikiLeaks founder Julian Assange into its London embassy—for legal norm-generating characteristics suggests that certain elements of diplomatic asylum practice seen in Latin America are accepted more widely as components of international law.[22] Such a distinction is important to the continued relevance of international legal practice.[23] By perpetuating the belief that diplomatic asylum is not accepted in international law despite incidents that suggest the contrary, the efficacy of international law is jeopardized as countries continue to act according to the incidents-based norms.[24]

Part I of this Note provides an overview of the history of diplomatic asylum practice. Part II provides a review of the incidents method and its application to international law, as well as a summary of the counterarguments against this method. Part III uses the incidents methodology to describe the facts of the Chen and Assange cases and the responses of various international actors. Part IV uses the facts described in Part III to ascertain their normative impact on global diplomatic asylum practice. Part V reviews hypothetical situations to describe how recognition of the norms described in Part IV more broadly implicate the applicability of international law as it re-

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cept of diplomatic asylum as a matter of international law."). *But see* Alona E. Evans, *The Colombian-Peruvian Asylum Case: The Practice of Diplomatic Asylum*, 46 AM. POL. SCI. REV. 142, 144 (1952) (indicating that numerous examples of diplomatic asylum may be cited from China, Persia, Turkey, Greece, Russia, and Spain).

21 *See, e.g.*, Alex Last, *Fifteen Years Holed Up in an Embassy*, BBC NEWS MAG., Sept. 5, 2012, http://www.bbc.co.uk/news/magazine-19470470 (describing the flight of Cardinal József Mindszenty to the American embassy in Budapest, Hungary in order to escape Soviet troops that had entered the city); Perry Link, *Beijing Dilemma: Is Chen Guangcheng the Next Fang Lizhi?*, NYR BLOG (Apr. 30, 2012, 7:00 PM), http://www.nybooks.com/blogs/nyrblog/2012/apr/30/chen-guangcheng-fang-lizhi-beijing-dilemma (describing human rights activists Fang Lizhi and Li Shuxian taking refuge in the American embassy in Beijing following the Tiananmen Square massacre).

22 *See infra* Part IV.

23 *See infra* Part V. *See generally* W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1, 4 (1984) (arguing that international legal practitioners will be ignored if they persist in seeking to interpret international law merely through text).

24 *See infra* Part V; *see also* Reisman, *supra* note 23, at 3 (describing that what "one *ought* to do" is—rightly or wrongly—only part of the decision of what "one *will* do").

lates to diplomatic asylum. Finally, Part VI assesses the generated norms in the context of current foreign relations practice.

I. Historical and Academic Perspectives

The long history of diplomatic asylum is replete with fits and starts. The following overview highlights both the history of diplomatic asylum law and scholarly opinions on the subject.

A. Historical Review of Diplomatic Asylum Law

The concept of diplomatic asylum began in the fifteenth century, when the Republic of Venice began sending permanent ambassadors to foreign countries.[25] In 1648, the Congress of Westphalia included "inviolability" as one of the central precepts governing embassies abroad out of concern for intrusions into ambassadorial residences.[26] These developments provided foreign diplomats with a sense of autonomy that ultimately resulted in a "habit of receiving persons sought by the authorities" of the host country.[27]

Diplomatic asylum remained largely accepted in Europe until the late seventeenth century, when host countries began to question it, perhaps as a threat to their sovereignty.[28] In particular, local authorities rejected the premise of *franchise des quartiers*, by which inviolability was claimed for the entire city quarter surrounding a foreign embassy.[29] By the nineteenth century, grants of diplomatic asylum had dramatically decreased in Europe.[30]

Yet just as Europe's use of this practice declined, Latin America became a hotbed for diplomatic asylum.[31] Rooted in the prior custom of seeking asylum in churches, newly independent countries were loath to violate the immunity of permanent diplomatic missions for fear of retribution.[32] Justified by humanitarian interests, regional practice, and general international law, there was a twenty-five year

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25 Riveles, *supra* note 10, at 144.

26 U.N. Secretary-General, *Question of Diplomatic Asylum: Rep. of the Secretary-General*, ¶ 2, U.N. Doc. A/10139 (Part II) (Sept. 22, 1975).

27 *Id.*

28 *Id.* ¶ 5.

29 *Id.* ¶ 2, 5.

30 *Id.* ¶ 10.

31 *Id*. ¶ 11.

32 C. Neale Ronning, Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations 27–28 (1965).

period during the mid-nineteenth century when granting asylum in diplomatic missions became "quite general."[33]

The practice in Latin America eventually reached the newly-formed International Court of Justice ("ICJ") in 1950 when it reviewed the case of Peruvian opposition leader Víctor Raúl Haya de la Torre in successive opinions.[34] Colombia granted Haya de la Torre asylum in its Lima embassy and asked for his safe passage out of Peru,[35] but the ICJ held that this grant was a violation of existing diplomatic asylum law.[36] When later asked to order Colombia to surrender Haya de la Torre, however, the ICJ stated that this was not required and the parties should reach a negotiated solution to the impasse.[37] The court's opinions in these cases have been popularly interpreted to suggest "that diplomatic asylum can exist only under explicit treaties or reciprocal usage."[38]

Meanwhile, Latin American countries were negotiating a series of agreements aiming to more clearly define diplomatic asylum practice.[39] These culminated in the 1954 Convention on Diplomatic Asylum.[40] Developed by members of the Organization of American States ("OAS"), the treaty guarantees 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."[41] Those charged with "common offenses" cannot be granted asylum and the asylee's need must be urgent, but the grantor is left to determine the nature and reasoning for prosecution by the

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33 *Id*. at 28. Indeed, some credit the diplomatic asylum practice in Latin America as a "mechanism which has saved many lives, both of important political figures and of ordinary people." Jean Grugel & Monica Quijada, *Chile, Spain and Latin America: The Right of Asylum at the Onset of the Second World War*, 22 J. LATIN AM. STUD. 353, 355 (1990). Although individual grants of asylum may have been questioned, the practice as a whole was generally accepted because individuals across the political spectrum benefited at one time or another. *Id.*

34 Haya de la Torre Case (Colom. v. Peru), 1951 I.C.J. 71 (June 13); Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

35 *Asylum Case*, 1950 I.C.J. at 273.

36 *Id*. at 288.

37 *Haya de la Torre Case*, 1951 I.C.J. at 82–83.

38 *Ecuador and Julian Assange*, *supra* note 8, at 26.

