The Position of United Kingdom towards Diplomatic Asylum of Julian Assange

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Abstract

This paper examines the position of United Kingdom towards diplomatic asylum of Julian Assange. This problem started when Ecuador decided to guarantee diplomatic asylum to Julian Assange. The Ecuadorian decision by guaranteeing diplomatic asylum to Assange harmed the position of United Kingdom since it interdicted the judicial process of United Kingdom. Meanwhile, the United Kingdom had legal obligation to extradite Assange to Sweden under the law of United Kingdom and international law. However, the United Kingdom could not interdict Ecuadorian decision. This phenomenon happened because of the existent of international regimes in international politics. In this case, international law recognize as international regime since it provides norms, principles, rules and decision-making procedures. There are two factors unable United Kingdom to interdict Ecuadorian decision which is the humanitarian principle and Vienna Convention on Diplomatic Relations (1961).

Keyword: Diplomatic Asylum, International Law, Norms, Principles, Vienna Convention on Diplomatic Relations

INTRODUCTION

Julian Assange was known as editor-in-chief and co-founder of the WikiLeaks (Värk, 2012). Wiki-Leaks.org is the self-proclaimed non-for-profit online repository of anonymous leaks (Berghel, 2012). Since 2006, Assange used WikiLeaks to publish the national secret documents that were stolen from the United States Government and other countries (Värk, 2012). Assange obtained the information from Bradley Manning, U.S Army private serving in Iraq. WikiLeaks did not only publish those secret documents, but also plenty of embarrassing documents regarding the U.S military actions (Berghel, 2012).

On November 20, 2010, European Arrest Warrant arrested Assange to face extradition in Sweden for rape and sexual assault allegations (Kai, 2015). He was interrogated in Sweden

regarding this issued for approximately three weeks. On December 8, 2010, he decided to turn himself to face judicial process in English Court, London for eighteen months. As conclusion, Sweden asked for extradition request towards Assange to the United Kingdom Supreme Court. United Kingdom officials accepted the Sweden request and gave ten days to take Assange to Sweden (Lavander, 2014). Assange was terrified by the risks that he would face in his travel to Sweden since it might lead him to face the U.S. in charges relating to WikiLeaks, and to receive death penalty as the consequence of his crime (Rees, 2014).

On June 19, 2012 Assange decided to pursue a diplomatic asylum from embassy of Ecuador (Lavander, 2014). Ecuador granted Assange's diplomatic asylum in August 16, 2012 (Kai, 2015). The Ecuadorian decision led to dispute between the United Kingdom and Ecuador. In August 16, 2012, The Foreign Secretary of United Kingdom, William Hague stated that the United Kingdom was disappointed towards Foreign Minister of Ecuador regarding to the issue of Julian Assange who was guaranteed under diplomatic asylum of Ecuador. He explained that

> "Under our law, with Mr Assange having exhausted all options of appeal, the British authorities are under a binding obligation to extradite him to Sweden. We must carry out that obligation and of course we fully intend to do so. The Ecuadorian Government's decision this afternoon does not change that in any way. Nor does it change the current circumstances in any way. We remain committed to a diplomatic solution that allows us to carry out our obligations as a nation under the Extradition Act". (Foreign and Commonwealth Office, 2012)

He also reminded Ecuador to respect the national law of the United Kingdom and to follow its rule (Foreign and Commonwealth Office, 2012).

Based on that explanation, the decision of Ecuador contradicted to the position of United Kingdom due to Ecuador government decision which interfered the United Kingdom law process towards Julian Assange in the case of raping and sexual assault allegations. It was the United Kingdom obligation to extradite Assange to Sweden. Ecuador must respect and follow the local

law in the United Kingdom. In the other words, Ecuadorian decision by guaranteeing diplomatic asylum harmed the position of United Kingdom. Based on the description, this research would emphasize in looking for the United Kingdom's position in this issue and other factors that supported the position of the United Kingdom.

