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Will International Law Retain the Upper Hand?

Diplomatic Asylum and Its Legal Frameworks in Europe and Latin America: Lessons from the Cases of Julian Assange and Jorge Glas

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Preface

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A. Introduction

Diplomatic asylum has once again come the forefront of international legal debate. On 5 April 2024, former Ecuadorian Vice-President Jorge Glas (2013-2018) was forcefully apprehended by Ecuadorian law enforcement agents inside the Mexican Embassy in Quito, where he had been sheltering for several months. In an unprecedented step, Ecuadorian authorities entered the diplomatic premises without the consent of the head of the mission and seized Glas. Ecuador, thereby, did what it had declared many years before – when sheltering Assange – would constitute a 'blatant disregard of the Vienna convention on diplomatic relations and of the rules of international law of the past four centuries.'[1]

As proceedings before the International Court of Justice's (ICJ) in the *Glas case* are ongoing, this moment provides an opportunity to reflect on the legal framework governing diplomatic asylum through the lens of these two cases involving Ecuador: first, that of Julian Assange, who sought shelter in the Ecuadorian Embassy in London (UK), illustrating the European legal framework; and second, that of Jorge Glas, who was sheltering in the Mexican Embassy in Quito (Ecuador), highlighting the Latin American approach to diplomatic asylum. A comparison of these cases sheds light on the benefits and limitations of the two divergent approaches: While no treaty-based right to grant diplomatic asylum exists in Europe, Latin American states have developed multiple regional conventions governing the practice.

Before embarking on the legal questions and the pending International Court of Justice's (ICJ) judgments in this regard, it is useful to provide some personal context. These personal remarks bring us back to June 1954, when 318 persons sought refuge in the Mexican Embassy, this time in Guatemala City. A CIA-backed coup had just overthrown the democratically elected Government of the country.[2] My grandfather was among the hundreds of refugees who sought shelter in the Mexican Embassy in the aftermath of the military coup.[3] He and over 300 individuals remained for

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[1] *Pearse*, Julian Assange Can Be Arrested in Ecuador Embassy, UK Warns, https://www.theguardian.com/media/2012/aug/16/julian-assange-ecuador-embassy-asylum (last accessed 22 October 2024).
[2] See for a detailed account *Schlesinger and Kinzer*.
[3] He narrates his experience in *Cruz Oliva,* pp. 15-18.

several months in the Mexican Embassy before being granted safe passage to Mexico, thereby escaping persecution.[4] The Mexican states' decision to provide them with asylum was crucial, shielding them from arbitrary detention, repression, and possible execution.[5] Indeed, the list of political refugees Mexico has welcomed over the last century is long and includes Spanish Republicans, Austrian and German anti-fascists, Chilean and Uruguayan socialists, Peronists and anti-Somozan,[6] among many others. The list includes many well-known names, such as José Martí, Fidel Castro, Leon Trotsky, Pablo Neruda and Rigoberta Menchú.[7] These historical examples, including that of my grandfather, also illustrate the broader context in which diplomatic asylum has developed in Latin America. The institution is understood to form part of '(Latin-) American International Law',[8] that is, 'the regionalist, at times anti-imperialist, and mostly left-wing project of Latin American solidarity'.[9] Despite its recognition across many Latin American states, there is no *globally* recognised right to grant diplomatic asylum.[10] This divergence makes a comparison between the European and Latin American legal frameworks particularly interesting. Both continents have taken different paths in balancing humanitarian claims of those seeking asylum on the one hand, and the protection of the state's territorial sovereignty on the other hand. Beginning with a discussion of Assange's case, we will first consider the current legal framework in Europe and then discuss the pending cases before the ICJ regarding diplomatic asylum in Latin America.

B. Diplomatic Asylum in Europe: The Case of Julian Assange

Without a doubt, one of the most well-known cases of diplomatic asylum is that of Julian Assange. His stay in the Ecuadorian Embassy in London led to significant diplomatic disputes, including a

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[4] See for a personal account ibid.

[5] As *Schlesinger* and *Kinzer* note, only weeks after the coup, '[a]t the CIA's behest, Castillo Armas announced […] the creation of a "National Committee of Defense Against Communism." A few weeks later, he followed that action by decreeing the Preventive Penal Law Against Communism. The Penal Law established the death penalty for a series of "crimes" that could be construed as "sabotage," including many labor union activities.' *Schlesinger and Kinzer,* p. 221.

[6] *Lajous*, p. 7.

[7] Ibid.

[8] See the Dissenting Opinion by Judge Alvarez in ICJ, *Colombian-Peruvian Asylum Case* (in the following: '*Asylum Case*'), Judgment, ICJ Rep 1950, 266, p. 292.

[9] *Becker Lorca*, UTLJ 2017, 465 (490).

[10] This practice has deliberately not found entrance into the Vienna Convention nor does it form part of customary international law (*d'Aspremont*, MPEPIL 2009, para. 23). Highlighting that it is not a subjective right of an individual, but rather a right of the state: *Shah*, MPEPIL 2007, para. 1. See also *Brunner*, Verfassungsblog 2024.

British diplomat threatening to raid the Ecuadorian Embassy to arrest him.[11] Ecuador ultimately revoked his asylum on 11 April 2019, granting UK police permission to enter the Embassy and arrest him.[12] He was finally released from prison in June 2024 after he had reached a plea deal with the US.[13] The dispute surrounding his stay in the Embassy, however, remains of great importance for understanding the institution of diplomatic asylum, particularly in comparing its practice in Europe and Latin America.

On 19 June 2012, Assange had entered the Ecuadorian Embassy in London to request asylum.[14] At that time, the WikiLeaks founder was facing his extradition to Sweden, where he was accused of raping one woman and sexually molesting and coercing another.[15] His primary concern were, however, not the Swedish proceedings themselves but the risk of being extradited from Sweden to the United States, where he would potentially face the death penalty for criminal charges, including espionage, for WikiLeaks' publication of hundreds of thousands of classified US diplomatic cables, including on US military operations in Afghanistan and Iraq. On 16 August 2012, Ecuador granted asylum to Assange, stressing the risk tor his integrity and life if he were extradited to the US.[16]

This prompted debate as to whether Ecuador was entitled under international law to grant Julian Assange diplomatic asylum.[17] Diplomatic asylum, as understood here, can be defined as asylum

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[11] *BBC*, Julian Assange: UK "threat" to Arrest Wikileaks Founder, https://www.bbc.com/news/world-19259623 (last accessed 26 February 2025).

[12] *Cancillería del Ecuador*, Comunicado Oficial Sobre La Terminación Del Asilo Diplomático de Julian Assange, http://www.presidencia.gob.ec/wp-content/uploads/2019/04/190411-COMUNICADO-JA.pdf (last accessed 25 February 2025).

[13] In addition to that, the investigations against him had been discontinued by the Sweden authorities. See *Swedish Prosecution Authority*, Chronology: Events Concerning Julian Assange in Chronological Order, https://web.archive.org/web/20190502114026/https:/www.aklagare.se/en/nyheter--press/media/the-assange-matter/chronology/ (last accessed 25 February 2025).

[14] *Secretaría General de Comunicación de la Presidencia*, Gobierno Ecuatoriano Otorga Asilo a Julian Assange, http://www.comunicacion.gob.ec/gobierno-ecuatoriano-otorga-asilo-a-julian-assange/ (last accessed 25 February 2025).

[15] *Swedish Prosecution Authority*, Chronology: Events Concerning Julian Assange in Chronological Order, https://web.archive.org/web/20190502114026/https:/www.aklagare.se/en/nyheter--press/media/the-assange-matter/chronology/ (last accessed 25 February 2025).

[16] *Secretaría General de Comunicación de la Presidencia*, Gobierno Ecuatoriano Otorga Asilo a Julian Assange, http://www.comunicacion.gob.ec/gobierno-ecuatoriano-otorga-asilo-a-julian-assange/ (last accessed 25 February 2025).