39 *See* U.N. Secretary-General, *supra* note 26, ¶¶ 24–81; Lynsay Skiba, *"Asilo Americano" and the Interplay of Sovereignty, Revolution, and Latin American Human Rights Advocacy: The Case of 20th-Century Argentina*, 3 CREIGHTON INT'L & COMP. L.J. 201, 212 (2012) (indicating that the ICJ Haya de la Torre decisions "inspired" the development of diplomatic asylum treaties).

40 Convention on Diplomatic Asylum, Mar. 28, 1954, 1438 U.N.T.S. 101. The Convention has only been ratified by fourteen of the thirty-four Organization of American States ("OAS") member countries. *Ecuador and Julian Assange*, *supra* note 8, at 27.

41 Convention on Diplomatic Asylum, *supra* note 40, art. II.

host country, as well as the requisite level of urgency.[42] The host country can request that the asylee be removed from its borders and must allow safe passage of the asylee out of its territory upon request by the granting embassy.[43] Finally, the asylum-granting country is not required to resettle the asylee within its own borders, but it may not return him to his host country "unless this is the express wish of the asylee."[44]

Although the OAS Convention on Diplomatic Asylum helped to standardize this practice in Latin America, no widely recognized multilateral treaty provides the right to grant diplomatic asylum outside of that region.[45] For example, the 1961 Vienna Convention on Diplomatic Relations[46] recognized the inviolability of diplomatic missions,[47] but failed to establish an explicit right to grant diplomatic asylum.[48] Similarly, the 1963 Vienna Convention on Consular Relations[49] states that "consular premises shall not be used in any manner incompatible with the exercise of consular functions," but it does not overtly question diplomatic asylum rights.[50]

Today, many major international actors do not recognize a formal right to grant diplomatic asylum.[51] Some, however, still provide diplomatic asylum-like refuge to certain political opposition leaders.[52] For example, in 1956, the United States granted refuge to anticommunist

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42 *Id*. art. III.

43 *Id*. arts. XI–XIII.

44 *Id*. art. XVII.

45 Riveles, *supra* note 10, at 158. Proposals that would have prevented embassies from sheltering those charged with local offenses were twice rejected during consideration of multilateral treaties based on "the reasoning that the subject of asylum was not intended to be covered." Den Heijer, *supra* note 11, at 412–13 n.83.

46 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227.

47 *Id*. art. 22.

48 *See* Special Rapporteur on Consular Intercourse and Immunities, *Third Rep. on Consular Intercourse and Immunities*, Int'l Law Comm'n, art. 53, U.N. Doc. A/CN.4/137 (Vol. II) (April 13, 1961) (by Jaroslav Žourek).

49 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77.

50 *Id*. art. 55.

51 *See, e.g.*, Hague, *supra* note 17 ("The [United Kingdom] does not accept the principle of diplomatic asylum."); Office of the Spokesperson, *supra* note 20 ("The United States . . . does not recognize the concept of diplomatic asylum as a matter of international law."). *But cf.* Evans, *supra* note 20, at 144 (explaining that numerous examples of diplomatic asylum exist, including grants from China, Persia, Turkey, Greece, Russia, and Spain).

52 Jeffrey, *supra* note 10, at 15–16; *see also* Skiba, *supra* note 39, at 205 (indicating the United States "has never recognized diplomatic asylum as part of international law," but "the United States and European countries have provided diplomatic asylum on occasion in modern times").

leader Cardinal József Mindszenty in its Budapest embassy.[53] Mindszenty lived in the embassy compound for nearly fifteen years before moving to Rome.[54] Similarly, in 1989, the United States accepted Tiananmen Square demonstration leader Fang Lizhi and his wife Li Shuxian into its Beijing embassy.[55] Fang and Li were eventually allowed to leave after the United States, China, and Japan reached a negotiated settlement.[56]

B. Academic Opinions on Diplomatic Asylum Law

International legal commentators are largely divided over the notion of diplomatic asylum. Formal academic rejections of the practice began as early as the late nineteenth century.[57] Early critics of the practice argued that diplomatic asylum constituted a "derogation" of the sovereignty of the host country.[58] They believed that the practice grew from an abuse of ambassadorial privilege and those supporting recognition failed to properly consider the host country's interest in its domestic affairs.[59]

This criticism continued into the twentieth century. Academic commentators suggested that host countries often allowed asylees to remain inside embassy compounds for practical reasons—not because they recognized the practice.[60] They further indicated that even the asylum-granting country may not have felt that its action was legally justified.[61] Insistence that practice had been established on this basis, they argued, would be harmful to the development of international legal custom.[62]

Effectively, these commentators reasoned that a grant of diplomatic asylum is always suspect.[63] They suggested the practice was more a matter of politics than law and even indicated that its recogni-

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53 Jeffrey, *supra* note 10, at 15.

54 *Id*.

55 Link, *supra* note 21.

56 *Id*.

57 *See, e.g.*, John Bassett Moore, *Asylum in Legations and Consulates and in Vessels*, 7 POL. SCI. Q. 397, 398–400, 405 (1892).

58 *E.g.*, *id*.

59 *Id*.

60 *See, e.g.*, RONNING, *supra* note 32, at 215 (indicating that a host country may tolerate diplomatic asylum because it is not truly interested in obtaining custody of the asylee or the host country may not have even been aware of the asylum grant because of ongoing political upheaval).

61 *Id*.

62 *Id*.

63 *E.g.*, Evans, *supra* note 20, at 156–57.

tion is nothing more than a political "out" for those seeking to meddle in a host country's domestic affairs.[64] Even in cases of humanitarian concern, they said, granting diplomatic asylum is no more excusable than a case of political interference from an objective legal point of view.[65]

In contrast, other commentators have sought to graft diplomatic asylum practice onto existing international law. During the apartheid era in South Africa, some argued that diplomatic asylum should be granted to activists on humanitarian grounds.[66] Specifically, they indicated the U.N. Charter established an obligation to accept anti-apartheid activists given international consensus that South Africa's actions represented crimes against humanity.[67] Effectively, if countries would be permitted to use armed force to protect those threatened with imminent injury, then they should certainly be afforded the more limited ability to grant them diplomatic asylum.[68]

More broadly, others argued that acknowledging the "protection of the fundamental human rights and freedoms" as the common basis and purpose of international law would alleviate the need to construe specific treaty provisions as implicitly accepting diplomatic asylum.[69] Particularly in Latin America, diplomatic asylum practice could be regarded as a "substantial asset" that helps to maintain good neighborly relations and acts as a method of appeasement in troubled times.[70] Such an asset should not be overturned simply because European conceptions of sovereignty may reject it.[71]

II. The Incidents Method in International Law

In 1984, Yale law professor W. Michael Reisman introduced a new approach to the study of international law—the incidents

64 *Id.* at 157.