THEORETICAL FRAMEWORK

INTERNATIONAL REGIME THEORY

To understand the issue and to answer the research question, the theoretical framework is necessary. In order to help in analyzing the issue and in finding the answer of the research question. The theoretical framework consists of theories and concepts that are used as tools to analyze the issue. This paper uses International regime theory from Donald J. Puchala and Raymond F. Hopkins. International regime is one of theories that is used in International Relations to help the understanding on the behavior of state. The behavior of state can be influenced by the regime that exists in that time. Regimes produce rules and procedures that must be followed by the participants.

Hopkins and Puchala (1982) explain five particular features of the phenomenon of regimes in their journal, "International Regimes: Lessons from Inductive Analysis". First, they argue that regime is an attitudinal phenomenon. It means behavior is a result from faithfulness to principles, norms and rules, which are sometimes in from legal codes. In the other side, regimes are subjective. They argue that, "The existence of regimes are mostly as expectations or convictions about legitimate, participants' understandings, appropriate or moral behavior". The regimes may exist in relations to system that independently establish based on geographic concern and some of them may exist in relation to a mixture of geographical and functional concerns (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982).

Second, an international regime contains doctrines regarding to producers for making decisions. Hopkins and Puchala (1982) emphasize that to identify regime, the major substantive norm and broad norms should be analyzed. They claim that the broad norm is also important for analysis. Broad norms produce the procedures of regime. The rules and principles of regime are formed by the procedures. Based on that explanation, the broad norm can be analyzed as the detailed additions. They note that to identify regime, there are four points that should be analyzed. Those points are the norms that exits in the regime, the parties who participate in regime, the interests or priority that dominate in the regime, and rules that establish to protect and keep the dominance in the decision making (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982).

Third, to describe the regime, they suggest to categorize the major principles and norms that advocate actor's behavior and exclude unusual behavior. It is especially useful to evaluate the hierarchies among principles and the prospects for norm enforcement (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982).

Fourth, regimes consist of asset of elites who act as practical actors in it. The prime official members of most international regimes are governments of national-states, however, transnational and, subnational organizations may participate and practice in international regimes. Often, most of bureaucratic unit or individual who participate in regime operates as part of the "government" of international subsystem by creating, enforcing or otherwise acting in compliance norms. In international networks of activities and communication, individuals, and bureaucratic roles are linked. Regimes are created by individuals and rules govern issue-areas (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982).

Finally, in every substantive issue-area in international relations, regime exists where there is detectably patterned behavior. Regulation is understandable as the outcome of regime and behavior of actors. The behavior consists of principles, norms or rules that must be exist. The pattern of behavior may reflect the dominance of powerful actor rather than the voluntary consensus among all participants (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982).

To examine international regimes, Hopkins and Puchala (1982) offer four characteristics of theoretical importance. First, specific versus diffuse regime. Before examination, the system should be analytically limited since regime must be intellectually mapped based on the activities and participants. Regimes can be classified from function along a continuum ranging from specific issue, single issue to diffuse, and multi issue. Regimes may also be defined based on the number of actors who follow principles or at least norms. Universal adherence cannot be commanded by international regimes, even though there are many approach addressing that issue. The specific regimes more often tend to entrenched in boarder, the principles and norms from diffuse ones are taken or even given in more specific regimes. In this sense, it can be called as normative superstructures[1], which are reflected in functionally or geographically specific normative substructures or regimes (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982, pp. 248-249).

Second, formal versus informal regimes. International organizations legislate some regimes by maintaining councils, congresses or other bodies and are supervised by international bureaucracies categorized as formal regimes. In the other hand, informal regimes are created and

[1] According to Beckett, the normative superstructure is the "constitution" of international law or international constitutional law. Since the normative superstructure' function is governs the formation and operation of international law. Beckett prefer to avoid using constitution in describe the phenomenon by using term "normative superstructure". (Cited on Yutaka Arai, "The Law of Occupation: Continuity and Change of International Humanitarian".)

maintained by general agreements based on the objectives among participants, compulsory by mutual self-interests, bounded on agreements and monitored by mutual surveillance (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982, p. 249).