[17] See e.g. *Marauhn and Simon*, ZJS 2012, 593; *Ambos*, RNFP 2013, 116; *Heijer*, LJIL 2013, 399; *Arredondo*, REDI 2017, 119.

granted in diplomatic premises (different to ‘territorial asylum’, which is granted in the territory of the state of refuge itself).[18] Unlike the case of Jorge Glas, discussed below, where regional treaties such as the 1954 Convention on Diplomatic Asylum (‘Caracas Convention’) and the 1933 Convention on Political Asylum (‘Montevideo Convention’),[19] provide a legal framework,[20] no such conventions exist in Europe that stipulate a right to grant diplomatic asylum.[21] Conventions on diplomatic asylum have exclusively been signed and ratified by Latin American states. They establish rights and obligations only among its Latin American parties and do not create any legal obligations for non-party states such as the UK.[22]

In addition to that, Ecuador could neither base the grant of asylum on customary international law, since diplomatic asylum has not (yet) been recognized as a general rule of customary international law.[23] Commentators have at most discussed the existence of a *regional* custom in Latin America, which cannot be opposed to the UK.[24]

One may add that the British government has consistently rejected the institution of diplomatic asylum, arguing that it lacks recognition under universal international law and, therefore, could only be granted with the explicit consent of the territorial state.[25] This stance was reaffirmed in Assange’s case, where the UK rejected Ecuador’s asylum grant, citing its obligation to extradite

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[18] Others define diplomatic asylum as *any* asylum granted outside the territory of the state of refuge. See *Carrie*, p. 18; *Ronning*, pp. 5–7. One may also limit the term to asylum granted for the purpose of protecting individuals from political persecution.
[19] The application of these treaties and their implications are discussed in detail below. See C.III.2.a.
[20] Convention on Political Asylum (26 December 1933) OAS Official Records; OEA/Ser. A-37, entered into force 28 March 1935; Convention on Diplomatic Asylum (28 March 1954) OAS Official Records; OEA/Ser. A-46, entered into force 29 December 1954. See regarding the Conventions: *Fenwick*, pp. 324–329; *Carrie*, pp. 77–81.
[21] *Marauhn and Simon,* pp. 597–598.
[22] Ibid. See also the ICJ’s reasoning regarding Peru as a non-state party to the Montevideo Convention (ICJ, *Asylum Case*, p. 276).
[23] See ICJ, *Asylum Case*, p. 277. See also *Marauhn and Simon*, p. 598.
[24] *Carrie*, pp. 146–148.
[25] This position was, for example, already reflected in official statements dating back to 1896, when the British Foreign Office asserted that only the host state's consent could justify the granting of diplomatic asylum (*McNair*, p. 76. See also *Carrie*, pp. 130–131.).

him to Sweden.[26] A similar position was expressed in 1975 when a British delegate to the UN emphasised that, despite its long history, diplomatic asylum had never become part of universal international law.[27] The delegate, nevertheless, acknowledged the need for some leeway in granting diplomatic asylum for humanitarian reasons.[28] The precise circumstances under which diplomatic asylum could be granted on humanitarian grounds, however, remain debated.[29] A recurring example of permissible diplomatic asylum is the case of a person fleeing mob violence into an embassy.[30] Relevant state practice indeed indicates that diplomatic asylum on humanitarian grounds may only be granted temporarily and in cases of emergency.[31]

The situation of Assange, however, was different in nature. Commentators agree that he was not facing a sufficiently immediate risk to his integrity or life that could have justified the grant of diplomatic asylum on humanitarian grounds.[32] These scholars especially stress existing legal safeguards against Assange's extradition to the US. Sweden could not legally extradite him to the US without the UK's consent.[33] Furthermore, according to a bilateral agreement between Sweden and the US on extradition, his extradition should not be granted if the offenses are deemed political or linked to a political offense.[34] In addition to that, according to an agreement on extradition between the EU and the US, Sweden could have extradited him to the US on the condition that the US would not impose or carry out a death penalty.[35] Finally, both the UK and Sweden are also bound by the

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[26] The UK was obliged to execute the European arrest warrant based on the principle of mutual recognition in accordance with Article 1(2) Council Framework Decision on the European arrest warrant, OJ L 190 18/07/2002, p. 1 (in the following 'Framework Decision'). See *Hague*, Foreign Secretary Statement on Ecuadorian Government's Decision to Offer Political Asylum to Julian Assange, https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange (last accessed 25 February 2025).
[27] See UNGA, 1555th Meeting of 03/11/1975, UN Doc. A/C.6/SR.1555, para. 34. See also regarding the UK's position *McNair*, p. 76.
[28] UNGA, 1555th Meeting of 03/11/1975, UN Doc. A/C.6/SR.1555, paras 33, 37. See also regarding the UK's practice to grant temporary asylum on humanitarian grounds ibid.
[29] UNGA, 1555th Meeting of 03/11/1975, UN Doc. A/C.6/SR.1555, para. 36. See also *Carrie*, pp. 147–148.
[30] UNGA, 1555th Meeting of 03/11/1975, UN Doc. A/C.6/SR.1555, paras 21, 36.
[31] *Carrie*, pp. 147–148. See regarding the UK's position in this regard *McNair,* p. 76.
[32] *Marauhn and Simon,* p. 598; *Ambos*, p. 128; *Heijer*, p. 412.
[33] Article 28(4) Framework Decision. See *Marauhn and Simon*, p. 594.
[34] Against the lack of any relevant stipulation in the Agreement on Extradition between the European Union and the United States of America, one must have regard to Article V(5) Convention on Extradition between the United States of America and Sweden, signed on 24 October 1961. See also *Ambos*, p. 123.
[35] Article 13 Agreement on Extradition between the European Union and the United States of America, L 181/27, 19 July 2003, entered into force on 1 February 2010.

European Convention on Human Rights (ECHR).[36] An extradition exposing an individual to the death penalty may under certain circumstances violate Article 3 ECHR, as affirmed by the European Court of Human Rights.[37] Thus, given these legal safeguards, the risks for his integrity or life were deemed too remote to substantiate the grant of humanitarian asylum. One may note that this reasoning is formalistic and neglects the *practical* risks that Assange could have faced if extradited to Sweden. Unfortunately, legal safeguards do not always translate into effective protection. This is particularly doubtful, since Sweden has previously extradited individuals to states where they were at risk of torture, or other cruel, inhumane or degrading treatment. The relevant states had made legal assurances that they would not subject the individuals to ill treatment. These assurances, however, proofed to be insufficient in practice.[38] It, therefore, remains unclear whether Sweden would have sufficiently ensured Assange's protection in the face of potential diplomatic pressure.[39] Still, this risk appeared to be too remote for most commentators to substantiate the grant of diplomatic asylum on humanitarian grounds to Julian Assange.

In conclusion, the absence of any treaty-based or (universal) customary international law that Ecuador could have invoked to grant Assange diplomatic asylum, along with the debate over whether humanitarian grounds could sufficiently justify his asylum (a position rejected by most commentators), illustrates the current legal reality in Europe: the protection individuals receive through diplomatic asylum remains largely at the discretion of states, and on how broadly or narrowly they interpret the (unwritten) right to grant asylum on humanitarian grounds.

Given the persistent ambiguity surrounding the circumstances under which diplomatic asylum may be lawfully granted, the UN' Sixth Committee debated whether explicitly regulating the institution

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[36] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953.
[37] ECtHR, *Case of Soering v. The United Kingdom*, No. 14038/88, Judgment, 7 July 1989, para. 111. See also *Marauhn and Simon*, p. 595; *Ambos*, p. 122–123.
[38] *Human Rights Committee*, Mohammed Alzery v. Sweden, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.5; *UN Committee against Torture*, Ahmed Hussein Mustafa Kamil Agiza v. Sweden, CAT/C/34/D/233/2003, 20 May 2005, 13.4.
[39] Sweden is also bound by Article 19(2) Charter of Fundamental Rights of the European Union, OJ 2000/C 364/01, European Union, 7 December 2000, as the extradition would be carried out under the Agreement on Extradition between the European Union and the United States of America (see Article 51(1) of the Charter).

would be preferable.[40] As the Secretary-Generals' report rightly observed, 'excessive doubt and undue caution may lead to unnecessary human suffering and loss of life as a result of the refusal of diplomatic asylum.'[41] Nevertheless, the majority of states opposed such codification.[42] According to the states' representatives, any codification (at that stage) was premature and would have risked undermining the institution, since, in their view, achieving consensus would likely have required concessions that would have weakened the institution and would have overly restricted the flexibility needed.[43] Bluntly put, states' reluctance towards diplomatic asylum remained too strong to allow for substantive progress on its formalisation – a stance that is likely to persist. For a more idealistic approach, one must look to Latin America.[44] However, as illustrated by the *Glas case,* discussed in the following section, the codification and active endorsement of diplomatic asylum in the region do not necessarily prevent diplomatic disputes.