65 *Id.*

66 Jeffrey, *supra* note 10, at 26, 28; Riveles, *supra* note 10, at 158.

67 Riveles, *supra* note 10, at 158. Neither the Vienna Convention on Diplomatic Relations nor the Vienna Convention on Consular Relations imposes on states any contrary obligation to refrain from granting diplomatic asylum. Jeffrey, *supra* note 10, at 18.

68 Jeffrey, *supra* note 10, at 26.

69 J.L.F. van Essen, *Some Reflections on the Judgments of the International Court of Justice in the* Asylum *and* Haya de la Torre *Cases*, 1 Int'l & Comp. L.Q. 533, 538 (1952). A recent scholarly article suggests human rights implications could "have significant consequences for the . . . future development" of diplomatic asylum practice, but would "not detract from the essential challenge underlying all grants of diplomatic asylum that the sending and receiving states come to a solution that satisfies all rights and interests." Den Heijer, *supra* note 11, at 424.

70 Van Essen, *supra* note 69, at 539.

71 *Id*.

method.[72] Although Reisman did not seek to wholly reject traditional sources of law,[73] he argued that the legal pronouncements of international entities are harder to discern than those of advanced national political systems.[74] Consequently, Reisman and his collaborator Andrew R. Willard developed a concrete methodology by which the decisions of international actors could be construed as the establishment of legal norms, regardless of whether the decisions were grounded in traditional sources of international law.[75]

A. Overview

The incidents method rests on the belief that useful study of international law draws inferences from "politically relevant actors."[76] Particular attention must be given to separating the beliefs of the incidents researcher as to the lawfulness of an action from the appraisal of the international community.[77] Incidents should be carefully chosen to ensure they actually implicate the international norms they purportedly illustrate, because some events may be insufficient to actually implicate certain norms.[78]

The words of politically relevant actors by themselves may not be enough to establish a norm because "actors may not have been conscious of the norms that guided their behavior or were applied in the instance at hand."[79] A review of other trends necessary to understand the context of selected incidents may be required.[80] Facts surrounding

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72 Reisman, *supra* note 23, at 12.

73 Traditional sources of international law are largely different from sources of domestic law in the United States. A rule of international law may result from (1) custom, (2) an international agreement, or (3) derivation from general principles of the world's major legal systems. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (1987). "Customary international law results from a general and consistent practice of [countries] followed by them from a sense of legal obligation." *Id.* § 102(2). Historically, "[a] practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it[, but] [i]t is often difficult to determine when that transformation into law has taken place." *Id.* § 102 cmt. c.

74 W. Michael Reisman & Andrew R. Willard, *The Study of Incidents: Epilogue and Prologue*, *in* INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 263, 263–64 (W. Michael Reisman & Andrew R. Willard eds., 1988).

75 *See id.*

76 Andrew R. Willard, *Incidents: An Essay in Method*, 10 YALE J. INT'L L. 21, 21 (1984). "Politically relevant actors are those . . . whose participation in or reaction to an incident critically affects the outcome." *Id*. at 21 n.1.

77 *Id*. at 22–23.

78 *Id*. at 23.

79 *Id*. at 24.

80 *Id*.

each of the relevant actors must also be evaluated—even if they are spatially removed from the event.[81]

The only claims that should be evaluated by incidents researchers, however, are those made to the international community.[82] Claims directed solely to domestic audiences are generally irrelevant because they do not implicate the associated norm.[83] Finally, an incidents researcher must not only review the international community's appraisal of the incident's outcome, but also make his or her own appraisal.[84] This appraisal process should enable others to both predict future behavior of international actors and serve as a blueprint for the process by which the relevant norms are redefined.[85]

As an example, an application of the incidents method to a nuclear-powered Soviet satellite falling from the sky into Canadian territory was published alongside Reisman's seminal article.[86] The analysis outlined the facts of the situation and then explored the differing opinions of the Soviet Union and Canada, as well the United States, on the need to provide advance warning of a satellite crashing and assigning liability for substantial cleanup costs.[87] Based on a review of various international appraisals of the incident, the analysis concluded that it generated four norms concerning (1) a country's duty to forewarn of an impending satellite crash, (2) the duty of the satellite owner to provide information to other countries about the dangers resulting from the crash, (3) special procedures governing the cleanup, and (4) compensation for cleanup costs.[88] These norms could be used by international actors to govern practice with respect to satellites in the absence of traditional sources of international law.[89]

B. Justification

The justification for the incidents method is rooted in the concept that international legal practitioners will be ignored if they persist in

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81 *Id.* at 25.

82 *Id*. at 26.

83 *Id*.

84 *Id*. at 27–31.

85 *See id*. at 30–31.

86 Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INT'L L. 78, 78–80 (1984).

87 *Id.* at 79–86.

88 *Id.* at 78–79, 81. As illustrated by this example, the incidents method effectively permits legal practitioners to construe norms from incidents by reviewing the facts and international appraisals of a situation.

89 *Id.* at 78–79, 90–91.

seeking to interpret international law merely through text.[90] Instead, they must examine international incidents as norm indicators or generators in the same manner as political advisers.[91] Reisman suggested that what "one *ought* to do" is—rightly or wrongly—only part of the decision of what "one *will* do."[92]

Thus while domestic legal practitioners are assumed to be reliable specialists in determining the expectations of the political and legal elite, international lawyers are "increasingly irrelevant," because they fail to account for the political incidents that international actors view as their norm-generating universe.[93] Instead of viewing incidents as something that could generate norms, international lawyers incorrectly examine incidents judgmentally in light of preexisting custom (i.e., they analyze the incident by asking whether it violates an a priori enduring norm).[94] In contrast, political analysts approach incidents as a tool *from which* norms can be inferred, because the incident allows the analyst to determine expectations of elite international actors based on their behavior.[95] Effectively, "the political adviser becomes a do-it-yourself lawyer."[96]

Reisman further argued that international courts or tribunals, traditionally viewed as providing an "authoritative expression of international law," are inadequate given their relative inactivity.[97] Transposing such domestic methods of legal interpretation into the international sphere produces results that are not in line with the expectation of elite political actors.[98] "The discrepancy . . . brings discredit upon the very notion of international law" and further illustrates Reisman's assertion that "political advisers rarely use their international lawyers."[99]

Other international legal commentators have also accepted the incidents method. They believe this genre of international law only serves to enlarge the methods of interpretation available to practitioners and indicate that the analysis of incidents "provides the best available means of comprehending the legislative potential of facts in

90 Reisman, *supra* note 23, at 4.

91 *See id.* at 3–5.