Third, evolutionary versus revolutionary change. Evolutionary regimes can be changed substantively or qualitatively. The substantive change may happen in at least two different ways: changing principles by preserving norms or inversing norms in order to change principles. Qualitative change happens because of the participants change their minds about the interests and aims. It usually happens when the changes of information are available to elites or new knowledge otherwise accomplished. It is called evolutionary change because it happens in the procedural norms of regime of which usually the distribution of power among participants majority does not change. The changes give no effect to power structures and rules of regimes itself. However, the revolution change affects the power structures and rules of game since the dominant participants have highly political power to change the regimes based on their interests. The changes of regimes can bring disadvantages towards some participants. They must accept regime principles and norms and receive punishment if they do not accept regime. It usually happens in diffused regimes in which the powerful participants have dominant role in the regime (Puchala & Hopkins, International Regimes: Lessons from Inductive Analysis, 1982, pp. 249-250).

Last, distributive bias. Hopkins and Puchala (1982) argue that, "*all regimes are biased"*. People establish regimes under hierarchies. The establishment of regimes is mostly in the favor of the interest of the strong and is the result of international governance. However, the degree of bias makes considerable difference in regime's durability, effectiveness, and mode of transformation (Puchala & Hopkins, International regimes: lessons from inductive analysis, 1982, p. 250).

CONSTRUCTIVISM THEORY

In addition, the constructivism theory emphasized that, "The international structure is determined by international distribution of ideas" (Finnemore & Sikkinik, 1998, p. 894). It means the proper behavior constructed the world structure, order and stability. In this case, the proper behavior resulted from the collective idea, expectation and beliefs. The constructivism argued that the developing idea of norms and ideas constructed the international structure since the norms and ideas could be understood as tool of balancing power. Finnemore and Sikkinik (1998) explained the norms as behavior standardization since the norms consist of things that states should be follow or decline. In other ways, the norms depends on the moral behavior of actors. The good actors will make decision based on the norms since the actor carried out the moral assessment in decision-making process (Finnemore & Sikkinik, 1998).

Finnemore and Sikkinik (1998) explained the life-cycle of the norms and the condition of the norms in their journal, "International Norm Dynamics and Political Change". In the life-cycle of the norms, Finnemore and Sikkinik explained three stages. The first stage is "the norm emergence", they explained that the norms is established by actors who have interests in applying the proper behavior in their community. The actors known as Norm entrepreneurs, the norm entrepreneurs introduced the issues to public. The norm entrepreneurs carried out the political strategies in the framework of norm to influence the public. In order to promote the norms at international level, they need to conduct organization platform such non-governmental organizations (NGOs) or larger transnational advocacy networks that NGOs followed (Finnemore & Sikkinik, 1998).

In other sides, there are the international organizations have aims to promoting their own norms such as World Bank and United Nations. In this stage, the norm entrepreneurs and

organizations tried to secure their position. For example, The World Bank and United Nations would like to gain support from the weak or developing states. In additional, NGOs and intergovernmental organizations asked support from the powerful states. The norm entrepreneurs and organizations used empathy and moral beliefs as motive. After this stage, it reached to "tipping or threshold points". The tipping or threshold points happened when "one-third of the total states in the system adopt the norm". The role of "critical state" as norm enforcement helps the developing of the norm in the system (Finnemore & Sikkinik, 1998).