C. Diplomatic Asylum in Latin America: The Glas Case

The case of Jorge Glas exemplifies the distinct path taken by Latin American states regarding diplomatic asylum. The case is explored in depth in the following, examining the legal arguments presented by both Mexico and Ecuador in order to address all arising issues, including the principle of non-intervention.

I. Who is Jorge Glas? The Facts of the Case

The pictures of Jorge Glas being dragged out of the Mexican Embassy in Quito have received international attention. He had sought refuge in the Embassy some months before, on 17 December

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[40] See regarding this debate also *Porcino*, NYU JILP 1976, 435 (451-452).
[41] UNGA, Question of Diplomatic Asylum: Report of the Secretary-General, UN Doc. A/10139 (Part I), 2 September 1975, para. 4.
[42] See the arguments advanced against the codification in UNGA, 1555th Meeting of 03/11/1975, UN Doc. A/C.6/SR.1555, paras 5, 15, 23, 31, 37, 40, 50, 52, 64, 77, 81.
[43] Idem.
[44] As the delegate of Ghana stated: 'the Latin American countries should be commended for their consistent presence in the vanguard of the progressive development of international law' (UNGA, 1555th Meeting of 03/11/1975, UN Doc. A/C.6/SR.1555, para. 27).

2023.[45] Once installed in the Embassy, he formally requested asylum from Mexico. Mexico granted the asylum on 5 April 2024. That same day, around 10:00 pm, Ecuadorian special operations agents stormed the Embassy and forcibly took him out of the building, placing him in a vehicle and, once again, in detention. He remains detained in Ecuador at the time of writing.[46]

When seeking refuge at the Embassy, Glas had been on temporary release from prison due to alleged health issues.[47] He had been convicted twice of bribery and other crimes, receiving prison sentences of six and eight years.[48] Further criminal proceedings against him are ongoing.[49] In relation to the latter, his pre-trial detention was ordered in early 2024.[50] Ecuador, therefore, argues that his apprehension was necessary to enforce the arrest warrant against him.

Crucially, Ecuador had taken several diplomatic steps before forcefully storming the Mexican Embassy. In particular, it had sent a Note Verbale to Mexico, which included information regarding the criminal proceedings against Glas,[51] and meetings were held between the Ministers of Foreign Affairs of both countries in early 2024.[52] Ecuador subsequently sent Mexico diplomatic notes, one formally asking Mexico whether Glas was still in the Embassy and a second requesting consent from the head of the Mexican Embassy to allow Ecuadorian law enforcement to enter the Embassy

[45] ICJ, *Embassy of Mexico in Quito (Mexico v. Ecuador)*, Request for the Indication of Provisional Measures, Order, 23 May 2024 (in the following: 'Order rejecting the Indication of Provisional Measures'), para. 15.
[46] See also the security footage published by Mexico (*AP News*, Mexico Releases Video of Ecuador's Raid on Its Embassy, https://apnews.com/article/mexico-ecuador-embassy-raid-878c73754d0f08bd74de1babfcdf1c2c (last accessed 7 January 2025).
[47] ICJ, Order rejecting the Indication of Provisional Measures, para. 15. See also ICJ, *Embassy of Mexico in Quito (Mexico v. Ecuador)*, Application Instituting Proceedings, 29 April 2024 (in the following: 'Application Instituting Proceedings, Mexico v. Ecuador'), para. 3.
[48] As Ecuador notes, the Odebrecht corruption scandal is 'the largest transnational bribery schemen in Latin America involving at least 10 countries' and has led to the fall of presidents. See also in more detail: ICJ, *Application Instituting Proceedings*, Mexico v. Ecuador, 29 April 2024, para. 9.
[49] ICJ, Order rejecting the Indication of Provisional Measures, para. 15. See also: *BBC*, Ecuador: el vicepresidente Jorge Glas, sentenciado a 6 años de prisión en caso Odebrecht, https://www.bbc.com/mundo/noticias-america-latina-42346644 (last accessed 22 October 2024).
[50] ICJ, Order rejecting the Indication of Provisional Measures, para. 15.
[51] ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 20.
[52] Meetings were held on 16 January 2024 and on 8 February 2024. See ICJ, *Embassy of Mexico in Quito (Mexico v. Ecuador)*, Application Instituting Proceedings Containing a Request for Provisional Measures, 11 April 2024, (in the following 'Mexico's Application Instituting Proceedings'), para. 4. The same day of his entry into the Embassy, Ecuador had also written a letter to the Embassy requesting cooperation (ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 17).

to apprehend him and execute the arrest warrant against him.[53] Mexico rejected the latter in March 2024.[54] In early April, tensions between both countries escalated when Ecuador's Ministry of Foreign Affairs declared the Head of the Mexican Embassy, Ambassador Raquel Serur Smerke, *persona non grata*.[55] The following day, on 5 April 2024, Mexico stated that it had granted diplomatic asylum to Glas and planned to request safe conduct for him to enable his departure to Mexico.[56] The same day, Ecuador responded by arguing that granting him political asylum was 'unlawful' under international law, that it would not give him safe conduct but continue to protect the Embassy in compliance with the Vienna Convention on Diplomatic Relations ('Vienna Convention').[57] Despite these statements, the same day, hours later, Ecuador's law enforcement agents forcefully entered the Embassy without consent by the premises' head and forcibly abducted Glas.[58]

Interestingly, both states submitted applications to the ICJ, each alleging that the other had violated international law. The following analysis maintains the chronological order and begins with Mexico's application against Ecuador (III), followed by Ecuador's application against Mexico (IV).

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[53] These facts appear to be undisputed and are put forward by both States before the ICJ. See Order rejecting the Indication of Provisional Measures, para. 16; ICJ, Mexico's Application Instituting Proceedings, para. 7. See also ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 22.
[54] ICJ, Mexico's Application Instituting Proceedings, para. 8. ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 23.
[55] Shortly thereafter, she left Ecuador. She was declared *persona non grata* as a response to the Mexican President's statements regarding the presidential elections in Ecuador (ICJ, Order rejecting the Indication of Provisional Measures, para. 17; ICJ, Mexico's Application Instituting Proceedings, para. 10). See regarding the Mexican President's statements on the elections also: *Mendonca and Valdés*, México no romperá relaciones diplomáticas con Ecuador luego de que la embajadora mexicana fuera declarada "persona non grata", https://cnnespanol.cnn.com/2024/04/05/mexico-no-rompera-relaciones-ecuador-trax (last accessed 22 October 2024).
[56] ICJ, Order rejecting the Indication of Provisional Measures, para. 18; ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 28. See also *Molina* and *Solano*, Mexico Da Asilo a Exvicepresidente Glas, Ecuador Lo Rechaza En Medio de Tension Diplomatica, https://www.sandiegouniontribune.com/2024/04/05/mxico-da-asilo-a-exvicepresidente-glas-ecuador-lo-rechaza-en-medio-de-tensin-diplomtica/ (last accessed 22 October 2024).
[57] Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, entered into force 24 April 1964. Ecuador referred, in particular, to the 1954 Convention on Diplomatic Asylum and the 1933 Convention on Political Asylum (ICJ, Order rejecting the Indication of Provisional Measures, para. 19; ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 29).
[58] ICJ, Order rejecting the Indication of Provisional Measures, para. 20; ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 30.

II. Mexico's Application Against Ecuador: Embassy of Mexico in Quito (Mexico v. Ecuador)

For the ICJ to hold Ecuador internationally responsible for its actions, Mexico's application must be admissible and substantiated on its merits.