92 *Id*. at 3.

93 *Id*. at 4.

94 *Id.*

95 *Id.*

96 *Id*. at 4–5.

97 *Id.* at 10.

98 *Id*. at 11–12.

99 *Id*. at 12.

relation to different topics and different geopolitical configurations on a local, regional, or global scale."[100] Furthermore, the incidents method "relates law to the texture of international life" and, in a manner similar to a media account, is not burdened by preconceptions because it recognizes international law's subordination to power dynamics.[101] This helps to bridge the fields of law and international affairs.[102]

C. Counterarguments

Despite the justifications for the incidents method described by Reisman and others, some have rejected it as nothing more than a "useful adjunct" to the traditional methods of studying international law.[103] They argue that the method is only truly useful when dealing with "major instances of the use of force or significant claims of jurisdiction."[104] This suggests a lack of utility for use in the majority of international disputes, which are generally bilateral in nature and where the silence of other states cannot be easily interpreted as approval, disapproval, or disinterest.[105]

Furthermore, they suggest the application of the method is complicated by questions as to whether international reactions to incidents are sufficiently widespread and, if so, whether they have been correctly interpreted.[106] For example, an elite political actor may react one way when dealing with the actions of a rival and another when examining the actions of an ally.[107] Additionally, the number of reactions generated may be too few to substantiate the establishment of an international legal norm.[108] Even if there are a sufficient number of reactions, unless the reactions to a single incident may by themselves produce a norm, the interpretation of reactions may only be indicative of a trend.[109] If this is the case, then the incidents method is nothing

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100 Richard Falk, *The Validity of the Incidents Genre*, 12 YALE J. INT'L L. 376, 379 (1987).

101 *Id*. at 380.

102 *Id*.

103 *E.g.*, Derek W. Bowett, *International Incidents: New Genre or New Delusion?*, 12 YALE J. INT'L L. 386, 394–95 (1987).

104 *Id*. at 388 (suggesting that only in these contexts will the reactions of international elites be readily available to be identified and recorded).

105 *Id*.

106 *Id*. at 391.

107 *See id*. at 394 (suggesting that the reaction of American states to British military action to recover the Falkland Islands in 1982 would likely not reflect their reactions to a dispute between Spain and Morocco—or Mexico and the United States).

108 *Id*. at 391.

109 *Id*. at 393.

more than a version of the typical method for establishing customary international law, rather than a wholly new approach.[110]

Yet critics of the incidents method miss the fundamental reason for its allure—equipping international lawyers with the ability to advise international actors through the same lens as political analysts.[111] As Reisman argued, simply applying domestic legal constructs in the international sphere could be inadequate to properly advise political actors.[112] The next Part describes the Chen Guangcheng and Julian Assange diplomatic asylum incidents in greater detail, and Part IV then applies the incidents method to those incidents.

III. Chen Guangcheng and Julian Assange

Chen Guangcheng and Julian Assange are two very different people. Chen is a blind human rights activist who was held under house arrest by local thugs for his efforts to embarrass the Chinese Communist Party.[113] Assange is the Australian-born founder of WikiLeaks and remains wanted for questioning as part of a criminal investigation in Sweden following sexual assault allegations leveled against him by two women.[114] As described below, however, their experiences reveal important similarities about the reaction of international actors to diplomatic asylum.

A. The Chen Guangcheng Incident

Chen lost his sight as a child, but eventually emerged as a leader of an activist movement that opposed forced abortions and sterilizations in Shandong province as part of China's one-child policy.[115] Regarded as a self-taught lawyer, Chen challenged the regional policy—which ostensibly violated national rules—by filing a lawsuit on behalf of women in Shandong in 2005.[116] The lawsuit led local officials to place Chen under house arrest, but he ultimately managed to escape this first confinement.[117] Subsequently captured, he was formally imprisoned for the crime of "damaging property and organizing a mob to disturb traffic."[118]

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110 *Id.*

111 *See* Reisman, *supra* note 23, at 4–5.

112 *See id.* at 11–12.

113 *See* Fish, *supra* note 2.

114 Somaiya, *supra* note 6, at A7.

115 Beech, *supra* note 1, at 115.

116 *Id.*

117 Fish, *supra* note 2.

118 *Id.*

Following his release from prison in 2010, local officials again placed Chen under house arrest where Chinese and international activists made repeated attempts to visit him.[119] The activists, as well as Chen and his family, were routinely beaten by local thugs guarding the house.[120] During his time under house arrest, Chen became a "rallying point" for the activist community and his plight drew international attention when a CNN film crew followed actor Christian Bale's attempt to visit him.[121]

Chen escaped house arrest for a second time on April 22, 2012 and made his way to Beijing with the assistance of a Chinese dissident network.[122] He was eventually able to enter the U.S. embassy in Beijing after receiving help from American officials who led presumed Chinese security vehicles on a car chase through city streets.[123] He remained in the U.S. embassy for six days before leaving under his own volition to be treated at a local hospital for an injury suffered during his escape.[124] Before Chen left the embassy for the hospital, U.S. Ambassador Gary Locke asked him if he was ready to leave and he replied, in Chinese, "let's go."[125]

Eventually, American and Chinese officials negotiated for Chen and his family to be placed on a plane to the United States for him to pursue formal legal studies.[126] A popular Chinese online news portal commented that both the United States and China acted in a "rational and pragmatic" way in handling the crisis.[127] Information about Chen, however, cannot be found on most major Chinese websites because his name has been blocked by the government.[128]

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119 *Id.*

120 *Id.*; Jane Perlez & Andrew Jacobs, *A Car Chase, Secret Talks, and Second Thoughts*, N.Y. TIMES, May 3, 2012, at A1.

121 Fish, *supra* note 2.

122 Perlez & Jacobs, *supra* note 120, at A1.

123 *Id.*

124 U.S. Dep't of State, Background Briefing with Senior State Department Officials on Chen Guangcheng (May 2, 2012), http://www.stategov/p/eap/rls/rm/2012/05/182850htm [hereinafter U.S. Dep't of State, Background Briefing].