The second stage is "norm cascades", the "norm cascade" happened that the number or participants of the norm increase. Many states applied and follow the norm without the domestic factors influence. In this point, the international democracy successfully influence the majority of states in international world. In the phenomenon of international politics, the states uses the diplomatic ways to gain support and uses material sanction as the tool of norm enforcement. In the second stage, the norm entrepreneurs and international organizations legitimate the norm by conducting agreements or conventions. In this stage, the norm became the part of policies and laws in international standard. Legitimation is needed interdict the disapproval behavior. The states that have disapproval behavior would be categorize as "rogue state" in international politics, the states would loss of the trust, credibility and reputation towards other states. However, some leaders followed the norm based on their own value or even the psychological. The third stage is "internalization", the norm accepted and it internalized by the actors and it performs automatically. In this stage, the norm is not be questioned and accepted totally in international politics (Finnemore & Sikkinik, 1998).

Finnemore and Sikkinik (1998) explained that the norm could be applied or accepted in several conditions. First condition is "legitimation", the norm accepted or applied as legal

instrument by majority actors in international politics. The second condition is “prominence”. Prominence means that several domestic norms have potentially applied as legal norms international politics. The last condition is “intrinsic characteristics of the norm”. There are several arguments about the “intrinsic characteristics of the norm”. The actors argue whether focusing on “the formulation of the norm” or “the substance of the norm and the issues it address (its content)” (Finnemore & Sikkinik, 1998).

INTERNATIONAL LAW AS INTERNATIONAL REGIME

In this discussion, international law was implemented as international regime since international law provides principles, norms, rules and decision-making procedures. International law was established by the states in order to manage relations among the states. International law provides some instruments from the past and recent conventions that establish among the states. International law implements the past and recent conventions as norms, principles, rules or even decision-making procedures in maintain relations among the states.

In the case of diplomatic relations, international law used the Vienna Convention on Diplomatic Relations (1961) as one of the instruments (Leonavičiūtė, 2012). International law implemented Vienna Convention on Diplomatic Relations (1961) as norm in the case of diplomatic relations since Vienna Convention on Diplomatic Relations (1961) provided immunities and privileges of states in conducting diplomatic relations. The immunities and privileges from Vienna Convention on Diplomatic Relations (1961) were recognized as rights and obligations of states in conducting diplomatic relations. In conducting diplomatic relations, the behavior of states reflected from the Vienna Convention on Diplomatic Relations (1961) since Vienna Convention on Diplomatic Relations (1961) managed the term of rights and obligations of the states.

THE POSITION OF DIPLOMATIC ASYLUM IN INTERNATIONAL LAW

In August 16, 2012, Ecuador guaranteed diplomatic asylum to Julian Assange (Värk, 2012). The Ecuadorian decision led to dispute between the United Kingdom and Ecuador. Both countries had different perspectives in this issue. Ecuador recognized the practice of diplomatic asylum under the conventions that held between Latin American countries such Havana Convention on Asylum (1928) (UNHCR, 1975). Latin America created regime in order to practice diplomatic asylum in its region.

The result of those conventions was applied as norms, principles and rules in the practice of diplomatic asylum. The norms and principles conducted rules and regulations. The rules and regulation reflected to the actor participants' behavior. The Latin America regime was classified as the specific regime in which it created regime in specific issue that was diplomatic asylum. The diplomatic asylum established by general agreements among the Latin America countries based on its interests (UNHCR, 1975). For this reason, Latin America regime was recognized as informal regime.

Meanwhile, Asylum is normally recognize as humanitarian action (Boed, The State of The right of Asylum In International Law, 1994). The states have capability to guarantee asylum to people based humanitarian principle that exist in international law. The humanitarian principle facilitate the practice of asylum under the requirement of The Convention Relating to the Status of Refugees (1951) (The Sphere Project, n.d.). Besides that some of Vienna Convention on Diplomatic Relations (1961) facilitate the practice of diplomatic asylum in International law.