1. Admissibility

Both states must have consented to the ICJ's jurisdiction.[59] Article 36(1) of the Statute of the Court covers referrals by mutual agreement.[60] Mexico has, unlike Ecuador, however, not signed the Optional Protocol to the Vienna Convention on Compulsory Settlement of Disputes.[61] Conversely, Mexico has accepted the ICJ's compulsory jurisdiction under Article 36(2) ICJ Statute, which, in turn, Ecuador has not (yet) accepted.[62] However, the American Treaty on Pacific Settlement (Pact of Bogotá), to which both states are party, [63] includes a relevant compromissory clause in its Article XXXI. The latter broadly covers

> 'all disputes of a juridical nature that arise among them concerning: a) The interpretation of a treaty b) Any question of international law; c) The existence of any fact which, if established, would constitute the breach of an international obligation; d) The nature or extent of the reparation to be made for the breach of an international obligation.'

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[59] *Kolb*, pp. 298, 370–382.
[60] Ibid p. 375; *Tomuschat*, in: Zimmermann/Tams (eds), The Statute of the International Court of Justice: A Commentary, Article 36, para. 34.
[61] Optional Protocol to the Vienna Convention on Compulsory Settlement of Disputes (24 June 1964) 500 UNTS 241, entered into force 24 April 1964. The Vienna Convention does not comprise any compromissory clause, foreseeing the jurisdiction of the ICJ. See already in this regard *Hernández Páez*, The Glas Case: Diplomatic Asylum Returns to the ICJ?, https://www.ejiltalk.org/the-glas-case-diplomatic-asylum-returns-to-the-icj/ (last accessed 22 October 2024). See regarding the state of ratification of the Option Protocol https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en (last accessed 22 October 2024).
[62] ICJ, Declarations recognizing the jurisdiction of the Court as compulsory, 28 October 1947, https://www.icj-cij.org/declarations/mx (last accessed 22 October 2024).
[63] Both states are Parties to the Treaty (Mexico ratified the Pact on 23 November 1948, and Ecuador on 3 March 2008). See Department of International Law, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement 'Pact of Bogotá', https://www.oas.org/juridico/english/sigs/a-42.html#Ecuador (last accessed 22 October 2024).

This clause serves as a basis of the ICJ's jurisdiction.[64] There must, furthermore, be a 'dispute' between the parties,[65] which cannot be settled by 'direct negotiations' through the usual diplomatic channels (Article II Pact of Bogotá). Even though Ecuador has accepted the 'extraordinary' and 'wholly exceptional' character of the police operation, this does not amount to a 'recognition' of a violation.[66] The dispute has, therefore, not yet been settled. Whether the dispute can be resolved through negotiations rather than dispute settlement depends on the subjective perceptions of both states. This requirement is met if they have not considered conducting 'direct negotiations'.[67] Such negotiations between them have indeed failed and appear to be deadlocked.[68] It is not likely that further negotiations would result in a settlement. Therefore, the ICJ is competent to adjudicate the claims against Ecuador.

2. Merits

Mexico argues that Ecuador violated several stipulations of the Vienna Convention on Diplomatic Relations when entering the Embassy,[69] including the inviolability of the premises (a), of its communication (b), as well as the personal inviolability of the diplomatic personnel (c).[70] Both Mexico and Ecuador have ratified the Vienna Convention.[71]

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[64] The reservation Ecuador made to the latter treaty is not relevant to the case. The compromissory clause would have to contradict the above-mentioned treaties (but see Articles 33, 92 UN Charter, Article 3(i) OAS Charter, Article 416(2) Ecuadorian Constitution). See in more detail *Páez*, The Glas Case: Diplomatic Asylum Returns to the ICJ?, https://www.ejiltalk.org/the-glas-case-diplomatic-asylum-returns-to-the-icj/ (last accessed 22 October 2024). The matter does neither fall within the exclusive domestic jurisdiction in the sense of Article V of the Pact. Finally, the exception foreseen in its Article VI does neither preclude the ICJ's jurisdiction, since Ecuador has made a reservation in this regard and the matter has not already been settled. See already ibid; *Plachta*, IELR, 177 (178).

[65] *Tomuschat,* para. 8.

[66] See also ICJ, Order rejecting the Indication of Provisional Measures, Declaration of Judge Nolte, para. 13.

[67] ICJ, *Border and Transborder Armed Actions (Nicaragua* v. *Honduras),* Judgment, [1988], ICJ Rep 69, p. 94. The threshold was met according to Judge *Nolte*. See ICJ, Order rejecting the Indication of Provisional Measures, Declaration of Judge Nolte, para. 14.

[68] See also ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, [2012] ICJ Rep 422, p. 446.

[69] ICJ, Mexico's Application Instituting Proceedings, para. 52(b).

[70] ICJ, Mexico's Application Instituting Proceedings, para. 24.

[71] Mexico ratified the Convention on 16 June 1965, and Ecuador on 21 September 1964. See United Nations Treaty Collection, Depositary, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en#20 (last accessed 20 October 2024).

a) Alleged Violation of Article 22(1) Vienna Convention (Inviolability of the Diplomatic Premise)

Article 22(1) Vienna Convention on Diplomatic Relations establishes the inviolability of diplomatic missions. The stipulation reflects customary international law[72] and explicitly prohibits agents of the receiving state from entering the mission without the consent of the head of the mission.[73] It requires the territorial State 'to abstain from exercising any sovereign rights, in particular law enforcement rights', unless the head of the mission consented to the exercise of such rights.[74] As noted before, the head of the mission of the Mexican Embassy gave no such consent. Despite the lack of such consent, law enforcement officials entered the mission. Accordingly, there has been a violation of Article 22(1) Vienna Convention.

Crucially, the Vienna Convention does not foresee any other exception than consent, even though the issue of diplomatic asylum was well known to the drafters of the Convention.[75] Scholars concur, therefore, that entering without the consent of the head of the premise – including in cases of wrongful diplomatic asylum – clearly amounts to a violation of the Vienna Convention as well as customary international law.[76] Thus, even if diplomatic asylum was wrongfully granted to an individual, the territorial state has no right to enter the premises.[77]

For the sake of argument, other exceptions that Ecuador might invoke are briefly discussed in the following.

aa) An Unwritten Exception in Cases of Emergency?

Indeed, Ecuador relied on exceptional circumstances, putting forward an ongoing non-international armed conflict (NIAC). One can, therefore, discuss whether consent may be presumed in certain

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[72] *Brunner*, Verfassungsblog 2024.
[73] Article 22(1) reads that '[t]he 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.' See also *d'Aspremont*, MPEPIL 2009, pp. 12–14.
[74] *Denza*, p. 135.
[75] *d'Aspremont*, MPEPIL 2009, para. 15.
[76] *Denza*, pp. 141–142; *Wagner, Raasch and Pröpstl*, pp. 170–173; *d'Aspremont*, MPEPIL 2009, para. 17.
[77] In the same vein *Payandeh and Saake*, Verfassungsblog 2019.

extreme cases of emergency based on an analogy to Article 31(2) Vienna Convention on Consular Relations.[78] However, such an exception was deliberately not included in the Vienna Convention.[79] But even if such an exception were admitted, it would not apply to the present case. There was no such emergency (comparable to 'fire or other disaster'), and no presumption can be admitted where consent was *explicitly* rejected, as in the present case.[80] The reliance on an NIAC appears too vague in the present case since no direct threat to life or a severe threat to national security (such as by storing arms at an embassy[81]) has been invoked.

bb) Violating the Inviolability as a Countermeasure?