125 *Id.* Later, there was significant controversy about whether Chen actually left the embassy for the hospital under his own volition or if he felt pressured to leave by the U.S. government. *See* Mark Landler, Jane Perlez & Steven Lee Myers, *Dissident's Plea for Protection Deepens a Crisis*, N.Y. TIMES, May 4, 2012, at A1. Although he previously declared a desire to stay in the country during this episode, Chen's continued fear for his safety prompted an "abrupt reversal and plea for protection from the United States." *Id.*

126 *See* Josh Chin & Laura Kusisto, *Blind Activist Starts New Life in U.S.*, WALL ST. J., May 21, 2012, at A11; *China and America: A Sigh of Relief*, *supra* note 16, at 45.

127 *China and America*, *supra* note 16, at 45.

128 Fish, *supra* note 2.

Official U.S. government statements indicated that Chen was temporarily allowed into the American embassy for medical treatment.[129] During his stay in the embassy, Chen purportedly indicated on a continual basis that his stay in the embassy was only temporary.[130] The Chinese government asked for a formal apology, but the U.S. government indicated that its action was "extraordinary" and it did not anticipate repeating it.[131] The United States believes it acted lawfully by accepting Chen into its embassy.[132]

B. The Julian Assange Incident

In 2010, WikiLeaks and its founder Julian Assange gained international recognition after releasing classified documents detailing American military and foreign affairs activities.[133] Assange has since been sought for questioning related to sexual assault allegations brought against him in Sweden, but has resisted the U.K.'s attempts to extradite him.[134] Assange claims the sex was consensual and his allies describe the U.K. extradition proceeding as simply a ruse aimed at his ultimate extradition to the United States for political reasons.[135] Legal commentators, however, have indicated that it would actually be harder to extradite Assange to the United States from Sweden than it would be if he remained in the United Kingdom.[136] The U.S. government has not formally indicted Assange,[137] but the American soldier who divulged classified information to WikiLeaks was convicted of espionage, among other charges.[138]

Although British authorities have indicated that past court rulings bind them to extradite Assange to Sweden,[139] on August 16, 2012, Ecuador's president, Rafael Correa, granted Assange diplomatic asylum in Ecuador's London embassy.[140] Ecuador's government purportedly received a communication from a U.K. official suggesting that British law providing for the inviolability of foreign embassies could

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129 U.S. Dep't of State, Background Briefing, *supra* note 124.

130 *Id.*

131 *Id.*

132 *Id.*

133 *See* Somaiya, *supra* note 6, at A7.

134 *Id.*

135 *Ecuador and Julian Assange*, *supra* note 8, at 26.

136 *Id.*

137 *Id.*

138 Ellison, *supra* note 9, at 302.

139 Hague, *supra* note 17.

140 *Ecuador and Julian Assange*, *supra* note 8, at 26.

"be revoked if the premises were misused."[141] Britain's foreign secretary quickly qualified this statement and said the United Kingdom remained "committed to settling the dispute through negotiations."[142] The country has indicated, however, that it will not provide Assange with safe passage outside of its borders and believes it is under no legal obligation to do so.[143] In response to Ecuador's continued pressure for guarantees that Assange's human rights will be protected, the United Kingdom has asserted that there are "extensive human rights safeguards" within its extradition law.[144]

IV. Application of the Incident Method to the Chen Guangcheng and Julian Assange Cases

Review of the Cheng Guangcheng and Julian Assange incidents provides insight into the state of international diplomatic asylum practice. In particular, these incidents reveal that a country is entitled to accept requests for diplomatic asylum at its embassies abroad.[145] Additionally, a country asked to grant asylum can determine whether the nature of the purported offense, reasoning for the request, and urgency of the situation warrant asylum.[146] Host countries, however, do not have an obligation to provide safe passage from the embassy to a location outside their borders.[147]

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141 *Id.*; *see also* Press Release, Org. of Am. States, OAS Permanent Council to Consider Convening of Foreign Ministers Meeting on Situation Between Ecuador and the United Kingdom (Aug. 16, 2012), *available at* http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-282/12.

142 *Ecuador and Julian Assange*, *supra* note 8, at 26; *see also* Press Release, Org. of Am. States, OAS Foreign Ministers Confirm Validity of the Inviolability of Diplomatic Missions in the Context of the Situation Between Ecuador and the United Kingdom (Aug. 24, 2012), *available at* http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-291/12 (reporting that a meeting of OAS foreign ministers "approved by acclamation a resolution supporting the inviolability of diplomatic premises . . . in the context of the situation between Ecuador and the United Kingdom"). In a prior meeting of the OAS permanent council, only the United States, Canada, and Trinidad and Tobago opposed a resolution to put the matter before the foreign ministers. *Julian Assange Row: Americas Ministers to Meet*, BBCNews.com, Aug. 18, 2012, http://www.bbc.co.uk/news/uk-19303615.

143 Hague, *supra* note 17.

144 *Id.*

145 *See infra* Part IV.A.

146 *See infra* Part IV.B.

147 *See infra* Part IV.C.

A. Countries Can Accept Diplomatic Asylum Requests at Embassies Abroad

Both the Chen Guangcheng and Julian Assange incidents suggest that countries are entitled to accept diplomatic asylum requests at their embassies abroad. In Chen's case, the United States actually assisted Chen's entrance into its embassy[148] and justified its action as "short term humanitarian assistance."[149] Although China demanded an apology for the purportedly improper action,[150] it sought a negotiated resolution instead of questioning the inviolability of the embassy, and the United States consistently maintained that its action was lawful.[151] Furthermore, the distinction between allowing Chen "temporary" access to the embassy[152] and formally granting him diplomatic asylum is merely semantic from a practical perspective.[153] During a previous incident involving Chinese activists, their "temporary refuge" in the U.S. embassy in Beijing lasted thirteen months and only ended when the two governments negotiated their exit from the embassy and exile abroad.[154]

Similarly, Julian Assange entered Ecuador's embassy in London and the United Kingdom has not made an effort to revoke the inviolability of the embassy.[155] The United Kingdom indicated that it is com-

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148 Perlez & Jacobs, *supra* note 120, at A1.

149 LAWRENCE & LUM, *supra* note 4, at 2–3.

150 *See* U.S. Dep't of State, Background Briefing, *supra* note 124.