THE IMPLEMENTATION OF HUMANITARIAN PRINCIPLE IN INTERNATIONAL LAW

Asylum was normally recognize as humanitarian action (Boed, The State of The right of Asylum In International Law, 1994). The states had the capability to guarantee asylum to people based on humanitarian principle that existed in international law. The humanitarian principle facilitated the practice of asylum under the requirement of The Convention relating to the Status of Refugees (1951) (The Sphere Project, n.d.). In this case, Ecuador claimed that Julian Assange had the right to enjoy diplomatic asylum. Ecuador pointed to the general definition of refugee in the article 1 on The Convention relating to the Status of Refugees (1951) (Casciani, 2012). According to article 1 on The Convention relating to the Status of Refugees (1951), person who have right to guarantee refugee is a person,

> "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" (Cryer, 2012).

Ecuador argued that Julian Assange encountered persecution for reason of political opinion and his own country could not protect him from persecution (Casciani, 2012). Ecuador emphasized that Julian Assange extradition to Sweden may lead him to face death penalty from United States of America in charges relating to WikiLeaks (Küffner, 2012).

However, article 1 (F) (b) on The Convention relating to the Status of Refugees (1951) mentions that,

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that…. He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

Assange's allegations in Sweden were sexual assault allegations and rape which were considered as serious nonpolitical crime (Casciani, 2012). Under article 1 (F) (b) on The

Convention relating to the Status of Refugees (1951), Julian Assange could not be categorized as person who had the right to guarantee diplomatic asylum.

In the case of Julian Assange, the United Kingdom recognized that Julian Assange as criminal offender rather than political offender. The United Kingdom emphasized that the intention of United Kingdom was to extradite Julian Assange to face allegations of serious sexual offences in Sweden. The United Kingdom's decision had no concern with WikiLeaks or the attitude of United States of America (Foreign and Commonwealth Office, 2012). International Court of Justice (1950) claimed that diplomatic asylum was offered for political offender (UNHCR, 1975). It meant Julian Assange did not have rights to enjoy the diplomatic asylum.

The United Kingdom reminded that Julian Assange did judicial process under law of United Kingdom. Julian Assange faced several courts in order to preclude extradition to Sweden. Julian Assange used all of legal options that were available to preclude extradition to Sweden. However, on May 30, 2012, the United Kingdom Supreme Court decided to extradite Julian Assange to face allegations of serious sexual offences in Sweden. Under law of United Kingdom, Julian Assange was recognized as criminal offender and he should be extradited to Sweden (Foreign and Commonwealth Office, 2012). Ecuadorian decision by guaranteeing diplomatic asylum harmed the position of United Kingdom. The United Kingdom carried out legal obligation to extradite Julian Assange to Sweden. Ecuadorian diplomatic asylum towards Julian Assange precluded the judicial process of United Kingdom. In the other words, Ecuador did not respect towards law of United Kingdom.

Based on that explanation, Ecuador could not implement the humanitarian principle as an excuse to withdraw Julian Assange from the law of United Kingdom. The humanitarian principle could not preclude the United Kingdom to interdict Ecuadorian decision to guarantee diplomatic

asylum towards Julian Assange. In here, United Kingdom carried out legal obligation to extradite Julian Assange to Sweden in order to face his punishment towards rape and sexual assault allegations.

THE EXISTENCE OF VIENNA CONVENTION ON DIPLOMATIC RELATIONS (1961) AS BASIC NORM IN CONDUCING DIPLOMATIC RELATIONS

In the case of diplomatic asylum dispute between the United Kingdom and Ecuador, Ecuador used the article 21(1) on Vienna Convention on Diplomatic Relations (1961) to maintain their position since the article 21(1) on Vienna Convention on Diplomatic Relations (1961) facilitated the practice of diplomatic asylum. The article 21 (1) on Vienna Convention on Diplomatic Relations (1961) mentioned that, "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". The article 21 (1) on Vienna Convention on Diplomatic Relations (1961) forbade United Kingdom to enter the Ecuadorian diplomatic premises. The United Kingdom could not enter the Ecuadorian diplomatic premises without permission from Ecuadorian head of the mission. The Vienna Convention on Diplomatic Relations (1961) offered protection to Ecuadorian diplomatic premises and people who were under the Ecuadorian diplomatic premises (Leonavičiūtė, 2012). The United Kingdom could not extradite Julian Assange to Sweden since Julian Assange was recognized as people who was under protection of Vienna Convention on Diplomatic Relations (1961).