Second, Ecuador may argue that Mexico had abused its 'privileges and immunities' by sheltering Glas and granting him asylum.[82] It may then contend that the raid was justified as a so-called 'countermeasure' in response to Mexico's alleged violations of international law.[83] Indeed, Mexico's conduct may have violated, among others, the Caracas and Vienna Conventions. While these allegations are discussed below, the violations are assumed here for the sake of argument.[84] Indeed, even if one assumed that Mexico violated international law by sheltering Glas and granting him asylum, Ecuador would still have no right to enter the diplomatic premises as a countermeasure. This is because the Vienna Convention conclusively lists possible responses to violations of its stipulations. According to the ICJ, '[t]he rules of diplomatic law […] constitute a self-contained régime'.[85] This means that in cases of violations of diplomatic law, states can only resort to measures foreseen in the same regime. Precisely in a case of wrongful diplomatic asylum, the ICJ

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[78] Vienna Convention on Consular Relations (24 April 1963) 596 UNTS 261, entered into force 19 March 1967. Article 31(2) establishes that 'consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.' (see *Wagner, Raasch and Pröpstl,* p. 176).
[79] Ibid p. 177.
[80] Ibid p. 176.
[81] See, for example, the raid by Pakistani law enforcement on the Iraqi Embassy in 1973 for an example of such a threat: ibid p. 175.
[82] *Páez*, The Glas Case: Diplomatic Asylum Returns to the ICJ?, https://www.ejiltalk.org/the-glas-case-diplomatic-asylum-returns-to-the-icj/ (last accessed 22 October 2024).
[83] See Chapter II of the Draft Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001).
[84] See in detail below: C.III.2.a.
[85] ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep 3, p. 40. See also *d'Aspremont*, MPEPIL 2009, para. 19.

had explained that the only ‘remedy for such possible abuses of diplomatic functions’ is to declare a member of the mission *persona non grata* (or as not acceptable, as foreseen in Article 9(1) of the Vienna Convention) or – in more extreme cases – to ‘break off diplomatic relations’.[86] These are the only foreseen responses to convention violations and, thus, were the only lawful responses available to Ecuador in this case. In addition to that, Article 50(2)(b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts and the UN GA Resolution on the responsibility of states for internationally wrongful acts explicitly establish that ‘[a] State taking countermeasures is not relieved from fulfilling its obligations […] [t]o respect the inviolability of diplomatic […] premises’.[87] This has also consistently been maintained by legal scholars.[88] Ecuador can, therefore, not invoke that its acts constituted countermeasures.

Finally, one may also note that Ecuador cannot invoke self-defence.[89] There was no armed attack originating in another state's territory.[90]

cc) Conclusion

In conclusion, Ecuador violated Article 22(1) of the Vienna Convention due to the lack of relevant exceptions or justifications when it forcefully entered the Ecuadorian Embassy without the consent of the head of the mission. One may add that the UK would have violated the same stipulation, if it had raided the Ecuadorian Embassy in London without the consent of the latter’s’ head of the mission.[91]

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[86] ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep 3, pp. 38-40. See *d'Aspremont*, MPEPIL 2009, para. 19. See also: *Páez*, The Glas Case: Diplomatic Asylum Returns to the ICJ?, https://www.ejiltalk.org/the-glas-case-diplomatic-asylum-returns-to-the-icj/ (last accessed 22 October 2024).

[87] UNGA Resolution A/RES/56/83, 28 January 2002, Article 50 (Obligations not affected by countermeasures).

[88] See in general *d'Aspremont*, MPEPIL 2009, para. 19. Also recognising a violation of Article 22 Vienna Convention: *Guapizaca*, Verfassungsblog 2024; *Brunner*, Verfassungsblog 2024.

[89] The House of Commons Foreign Affairs Committee discussed this justification. See *Cameron*, First Report of the Foreign Affairs Committee of the House of Commons, International and Comparative Law Quarterly 1985, 610 (618).

[90] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, p. 194.

[91] The UK ratified the Vienna Convention on 1 September 1964. See: United Nations Treaty Collection, Depositary https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en (last accessed 27 February 2025).

b) Alleged Violation of Articles 25 and 27(1) Vienna Convention (Inviolability of Communication)

Mexico, furthermore, submitted that at the time of the operation on April 5th, neither the cellphone signal of the Embassy's staff worked nor the fixed-line telephone of the Embassy's security guard.[92] Diplomatic personnel believed that this was due to an Ecuadorian military vehicle parked outside the premises that could 'intervene cellphone communications' and that Ecuadorian agents had 'pulled out the telephone cables'.[93] Under Article 25 Vienna Convention, Ecuador is obliged to 'accord full facilities for the performance of the functions of the mission.' The use of telephones is indeed necessary for the general performance of the functions of the mission in the sense of Article 25.[94] In addition to that, Article 27(1) stipulates that '[t]he receiving State shall permit and protect free communication on the part of the mission for all official purposes' (so-called inviolability of communication[95]). Free communication must be understood as the 'absence of prohibition or restriction' of the communication.[96] Article 27(1), thus, explicitly requires the territorial state to refrain from interfering with the means of communication. This obligation was breached by interrupting the communication. Finally, as argued above, there is no applicable justification. If Ecuador wanted to use the measures as a response to the alleged violations of international law, it would have had to resort to such measures explicitly foreseen within the Vienna Convention, which does not include the interruption of signals. The measure, therefore, violated Articles 25 and 27(1) Vienna Convention.

c) Alleged Violation of Article 29 (Personal Inviolability)

Mexico also argues that Canseco, the Deputy Chief of Mission, was violently assaulted by the Ecuadorian law enforcement agents on April 5th, including 'aimed at with a weapon', resulting in several physical injuries as well as psychological harm.[97] Mexico, furthermore, claims that when

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[92] ICJ, Mexico's Application Instituting Proceedings, para. 17.
[93] ICJ, Mexico's Application Instituting Proceedings, paras 11, 17.
[94] Whether the function includes granting diplomatic asylum is discussed below. See C.III.2.c.
[95] *Denza*, p. 212.
[96] Ibid, p. 217.
[97] ICJ, Mexico's Application Instituting Proceedings, paras 15-16.

he tried to stop the Ecuadorian agents, he was 'subdued by agents while on his knees with his face to the ground'.[98] Mexico also argues that he and the Embassy's head of the administration were surveilled and followed on April 4th and 5th, respectively.[99]

Article 29 Vienna Convention enshrines the personal inviolability of diplomatic agents. It explicitly establishes that '[t]he receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.' According to Article 1(e) Vienna Convention, Canseco, as a member of the diplomatic staff, benefitted from the protection of Article 29. Therefore, Ecuador was required to respect his inviolability, including again, by refraining 'from exercising sovereign rights and in particular law enforcement rights'.[100] By the physical force applied against him, he was physically attacked as well as his dignity violated. In addition to that, the threats by law enforcement agents when following the diplomatic personnel leaving the premises intimidated them and, thus, constituted an unjustified attack against them.

One may note that the ICJ has recognised an exception to the principle of personal inviolability in case 'a diplomatic agent [was] caught in the act of committing an assault or other offence',[101] which Ecuador may argue, was the case, when Canseco resisted the law enforcement agents.

Canseco was, however, not committing any assault or other offence at the time, but rather objecting to law enforcement entering the Embassy unlawfully. As argued above, the measures cannot be justified by referring to Mexico's violations of international law. Ecuador, therefore, also violated Article 29 Vienna Convention.

d) Legal Consequences

In conclusion, Ecuador violated Articles 22(1), 25, 27(1) and 29 Vienna Convention by forcefully entering the premises, disrupting means of communication, and attacking Canseco. Consequently,

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[98] ICJ, Mexico's Application Instituting Proceedings, para. 16.
[99] ICJ, Mexico's Application Instituting Proceedings, paras 11-12.
[100] *Denza*, p. 258.
[101] ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep 3, p. 40.

Ecuador must make full reparation to the Mexican Government.[102] Restoring the *status quo ante* would, in principle, mean ceasing the interruption of communication means and refraining from threats against diplomatic personnel. Glas would have to be returned to the premises.[103] However, Mexico instead requested the ICJ to 'determine that the breaches by Ecuador […] entail consequences to its status as a Member of the United Nations, that may amount to its expulsion under Article 6 UN Charter.[104] This is an unusual request. The Charter indeed details the expulsion procedure in Article 6, stipulating that the UN Security Council (making the recommendation) and the General Assembly (deciding upon the recommendation by the Security Council) determine the expulsion of Members of the UN.[105] The process foreseen therein is, therefore, of a political nature. No judicial control by the ICJ has been foreseen by the drafters of the Charter. The ICJ is, consequently, not competent to decide upon the matter. The Security Council and the General Assembly may still consider the ICJ's findings should they wish to act upon the matter. This would be the first time a member of the UN is expelled.[106] Such a decision is, therefore, extremely unlikely.