151 *See China and America*, *supra* note 16, at 45 (indicating both the United States and China made efforts in their negotiations to avoid "provoking China's nationalists"); U.S. Dep't of State, Background Briefing, *supra* note 124 (responding "I think our actions were lawful" to a reporter's question about the legality of American actions with regard to Chen).

152 U.S. Dep't of State, Background Briefing, *supra* note 124. The Chinese claim that the action of accepting Chen was unlawful could support the contrary assertion that diplomatic asylum practice is not actually normative. *See id.* (indicating that the Chinese government asked for a formal apology from the United States). The host country's government, however, will invariably be angered by an embassy accepting an asylee and its outward rejection would be better viewed as a product of the desire to obtain the asylee than its view of international legal norms, particularly if it does nothing beyond lodge protests (as opposed to, for example, attempting to revoke the inviolability of the embassy itself).

153 The distinction is perhaps more important to U.S. domestic law. "[U.S. embassies and consulates] may not grant or in any way promise 'asylum' to any foreign national . . . [and] should be aware that the term has specific meaning in U.S. immigration law." 2 U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL § 227.2 (2012). "Persons may apply for asylum under U.S. law only if they are physically present in the United States or at a land border or port of entry and may be granted asylum only if they meet the definition of a refugee under U.S. law and are otherwise admissible." *Id.* The United States maintained that Chen did not request asylum during his stay in its embassy. LAWRENCE & LUM, *supra* note 4, at 7.

154 Link, *supra* note 21.

155 Hague, *supra* note 17.

mitted to resolving the dispute through negotiations.[156] The U.K. government does not intend to storm the embassy or take other substantive measures that would suggest that holding Assange in the embassy is generally unlawful.[157]

B. Determining the Nature, Reasoning, and Urgency of the Situation

Both incidents also suggest that the country asked to grant asylum is the party entitled to determine whether the nature of the offense, reasoning for the request, and urgency of the situation warrant it.[158] The United States concluded it was acceptable to temporarily allow Chen to enter its Beijing embassy for humanitarian and medical reasons.[159] Although the U.S. government indicated it never formally granted asylum to Chen, it noted that it acted in an "extraordinary case,"[160] further suggesting the country viewed itself as the arbiter of whether someone should be allowed in its embassy. Chen had served time in prison for supposedly nonpolitical crimes,[161] yet by bringing him into its embassy the United States implicitly recognized that he was being held as a political prisoner whose situation warranted assistance.

Similarly, Ecuador granted asylum to Julian Assange even though he faced extradition to Sweden for questioning in a sexual assault investigation,[162] a decidedly nonpolitical offense. Aside from Ecuadorean president Rafael Correa's musings about the potential for Assange to be extradited to the United States from Sweden, international lawyers believe Swedish extradition would make transfer to the United States less likely.[163] Furthermore, Ecuador refused to accept British assurances that its extradition procedures provide safeguards against transfers for political reasons.[164] Ecuador's refusal to acknowledge the strong evidence that Swedish extradition would not result in a politically motivated case being brought against Assange only reinforces the notion that a country can choose to accept an asylee based

156 *Id*.

157 *Id*.

158 As opposed to the host country or other nations determining whether granting a request for diplomatic asylum is appropriate.

159 U.S. Dep't of State, Background Briefing, *supra* note 124.

160 *Id.*

161 *See* Fish, *supra* note 2.

162 *See* Somaiya, *supra* note 6, at A7.

163 *Id.*

164 *See* Hague, *supra* note 17.

solely on its own assessment of the nature of the offense, reasoning for the request, and urgency of the situation.

C. A Host Country Has No Obligation to Provide Safe Passage

Even though a country can grant diplomatic asylum at its foreign embassies and is the sole arbiter of the nature of the offense, reasoning for the request, and urgency of the situation, both incidents suggest a host nation is under no obligation to grant an asylee safe passage abroad. Although Chen was eventually allowed to board a plane to the United States in order to study law, he had already left the U.S. embassy of his own volition.[165] This suggests that his exit from China was a product of negotiations and not any Chinese perception of a legal obligation to let him leave. Furthermore, Chen's decision to leave the embassy was made by his own accord,[166] knowing that there was no guarantee that he would be provided with safe passage out of China.

Assange's continuing presence in Ecuador's London embassy provides even stronger evidence that a host country is under no obligation to provide safe passage. He still lives inside the embassy[167] and the United Kingdom appears primed to reject any negotiated solution that involves compromising its extradition laws.[168] All signs continue to point to the United Kingdom's belief that it is under no obligation to provide Assange with safe passage outside its borders based on Ecuador's action.[169] This position is perhaps best illustrated by the high costs the United Kingdom must incur to continually monitor Ecuador's embassy to prevent Assange from escaping.[170]

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165 *See* Chin & Kusisto, *supra* note 126, at A11; *China and America*, *supra* note 16, at 45; U.S. Dep't of State, Background Briefing, *supra* note 124.

166 U.S. Dep't of State, Background Briefing, *supra* note 124. Again, there were reports—later tempered by Chen himself—that Chen may have felt pressured to leave the embassy by the U.S. government. Landler, Perlez & Myers, *supra* note 125. Regardless of whether this was the reason he initially left, he could not have felt that his subsequent passage out of China was assured because he later felt the need to request safe passage after being transferred from the U.S. embassy to a Chinese hospital. *See id.*

167 Ellison, *supra* note 9.

168 *See* Hague, *supra* note 17.

169 *See id.*

170 *See* Ellison, *supra* note 9, at 302 ("According to Scotland Yard, the authorities have so far spent $6 million to keep Assange under a watchful eye (and to keep him in place at the embassy).").

V. Comparison of Incidents-Based Norms to Currently Recognized International Law

The differences in outcome between a case of diplomatic asylum under currently recognized international law and the incidents-based norms discussed in Part IV are nuanced and reflect more broadly on the role of international law in political disputes. Suppose a hypothetical nation, Country A, decides to offer asylum to a political dissident at its embassy in Country B. While never formally charged with a crime, the dissident ran afoul of Country B's ruling party and was subjected to extralegal detention and torture. Neither Country A nor Country B is party to any treaty governing diplomatic asylum practice. As expected, Country B's government is angered that Country A has taken in the asylee and relations between the two countries are jeopardized.