In the other words, The Vienna Convention on Diplomatic Relations (1961) precluded the United Kingdom to extradite Julian Assange to face allegations of serious sexual offences in Sweden. The United Kingdom recognized that entering the Ecuadorian diplomatic premises to extradite Julian Assange was violation towards the Vienna Convention on Diplomatic Relations

(1961). The Vienna Convention on Diplomatic Relations (1961) was recognized as the instrument of international law. It meant that violation towards Vienna Convention on Diplomatic Relations (1961) was recognized as violation towards international law.

Meanwhile, Vienna Convention on Diplomatic Relations (1961) recognized as the basic norm in dealing with the diplomatic relations issue. The Vienna Convention on Diplomatic Relations (1961) consist of immunities and privileges that states have in dealing with diplomatic relations. The immunities and privileges recognized as the right and obligation, and the right and obligation manages the behavior of the states. The status of Vienna Convention on Diplomatic Relations (1961) as one of instruments of the international law made Vienna Convention on Diplomatic Relations (1961) have legal status which accepted or applied by the majority states in international politics.

In other words, the Vienna Convention on Diplomatic Relations is legitimated by international law. The United Kingdom as the state that applied Vienna Convention on Diplomatic Relations (1961) could not violate it. The United Kingdom applied the Vienna Convention on Diplomatic Relations (1961) in their national law. In this case, the national law of United Kingdom reflected from international norm which is the Vienna Convention on Diplomatic Relations (1961). The term of immunities of diplomatic premises from article 21 (1) on Vienna Conventions on Diplomatic Relations (1961) is applied under Diplomatic Privileges Act 1964 section 2 (1) and schedule 3 (The Crown Prosecution Service, n.d.). In this point, the immunities of diplomatic premises do not only in international law, but also the national law of United Kingdom.

Based on those arguments, the United Kingdom's behavior was the result from faithfulness to the international law. The United Kingdom implemented the instrument of international law in

its decision. However, the United Kingdom's obedience to the Vienna Convention on Diplomatic Relations (1961) precluded United Kingdom to extradite Julian Assange to Sweden since United Kingdom could not enter Ecuadorian diplomatic premises.

CONCLUSION

Based on international regime theory of Donald J. Puchala and Raymond F. Hopkins, the diplomatic asylum is recognized under the specific and informal regime. The Latin America regime was recognized as specific regime since it created regime in the specific issue which was diplomatic asylum. In addition, the diplomatic asylum was established by agreements based on mutual interests among the Latin America countries (UNHCR, 1975). Because of that, it was recognized as informal regime. It means that the practice of diplomatic asylum is only recognized in Latin America region.

In fact, the states have rights to guarantee asylum under the principle of humanitarian with requirement of The Convention Relating to The Status of Refugee (1951) as legal consideration (Cryer, 2012). In the case of diplomatic asylum dispute between United Kingdom and Ecuador, Ecuador could not use The Convention Relating to The Status of Refugee (1951) since Julian Assange was not recognize as person who have right to enjoy asylum based on that convention (Casciani, 2012).

In the other side, the Vienna Convention on Diplomatic Relations (1961) as one of instrument of international law facilitated the practice of diplomatic asylum. Beside that Vienna Convention on Diplomatic Relations (1961) recognized as basic norm that manage the behavior of the states in dealing in diplomatic relation issue. The article 21 (1) on Vienna Convention on Diplomatic Relations (1961) precluded the United Kingdom to enter Ecuadorian diplomatic

premises to extradite Julian Assange to Sweden. The United Kingdom could not exercise its law in Ecuadorian diplomatic premises since it was under the protection of Vienna Convention on Diplomatic Relations (1963) and reflected to the Diplomatic Privileges Act 1964 which is national law of United Kingdom.

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