3. Request for the Indication of Provisional Measures

In its application of 11 April 2024, Mexico also requested provisional measures.[107] Mexico thereby sought to ensure respect and protection of its Embassy in Quito, including its property and archives, as well as the private residences of its diplomats. Additionally, Mexico requested that Ecuador allow Mexico to clear the latter[108] and take no action which might prejudice Mexico's rights in the

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[102] The right pertains to the Government, not to *Canseco* personally.
[103] But see also regarding the obligation of Mexico to terminate the asylum and surrender *Glas* below C.III.2.a.cc.
[104] Charter of the United Nations (26 June 1945) entered into force 24 October 1945. See ICJ, Mexico's Application Instituting Proceedings, para. 29.
[105] See also ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Rep 151, pp. 163-164.
[106] Such a measure has been discussed *inter alia* with regard to Israel, South Africa, Belgium (situation in Congo) and Portugal (situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples). For example, a draft resolution had foreseen 'to expel Israel from the United Nations under Article 6 of the Charter for her persistent violation of the principles of the Charter.' This draft resolution, however, was not voted. Further draft resolutions discussed the same with regard to South Africa in 1961 and 1962 due to its apartheid policies. See for a complete overview UN Codification Division Publications, Repertory of Practice of United Nations Organs, Supplements No 1 and 3, (1954-1955 and volume 1), https://legal.un.org/repertory/art6.shtml (last accessed 8 November 2024(.
[107] ICJ, Mexico's Application Instituting Proceedings.
[108] ICJ, Mexico's Application Instituting Proceedings, para. 60.

ICJ proceedings. According to Article 41(1) of the ICJ Statute, the Court can indicate provisional measures.[109] Such measures are, however, only granted in 'exceptional' cases,[110] and where all cumulative requirements are met.[111] In particular, there must be *prima facie* jurisdiction (1), the rights asserted must be at least plausible (2), there must be a link between the plausible rights and the measures requested (3), and there must be a real and imminent risk of irreparable harm (4).

As seen above, the ICJ has jurisdiction to adjudicate the merits of the claim. The court thus has *a fortiori*, *prima facie* jurisdiction.[112] In addition, the rights asserted by Mexico are also plausible since Articles 44 and 45 Vienna Convention establish the inviolability of diplomatic premises, property and archives in case of a breach of diplomatic relations.[113] There is also a link between the plausible rights and the measures requested, considering that disregarding the rights under the Convention would possibly entail irreparable harm to the archives. However, the ICJ only indicates provisional measures in case of urgency. There must be a real and imminent risk that the right invoked will be irreparably damaged before the ICJ rules on the merits of the case.[114] In this regard, Mexico argues that Ecuador could, again, enter the premises or private residences of diplomats, which still contain confidential and important documents, including in relation to Glas, and that Ecuador's previous conduct supports this risk.[115]

However, two days before Mexico requested provisional measures from the ICJ, Ecuador sent a Note Verbale to Mexico, assuring that it would respect and protect the Embassy, including its

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[109] Statute of the International Court of Justice (26 June 1945) 33 UNTS No 993 entered into force 24 October 1945.
[110] ICJ, *Aegean Sea Continental Shelf*, Interim Protection, Order, [1976] ICJ Rep 3, p. 11.
[111] ICJ, Order rejecting the Indication of Provisional Measures, para. 35.
[112] One may note that in its order from 23 May 2024, the Court did not raise the issue, which Judge *Nolte* heavily criticised in his Declaration to Order rejecting the Indication of Provisional Measures, para. 13. See also ICJ, Order rejecting the Indication of Provisional Measures, para. 35.
[113] ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep 3, p. 40. Even though 'the condition of plausibility of rights has a certain logical and substantive priority over the requirement of a real and imminent risk of irreparable harm', this was, again, not explicitly examined by the ICJ in its 23 May order. See Declaration of Judge *Nolte* to the Order rejecting the Indication of Provisional Measures, para. 15.
[114] ICJ, Order rejecting the Indication of Provisional Measures, para. 28 referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order, [2020] ICJ Rep 24, paras 64-65.
[115] ICJ, Mexico's Application Instituting Proceedings, para. 62.

property and archives.[116] It argued the same in a letter sent to the ICJ[117] and during the oral hearing before the ICJ.[118] Admittedly, Ecuador had also ensured to protect the Embassy hours before entering it on April 5th.[119] However, according to the ICJ's jurisprudence, such unilateral declarations, as made by Ecuador, 'can give rise to legal obligations.'[120] Indeed, the two requirements of publicity and intention to be binding are met in the present case,[121] and the assurances 'encompass the concerns expressed by Mexico in its Request.'[122] The assurances, therefore, 'are binding and create legal obligations'.[123] Consequently, Ecuador must respect and protect the premises, including its archives and property, until Mexico empties them based on its unilateral declarations.[124] No provisional measures are, therefore, in order.[125]

III. Ecuador's Application against Mexico: *Glas Espinel (Ecuador v. Mexico)*

On 29 April 2024, Ecuador submitted an application to the ICJ, instituting proceedings against Mexico.[126] Ecuador claims that Mexico has, by its conduct from 17 December 2021 until 5 April 2024, violated several obligations under international law, which are discussed in the following.[127]

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[116] The note is dated 9 April 2024 (ICJ, Order rejecting the Indication of Provisional Measures, paras 10, 29).
[117] The letter is dated 19 April 2024 (ICJ, Order rejecting the Indication of Provisional Measures, paras 25, 30).
[118] The public hearing was held on 1 May 2024. See: ICJ, Order rejecting the Indication of Provisional Measures, paras 25, 31.
[119] ICJ, Mexico's Application Instituting Proceedings, para. 11. See also: ICJ, Order rejecting the Indication of Provisional Measures, para. 25.
[120] ICJ, Order rejecting the Indication of Provisional Measures, para. 33.
[121] ICJ, Order rejecting the Indication of Provisional Measures, Declaration of Judge Aurescu, paras 8-9.
[122] ICJ, Order rejecting the Indication of Provisional Measures, para. 32.
[123] ICJ, Order rejecting the Indication of Provisional Measures, para. 33. See also ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order, [2023] ICJ Rep 619, p. 637. See also *Labardini*, IELR 2024, 249 (251).
[124] ICJ, Order rejecting the Indication of Provisional Measures, para. 33. Indeed, as pointed out by the Mexican Judge, the inviolability pursuant to Article 22 and Article 45(a) terminates after a certain period after ceasing diplomatic relations (ICJ, Order rejecting the Indication of Provisional Measures, Declaration of Judge Gómez Robledo, paras 4-5). See also *Denza*, pp. 176–177. According to him, the determination of the exact moment is upon Ecuador and – in analogy to Article 39(2) Vienna Convention – the obligation to respect and protect the premises ceases after a 'reasonable period'.
[125] In any case, according to Article 75(3) Rules of the Court, Mexico may request provisional measures again if new facts arise. See also ICJ, Order rejecting the Indication of Provisional Measures, Declaration of Judge Gómez Robledo, para. 11.
[126] ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 35.
[127] ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 2.

1. Admissibility

As seen above, both States are parties to the Pact of Bogotá, which includes a relevant compromissory clause in Article XXXI (jurisdiction *ratione materiae*).[128] There is also a dispute between the Parties, which direct negotiations cannot settle.

2. Merits

Ecuador's allegations can be split into four different subject matters – all related to sheltering Glas and granting asylum.

a) Alleged Violations of Caracas and Montevideo Conventions by Granting Glas Asylum

The case's core relates to whether Mexico wrongfully granted diplomatic asylum to Glas. As noted before, diplomatic asylum is essentially a Latin American practice. In contrast to European states, Latin American states have regulated the practice in several regional conventions, comprising the here relevant Caracas Convention and the Montevideo Convention, to which both states are parties. Such Asylum Conventions essentially seek to govern and prevent the abuse of diplomatic asylum.[129] According to Article II Caracas Convention, Mexico has, in principle, 'the right to grant asylum'. However, the same Convention limits this prerogative in its Articles III to VII. Diplomatic asylum may only be granted in 'urgent cases' and not to persons who have been convicted or are being prosecuted for common offences. Historically, this is uncontested. As noted by another commentator, '[n]o state is known to claim or to admit a right of asylum for common criminals.'[130] The criteria are discussed in detail in the following.