Under currently recognized international law, absent a treaty between the two countries, Country A violated international law when it accepted the dissident into its embassy.[171] Yet Country A understandably acted on humanitarian grounds to protect the life of someone who had been singled out by her own government and, based on the precedent it established, would likely do so again if presented with similar circumstances.[172] The divergence between incidents-based norms and the norms of recognized international law undermines international law's credibility. If a generally recognized international legal principle is simply ignored by political actors, it fundamentally lacks meaning, particularly in light of the relative inactivity of international judicial bodies and general difficulty in negotiating international agreements.[173]

Instead, by recognizing the norms discussed in Part IV, Country A would be within its international legal right to accept the dissident into its embassy based on what it determined to be an important humanitarian need.[174] Country B's government will, of course, remain

171 *See* Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 274–75 (Nov. 20) (rejecting the right to grant diplomatic asylum in an embassy abroad if there is no treaty between the two affected nations recognizing such a right).

172 For example, the United States continues to accept high-profile dissidents into its embassies abroad. *See, e.g.*, Link, *supra* note 21(describing the United States' acceptance of Fang Lizhi and Li Shuxian into the Beijing embassy in 1989 after the Tiananmen Square massacre); *North Koreans Seeking Asylum at Diplomatic Compounds in China*, 96 Am. J. Int'l L. 718, 718–19 (2002) (describing a 2002 incident in which North Koreans entered the U.S. consulate in Shenyang, China and were later allowed to travel to South Korea); *supra* Part III.A (describing Chen's flight to the U.S. embassy in Beijing in 2012).

173 *See* Reisman, *supra* note 23, at 4, 10.

174 *See supra* Part IV.A (recognizing a norm to allow acceptance of diplomatic asylees into

upset and at least initially refuse safe passage outside its borders, which it will be within its legal right to do.[175] Effectively, this is the same practical outcome as before, but Country A's grant of diplomatic asylum is no longer considered to violate international law. Instead, the law reflects how countries actually behave in these circumstances. It permits Country A to take action to right a humanitarian wrong while preserving Country B's ability to prevent safe passage outside its borders—the only practical action the latter could take in the first place without risking a broader conflict by actually impinging upon the embassy's inviolability.

The flipside of this scenario is one in which an asylee is not accepted on purely humanitarian grounds. For example, assume hypothetical Country C dislikes Country D's international trade policies and seeks a bargaining chip to force a change. Meanwhile, Country D is trying to extradite an international businesswoman charged with violating its tax laws from a third nation pursuant to a bilateral extradition treaty. Country C decides to grant the businesswoman diplomatic asylum inside its embassy in the third nation to stop her extradition to Country D. Country C says it is acting because it believes the tax charges are false, but really just wants a platform to protest Country D's trade practices.

Under currently accepted international law, Country C's action would be illegal.[176] This seems like the correct answer because Country C only seeks to use the extradition as part of its international trade negotiations, which ostensibly have nothing to do with the asylee's alleged crimes. Yet under the norms discussed in Part IV, Country C would likely be considered within its rights given that it is the sole arbiter of whether the reasoning for granting asylum in its embassy is valid.[177] In this case, however, there would be no practical change because the third nation, according to its bilateral extradition treaty with

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embassies abroad); Part IV.B (recognizing a norm that the country granting asylum is entitled to determine whether the nature of the offense, reasoning for the request, and urgency of the situation warrant it).

175 *See supra* Part IV.C (recognizing a norm that a host country is not obligated to grant passage outside of its borders to an asylee).

176 *See Asylum Case*, 1950 I.C.J. at 274–75 (rejecting the right to grant diplomatic asylum in international law generally).

177 *See supra* Part IV.B (recognizing a norm that the country granting asylum is entitled to determine whether the nature of the offense, reasoning for the request, and urgency of the situation warrant it).

Country D, would likely refuse to permit safe passage from the embassy, leaving no other route but negotiations.[178]

Although this second scenario makes the application of the norms described in Part IV harder to justify, the tradeoff is necessary to protect the integrity of international law as a whole, particularly as it concerns diplomatic asylum. The third nation, attempting to extradite the businesswoman, and Country D, seeking extradition, are still well within their legal rights to refuse safe passage and will probably be forced to negotiate a resolution with Country C. Under these norms, however, the currently recognized legal fiction that Country C is acting against international legal practice no longer exists. This will force the countries to more directly confront the situation as presented, without resorting to threats and accusations that could trigger a broader conflict.[179]

VI. Application of the Norms to Current Foreign Relations Practice

The norms discussed in Part IV also have significant impacts on the political interplay among countries involved in diplomatic asylum incidents. First, negotiations are generally required to reach an ultimate resolution to the situation because the norms do not reveal a mandatory right of travel from the host country for the asylee. Countries are more likely to take a hardline negotiating stance if their own sovereignty interests and international legal obligations are implicated. Second, countries like the United States that grant asylum-like refuge, but explicitly reject diplomatic asylum as an international legal right, can maintain critical positions about other countries granting asylum based on differing circumstances. In particular, if other international legal obligations are present, these countries can make their criticism known without jeopardizing their own right to exercise normative diplomatic asylum rights.

A. Likelihood of Subsequent Negotiation

As evidenced by key differences between the Chen and Assange incidents, a host country is more likely to reach a negotiated solution with the country granting asylum if other international norms are not

178 *See supra* Part III.B (describing Assange's diplomatic asylum inside Ecuador's London embassy as U.K. officials seek to extradite him to Sweden pursuant to a treaty).

179 *See* Press Release, Org. Am. States, *supra* note 141 (describing a letter sent by the U.K. government to Ecuador indicating it could take action to arrest Assange by revoking the inviolability of Ecuador's London embassy).

implicated. For example, China and the United States reached a negotiated settlement after Chen voluntarily left the embassy that allowed Chen and his family to travel to the United States for legal studies.[180] Conversely, Ecuador and the United Kingdom have not negotiated a settlement regarding Assange's ongoing housing in Ecuador's London embassy.[181]

A key difference between the two incidents was the presence of a formal legal obligation requiring the United Kingdom to extradite Assange to Sweden.[182] The British government vociferously argued against Ecuador's charge that extradition to Sweden was a run-around that would result in Assange falling into American custody, noting that exhaustive legal proceedings took place prior to the United Kingdom's attempt to enforce the extradition order.[183] Even though the expenses of keeping round-the-clock watch on Ecuador's embassy are high,[184] the British seem unlikely to negotiate for Assange's safe passage from its borders given the treaty-based obligation to Sweden.[185]

There was no similar international legal obligation implicated in the Chen incident. Chen escaped from an extralegal house arrest enforced by local thugs.[186] The detention was not publicly supported by the national Chinese government,[187] and "local officials had decided to turn [Chen's] home into a makeshift prison" even though he was not then implicated in any common—or even political—crime.[188] This may have made Chinese authorities more likely to negotiate, given that they had no formal legal basis to hold Chen.[189]

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180 *China and America*, *supra* note 16, at 45; U.S. Dep't of State, Background Briefing, *supra* note 124.

