

Australian government has obligation to protect Julian Assange

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The comment below is an analysis of the legal and constitutional issues facing Julian Assange that arise from his detention, for six years, in the Ecuadorian embassy in London.

Demonstrations and vigils are about to take place throughout the world in support of Julian Assange, demanding his freedom and safe return to Australia.

Assange is being persecuted and his human rights abridged by four governments: the US, Australian, British and Ecuadorian.

Both international and Australian law provide a firm foundation necessitating that the Australian government act to protect Assange as an Australian citizen. Instead, his human rights are being denied and he faces unacceptable conditions and hardship, in circumstances where he has committed no crime.

The legal right of diplomatic protection

It is a well-established principle of international law—and part of Australian law recognised by its own courts—that if a country's citizens face improper treatment, persecution, and human rights violations, they may be the subject of diplomatic action, in that sovereign power's discretion, to protect its citizens abroad. The Australian government must exercise that discretion and request from Britain the safe passage of Assange to Australia, to protect Assange and also Australia's reputation as a rule-of-law state.

In the case of *Mavrommatis Palestine Concession (Greece v United Kingdom) 1924*, the Permanent Court of International Justice gave the following formulation of the right of diplomatic protection; "By taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law."

The issue at stake for the Australian government is its commitment to the protection of the human rights of its citizens, including internationally recognised legal and

democratic norms such as free speech, the right of due process, freedom from cruel and degrading treatment, and the right not to be punished in the absence of a criminal act.

Australia is a signatory to the International Covenant on Civil and Political Rights, which came into force in 1973. Internationally, it has traditionally been considered to be a nation solicitous of human rights and the rule of law.

The Australian government has the legal right to seek the diplomatic protection of Julian Assange. Such action may involve diplomatic requests and representations to the British government, and, in some circumstances, the bringing of proceedings against Britain, in British courts of law. The factual bases for the exercise of Australia's discretion to protect Assange are both extreme and momentous. The circumstances in which a sovereign nation may act to protect its subjects are wide-ranging.

Whilst discretionary, the International Law Commission, and Australian courts have recently reinforced both the human rights considerations and the need for the lawful and careful exercise of this discretion. Pursuant to article 19 of the ILC Articles on Diplomatic protection, a state should give "due consideration to the possibility of exercising diplomatic protection especially when significant injury has occurred."

In the 2007 Australian Federal Court case of David Hicks, who was detained at Guantanamo Bay, without charge, for five years, the court rejected an application for summary dismissal, holding that it was necessary to determine the nature and extent of the injustice that the applicant claimed to have suffered. The court held that deprivation of liberty for over five years, without charge, was so exceptional that it was obliged to consider the matter.

Assange's circumstances justifying diplomatic protection

The exercise of diplomatic protection for Assange will not infringe the Act of State doctrine, which precludes a sovereign state from challenging the unlawfulness of another government's action. Rather, what the Australian government

must act to ensure, by diplomatic process, is that Assange be permitted by the British authorities to freely leave Britain for Australia. Accordingly, there is no legal impediment to Australia seeking to protect Assange.

There are several significant and overwhelming factors warranting steps being taken for Assange's diplomatic protection. Undoubtedly there are further particular circumstances, but the following major matters warrant consideration in the exercise of discretion:

1. Assange has effectively been in detention for six years. It is not, in substance, correct to say that his "imprisonment" is self-imposed because of the context in which he sought protection against persecution from the Ecuadorian government. He has been at the Embassy, in effect, in a mode of "protective custody."

2. No charge for alleged sexual misconduct has ever been laid against Julian Assange in Sweden, or any other country. Accordingly, the circumstance for which he was originally detained by British authorities falls away.

3. Assange sought and was granted asylum after careful consideration by the sovereign state of Ecuador, on the basis of a well-founded fear of persecution. That application was granted under well-recognised international law treaties and doctrines of political asylum.

4. High ranking representatives of the US have indicated publicly their intention to prosecute and harm Assange because of WikiLeaks' disclosures of US conduct. A number have called for the death penalty. In 2010 Donald Trump, now US President, called for the death penalty for Assange. More recently, Mike Pompeo, US Secretary of State (the equivalent of the minister for foreign affairs) called for Assange to be "severely punished" for the disclosures.

5. In relation to the publication of disclosed information, Assange has committed no crime known to Anglo-American law. The sources of the leaks may have done so, but he has not. Indeed, what Assange did was no more than publish information—as journalists do when they are acting professionally—to tell the public the truth and keep citizens informed of government action. Such journalistic practice is vital to maintaining democratic government and lawful state action.

6. The breach of bail in respect of the now-defunct Swedish extradition proceedings, which occurred when Assange sought refuge in the Ecuadorian embassy, and for which British authorities maintain they still seek to detain him, is a matter of very marginal, and now even trivial, relevance in the overall context and circumstances of Assange's situation. Furthermore, the bail bond was forfeited, which is the primary and essential punishment for a bail breach under the criminal law. A breach of bail would not lead to a penalty of incarceration. It is very difficult to avoid the conclusion, therefore, that the desire of the British to detain Assange is in order to facilitate handing him over to the US authorities, the very matter that resulted in

international law recognising Assange's claim to asylum, as granted by Ecuador.

The Australian government must stop Britain facilitating the suppression of free speech

Fundamental to the need to give protection to Assange is the defence of democratic rights, respected and upheld by a civilised government, and the taking of strong action to stop the suppression of free speech. The British government, in effectively enforcing the "protective custody" of Assange in the Ecuadorian embassy, by insisting on his arrest and detention to assist US actions, is acting as a powerful vehicle for the suppression of free speech. This is an outrage to democracy, to the rule of law and to an Australian citizen. The Turnbull government must not countenance this conduct.

The Australian prime minister speaks frequently of the need to uphold the rule of law and the international "rules based system." This is a case where he must show whether he is truly committed to those principles. Indeed, as a young lawyer in 1987 in the *Spycatcher* case, Turnbull fought the British government's attempts to suppress free speech. There is no difference in principle involved in Assange's case. British authorities are facilitating the persecution of Assange to further the suppression of free speech.

In his book written about the case, *The Spycatcher Trial*, Mr Turnbull wrote that it was in the public interest for the *Spycatcher* book to be published, because it revealed evidence of crimes and other unlawful acts committed by the British government. The case of Julian Assange, and the protection he now needs from the Australian government, affords Prime Minister Turnbull the opportunity to exercise the power of government in order to defend the right of free speech of an Australian citizen in peril abroad.

The workers movement must fight for the defence of democratic rights, and the rule of law that enshrines them. In the context of the rising tide of authoritarianism around the world, it is even more imperative that it do so. It must support Julian Assange unreservedly, and call on the Australian government to take all steps necessary to protect him and guarantee his safe return to Australia.



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