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[128] ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 6.
[129] With regard to the 1928 Havana Convention on Asylum, ICJ, *Asylum Case*, p. 282.
[130] *Ronning*, p. 8.

aa) Political Persecution

As illustrated in our initial example, the practice of Latin American States is to grant asylum 'only in cases of political offence and not to common criminals.'[131] Historically, diplomatic asylum is essentially understood as 'asylum for political offenders'.[132] Today, Article III of the Caracas Convention and Article 1 of the Montevideo Convention explicitly establish that it is *not* lawful to grant diplomatic asylum to individuals who have been convicted or are being prosecuted by competent regular courts for common crimes and have not served the relevant sentence. The only exception foreseen by the Caracas Convention is that the 'acts giving rise to the request for asylum, whatever the case may be, are clearly of a political nature.'[133] The difficulty is then to define what qualifies as a common and what as a political offence, and even more delicate to define, who determines the nature of the crime.

(1) The Nature of the Offences

In broad terms, one may define political acts as acts 'which purport[] to overthrow the domestic political order of a country', such as military rebellion.[134] Importantly, the nature of the crime is not to be defined by the domestic law in question but by 'considerations of international justice'.[135] There are two final convictions against Glas, as well as ongoing criminal proceedings and an ongoing criminal investigation against him. In particular, Ecuador's highest court, the National Court of Justice, sentenced Glas in 2018 to six years in prison for illicit association in connection with the commission of, among others, embezzlement of public funds, bribery, illicit enrichment, trading in influence and money laundering (*the Odebrecht case*).[136] In addition, he was convicted of bribery and sentenced to another eight years in prison in the *Sobornos case* in 2020.[137] Both convictions are final. His temporary release was revoked, and his request for early release rejected,[138]

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[131] Dissenting Opinion by Judge Alvarez, ICJ, *Asylum Case*, p. 295.
[132] *Ronning*, p. 9.
[133] Article III Caracas Convention.
[134] He argues, that, therefore, murder could also qualify as a political crime (ICJ, *Asylum Case*, p. 300).
[135] Dissenting Opinion by Judge Alvarez, ICJ, *Asylum Case*, p. 298.
[136] National Court of Justice, Case no. 17721-2017-00222, Judgment of 23 January 2018.
[137] National Court of Justice, Case no. l 7721-2019-00029G, Judgment of 26 April 2020.
[138] ICJ, *Glas Espinel (Ecuador v. Mexico)*, Application Instituting Proceedings, 29 April 2024, paras 11-12.

so that on 7 March 2024, his arrest was ordered.[139] His sentences have, therefore, not been fully served. Additionally, two further proceedings against him are ongoing. In separate proceedings, his pre-trial detention and arrest were ordered in January 2024 *(the case of the Reconstruction of Manabí*).[140] Moreover, criminal investigations are ongoing for intimidation and psychological violence against a former employee.[141] Considering the offences he was convicted for – all corruption-related offences – and the offences he is prosecuted for, there are no indications that they are of a political nature. The Caracas and Montevideo Conventions appear, thus, to prohibit, without leaving discretion to the state, the granting of asylum to Glas: He has been convicted for 'common offences' by competent regular courts and has not yet served his sentences.[142]

As noted before, the only exception foreseen by Article III Caracas Convention is that 'the acts giving rise to the request for asylum, whatever the case may be, are clearly of a political nature'. As put forward by Ecuador, the threshold to demonstrate such political persecution is high. Indeed, the term 'clearly' indicates that the political nature of the persecution must be evident. It must be acknowledged that there is a political connotation in this case, considering that Glas was the Vice-President under the leftist President Rafael Correa and was prosecuted under the subsequent conservative administrations of Lasso and Noboa. His prosecution is, thus, potentially of a 'dual character', i.e. 'political in motive and yet having the substantive character of a common crime'.[143] The question is, then, whether he was selectively targeted, or whether he received a fair and impartial trial by an independent judiciary, and whether the prosecution served legitimate reasons (such as countering corruption) or whether it was primarily aimed at undermining a political rival. The serious nature of the charges, the multiple convictions and the proceedings which spanned over a prolonged period, make it difficult to argue that the acts were entirely devoid of any substantive legal and factual basis but were of 'clearly political nature'. Indeed, this would require that the

[139] Court of Justice of the Province of Pichincha, Case No. 17U062023.00032G, Judgment of 7 March 2024. See also ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 12.
[140] National Court of Justice, Case no. 17721-2019-00033G, decisions of 5 and 7 January 2024. An appeal against these orders was rejected on 21 February 2024 (ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 13).
[141] Investigation no. 170101823101641 (ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 14).
[142] This distinguishes the case from the *Asylum Case*, where *Haya de la Torre* had been accused of military rebellion, and, thus, not of a common crime.
[143] *Fenwick*, p. 327.

judiciary, including involved prosecutors and judges, evidently acted under pressure from the executive branch. The ICJ did not find this to be the case in the Haya de la Torre case. It appears difficult to sustain that this high threshold was met in Glas's case.

(2) The Right to Unilateral Qualification

But even if one assumes that Glas was not (objectively) subjected to political persecution, the right to determine this pertains to Mexico. Under Article IV Caracas Convention, '[i]t shall rest with the State granting asylum to determine the nature of the offence or the motives for the persecution.' Article 2 Montevideo Convention also states that '[t]he judgment of political delinquency concerns the State which offers asylum.' Thus, both Conventions provide for unilateral qualification. This was stipulated following the ICJ's finding that, as a general rule, both states have 'equal rights of qualification' of the nature of the offence *unless* there is a rule to the contrary.[144] The ICJ recognised that this general rule of a shared right was impracticable in cases of diplomatic asylum.[145] As a result, Latin American States included a 'right of unilateral qualification' in the relevant conventions, granting the state of refuge – here, Mexico – the exclusive right to determine whether a person is a political offender.

(3) Competence of the ICJ to Determine the Nature of the Offence

Yet, it is still a matter of dispute whether Mexico's determination is definitive or whether Ecuador can object to its unilateral determination and submit the question to the ICJ.[146] Some scholars have argued that the drafters of the conventions wanted to include a right to 'definitive determination'

[144] ICJ, *Asylum Case*, p. 275.
[145] ICJ, *Asylum Case*, p. 275.
[146] Leaving this question open but admitting that the definitive nature of the determination of the nature of the offence, does not, as such, preclude the ICJ from examining the nature of the offence *Quintana and Uriburu*, Mexico and Ecuador at the ICJ: A Plea for Taking the Latin American Experience Seriously, https://www.ejiltalk.org/mexico-and-ecuador-at-the-icj-a-plea-for-taking-the-latin-american-experience-seriously/ (last accessed 20 October 2024). Not answering this question but stating that 'the declaration of political asylum is a sovereign act of the State and logically not subject to review by the country from which the person would be fleeing.' (*Guapizaca*, Verfassungsblog 2024).

of the state granting the asylum.[147] It appears, however, to be reasonable to conclude that the ICJ has *a limited right* of review. Indeed, such 'self-judging clauses' in international treaties are typically still subject to a good faith review by international courts and tribunals. This is because, according to Article 26 Vienna Convention on the Law of Treaties ('VCLT'), states are obliged to perform a treaty 'in good faith.'[148] In this sense, as another commentator reasoned, self-judging clauses 'do not oust the jurisdiction of an international Court or Tribunal. Instead, they modify the standard of review to be applied in view of the discretion the clauses grant.'[149] Indeed, if no such objection and submission to dispute settlement were available to the territorial state, the conditions for lawfully granting diplomatic asylum (as established in the Montevideo and Caracas Conventions) would be rendered meaningless – and the object of the treaty, i.e. preventing the misuse of diplomatic asylum, frustrated.[150] States would have *a de facto* unlimited right to grant diplomatic asylum – a prerogative that both Conventions' drafters clearly sought to prevent. Similarly, former ICJ Judge Alvarez maintained that it does not necessarily follow from the right to unilateral qualification (as enshrined in Article 2 Montevideo Convention) that the determination by the state of refuge 'is definitive and irrevocable'. According to him, the territorial State may question the determination, and if both states fail to reach an agreement, it may recurse to dispute settlement.[151] There are good reasons to conclude, therefore, that the unilateral determination is subject to judicial control by the ICJ, even though in a more limited way.[152] The content of such a limited review is, again, contested. However, the ICJ may at least take into account obvious considerations, i.e., whether there are clear indicators that the conditions outlined in the relevant conventions have not been met. With a view to the above-mentioned considerations regarding the nature of the offence, it appears that the facts fall short of the requirements outlined in Articles III Caracas Convention