181 *See* Ellison, *supra* note 9, at 302, 370; Hague, *supra* note 17.

182 Hague, *supra* note 17.

183 *See id.*

184 *See* Ellison, *supra* note 9, at 302.

185 *See* Hague, *supra* note 17 (stating that the United Kingdom "remain[s] fully committed to seeking a legal and binding bilateral solution" but also noting that "it is important that everyone understands that as a nation under law . . . we must ensure that our laws are respected and followed").

186 Fish, *supra* note 2.

187 *See* LAWRENCE & LUM, *supra* note 4, at 4 (indicating "the national government had not taken a public stance on [Chen's] case"). Although the national Chinese government refrained from offering public support for Chen's detention, suggestions have been made that the national government "at least condoned his treatment, and may have actively supported it." *Id.*

188 *See* Perlez & Jacobs, *supra* note 120 (suggesting "there were no legal charges pending against" Chen and his wife).

189 Of course, other factors were also in play. In particular, Hillary Clinton was in China during part of the ordeal and the agreement for Chen to travel to the United States was reached on the last day of her trip. Jane Perlez & Michael Wines, *Deal Would Let China Dissident and Family in U.S.*, N.Y. TIMES, May 5, 2012, at A1.

Effectively, there were strong sovereign interests implicated in the Assange incident that were not similarly implicated in the Chen incident. The United Kingdom was party to a treaty with Sweden that required extradition upon the fulfillment of certain judicial requirements.[190] After these procedures were fulfilled and the British became obligated to deliver Assange, a negotiated release would have required the United Kingdom to upset its sovereign interest in respecting its treaty obligations. Even if China somehow recognized a sovereign interest in prohibiting its citizens from traveling abroad without a legal reason for preventing their exit from the country,[191] it would not likely be considered as strong as the United Kingdom's extradition obligation. This created a scenario where China was more likely to negotiate than the United Kingdom.

B. Maintaining Positions Critical of Other Countries Granting Diplomatic Asylum

Key factual differences between the Chen and Assange incidents—and the associated international legal concepts—also implicate the ability of third-party countries to criticize a grant of asylum. These differences could allow countries that explicitly reject the legality of diplomatic asylum, despite occasionally granting asylum-like refuge themselves, to accept such a norm. As discussed above, Chen was a vocal political dissident being held extralegally at the behest of regional Chinese authorities.[192] In contrast, Assange remains wanted for questioning in a sexual assault investigation and the United Kingdom is simply attempting to uphold its binding extradition agreement with Sweden.[193]

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190 *See* SCOTT BAKER, DAVID PERRY & ANAND DOOBAY, A REVIEW OF THE UNITED KINGDOM'S EXTRADITION ARRANGEMENTS 22–23 (2011) (describing the status of European Union members and Gibraltar as designated "category 1 territories" under the United Kingdom's 2003 Extradition Act, which provides for extradition based on mutual recognition of arrest warrants, an extradition hearing where the judge decides if extradition is barred for any statutory reason, and a judicial determination of whether extradition is compatible with European and British human rights law).

191 China notoriously limits the foreign travel of citizens who are "perceived enemies" of the Communist Party. *See* Andrew Jacobs, *No Exit: China Uses Passports as Political Cudgel*, N.Y. TIMES, Feb. 23, 2013, at A1. "Although the government does not release figures on those who have been denied passports, human rights groups suggest that at least 14 million people . . . have been directly affected by [passport] restrictions, as have hundreds of religious and political dissidents." *Id.*

192 *See supra* Part III.A.

193 *See supra* Part III.B.

Despite the norm that the country granting asylum in its embassy is entitled to determine whether the nature of the offense, reasoning for the request, and urgency of the situation warrant sanctuary,[194] other countries do not lose the ability to criticize the granting nation. For example, it is open to question whether the United States would be justified in criticizing Ecuador about the Assange incident, even though it also recently exercised its normative discretion by granting asylum-like refuge to Chen. Because the United Kingdom acted according to an international legal obligation by preventing Assange from leaving its borders and China was not acting based on a similar commitment, the United States could make the argument that it was acting to prevent an ongoing human rights violation implicitly authorized by the Chinese government.

The United States would, therefore, be justified in criticizing Ecuador because President Correa appears to have ignored reasonable assurances that Assange's extradition conformed to due process constraints and that Assange remains wanted for questioning related to an alleged crime that is not political in nature. Such a distinction is likely important to the United States, which does not explicitly recognize diplomatic asylum rights even though it has accepted high-profile individuals into its embassy walls. By distinguishing between asylum granted to protect human rights and sanctuary granted despite the extension of substantial due process, the United States could justify acceptance of an international norm allowing diplomatic asylum without jeopardizing its ability to criticize other countries that accept asylees who are not wanted for political offenses and have been afforded substantial due process.

CONCLUSION

Using the incidents method to international law as a guide, the events surrounding the acceptance of Chen Guangcheng and Julian Assange into foreign embassies suggest that there is a norm permitting diplomatic asylum, even though it is not currently recognized by traditional sources of international law. Additionally, the norm-generating aspects of these incidents suggest that it is up to the country granting asylum to determine the nature of the offense, the appropriate reasoning for accepting requests, and the urgency of the situation. Finally, the host country is under no obligation to provide safe passage for the asylee out of its borders. Acceptance of these norms is impor-

194 *See supra* Part IV.B.

tant to ensuring that international law actually reflects how countries act in these situations.

A key difference illustrated by the incidents, however, is the willingness of a host country to negotiate the safe passage of an asylee outside of its borders. If established domestic and international legal obligations are implicated, a host country is less likely to negotiate than if it is acting for other reasons that may not have such direct involvement with sovereign interests. Furthermore, this difference may allow countries like the United States that explicitly reject diplomatic asylum rights, even though they grant asylum-like refuge themselves, to accept it as a norm without losing the ability to criticize countries accepting asylees that are not charged with political crimes and have been provided substantial due process.