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[147] *Fenwick*, p. 327. See also *Quintana and Uriburu*, Mexico and Ecuador at the ICJ: A Plea for Taking the Latin American Experience Seriously, https://www.ejiltalk.org/mexico-and-ecuador-at-the-icj-a-plea-for-taking-the-latin-american-experience-seriously/ (last accessed 20 October 2024).
[148] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980. See ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] ICJ Rep 177, p. 229. See for a discussion *Schill and Briese*, UNYB Online 2009, 61 (113-118).
[149] Ibid p. 118.
[150] See ibid p. 117. See also Declaration of Judge *Keith* in ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] ICJ Rep 177, p. 279.
[151] See Dissenting Opinion by Judge *Alvarez* in ICJ, *Asylum Case*, p. 297.
[152] *Schill and Briese*, p. 116.

and Article 1 Montevideo Convention. But even if the requirements were met, asylum could only be lawfully granted in 'urgent cases'.

bb) The Urgency of the Case

According to Article V Caracas Convention, asylum may only be granted in 'urgent cases' and to protect the individual's safety. Article VI defines urgent cases, among others, as those,

> 'in which the individual is being sought […] by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution and cannot, without risk, ensure his safety in any other way.'

The ICJ has argued in the *Asylum Case* (regarding the 1928 Havana Convention on Asylum, which uses the same terminology with regard to the 'urgency' as the Caracas Convention[153]) that 'the essential justification for asylum' is 'the imminence or persistence of a danger for the person of the refugee.'[154] Clearly, the arrest of Glas was imminent. However, in addition to that, the danger for the refugee must consist of a danger for his *safety*. The ICJ has interpreted the term 'safety' (which had equally been used in the Havana Convention before) as requiring that 'the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law.'[155] It is evident from that reasoning that the ICJ does not understand asylum as 'a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals.'[156] Consequently, the ICJ found in the *Asylum Case* that the fact that Haya de la Torre would face legal proceedings was insufficient to substantiate the necessary danger for his safety. Even though Haya de la Torre had clearly been a political offender, facing legal proceedings due to his actions was considered insufficient to grant diplomatic protection. Although the ICJ's jurisprudence precedes the entry into force of the Caracas Convention, the terms 'urgency' and 'safety' have been

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[153] Article 2(2) reads that 'Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.'.
[154] ICJ, *Asylum Case*, p. 282.
[155] ICJ, *Asylum Case*, p. 284.
[156] ICJ, *Asylum Case*, p. 284. Reiterated in ICJ, *Haya de la Torre Case*, Judgment, [1951] ICJ Rep 71, p. 81.

preserved in the Caracas Convention and mirror the stipulations of the Havana Convention, which gave rise to the relevant ICJ jurisprudence. It is rather unlikely – though not impossible – that the ICJ will interpret the same terms differently today. Considering this, Glas could not be lawfully granted asylum due to the lack of a relevant danger to his safety.

One may additionally note that Article 41(1) Vienna Convention on Diplomatic Relations obliges diplomatic personnel to act in accordance with the laws of the receiving State and not to interfere in its internal affairs.[157] It could, therefore, additionally be argued, that understanding asylum as a protection from law enforcement 'would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them'.[158] Admittedly, one may argue against this by stating that if the territorial state fails to guarantee the rule of law, there is no relevant legal framework with which diplomatic personnel must comply under Article 41(1) of the Vienna Convention.[159] There are, however, insufficient indicators – to the author's knowledge – that the justice system in Ecuador is subordinated to the executive or that Glas has no judicial guarantees. The fact that he had been released on health grounds speaks against such a lack of judicial guarantees, as well as the fact that an Ecuador's high court ruled that the raid and apprehension of Glas had been unlawful.[160]

In conclusion, the prosecution of Glas and his conviction by regular tribunals for common offenses fall short of an urgent case requiring protection for his safety. Crucially, Article VII, again, foresees the right of 'the State granting asylum to determine the degree of urgency of the case.' But as seen above, this 'self-judging clause' is still subject to a good faith review by the ICJ. The ICJ may thus examine (even though in a more limited way) the nature of the offence and the urgency of the case and ultimately conclude that Mexico violated its obligation to perform the Caracas Convention in good faith, as required to under Article 26 VCLT.

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[157] See in more detail below C.III.2.c.

[158] ICJ, *Asylum Case*, p. 284. Reiterated in ICJ, *Haya de la Torre Case*, Judgment, [1951] ICJ Rep 71, p. 81. According to the ICJ, the only exception to this rule is *arbitrary action* against political opponents. Even in the case of Haya de la Torre, such an exception was not admitted (ICJ, *Asylum Case*, p. 284).

[159] *Wagner, Raasch and Pröpstl*, p. 171.

[160] *Mella*, Ecuador Court Says the Detention of Jorge Glas inside the Mexican Embassy Was Illegal, https://english.elpais.com/international/2024-04-13/ecuador-court-says-the-detention-of-jorge-glas-inside-the-mexican-embassy-was-illegal.html (last accessed 17 December 2024).

cc. Conclusion

The grant of the asylum was contrary to the obligation to perform the Caracas and the Montevideo Conventions in good faith. Mexico was, therefore, according to Article III(2) Caracas Convention under the obligation to surrender Glas to the local authorities.[161]

b) Alleged Violation of Conventions against Corruption by Refusing to Surrender Glas

Ecuador, furthermore, argues that Mexico violated the Inter-American Convention against Corruption and the UN Convention against Corruption (Merida Convention) by failing to surrender Glas despite Ecuador's requests.[162] Both states are Parties to the Conventions.[163]

The relevant crimes (embezzlement of public funds, bribery, illicit enrichment, trading in influence and money laundering, among others) are covered by Article VI(1) Inter-American Convention against Corruption and, therefore, fall within the scope of the Convention. Article XIV(1) of the Convention requires mutual assistance 'to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.' Similarly, Article 46(1) Merida Convention foresees 'mutual legal assistance in investigations, prosecutions and judicial proceedings', and its Article 48(1) requires cooperation to combat corruption-related offences. The question, however, arises whether the Caracas Convention's right to grant asylum overrides these obligations.[164] While individuals may face false corruption charges due to political persecution, this was not the case here, as argued above. Therefore, Mexico also violated the relevant conventions against corruption.

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[161] This obligation is new and was not foreseen in the Havana Convention, leading the ICJ to conclude that Colombia was not under the obligation to surrender *Haya de la Torre*, even though Colombia had not lawfully granted him asylum (ICJ, *Haya de la Torre Case*, Judgment, Judgment, [1951] ICJ Rep 71, p. 83).

[162] UN Convention against Corruption (31 October 2003) 2349 UNTS 41, entered into force 14 December 2005; Inter-American Convention against Corruption (29 March 1996) OAS Official Records; OEA/Ser. B-58, entered into force 6 March 1997. See ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 45.

[163] They ratified the UN Convention on 20 July 2004 (Mexico) and 15 September 2005 (Ecuador) (see United Nations Treaty Collection, Depositary, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&clang=_en#EndDec (last accessed 20 October 2024) and the Inter-American Convention on (27 Mai 1997 [Mexico] and 26 Mai 1997 [Ecuador], see OAS, Department of International Law, Inter-American Treaties, www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp (last accessed 20 October 2024).

[164] Regarding this question see also *González Collantes*, RPDI 2024, 237 (257-262).

c) Alleged Violation of Article 41 Vienna Convention by Sheltering Glas

Ecuador also alleges that Mexico violated Article 41 of the Vienna Convention by sheltering Glas in the Embassy and refusing to surrender him to Ecuadorian authorities.[165] Article 41(1) Vienna Convention obliges diplomatic personnel to act in accordance with the laws of the receiving State and to refrain from interfering in its internal affairs, while Article 41(3) of the same Convention prohibits using the premises in a manner that is incompatible with their *functions*.[166] The functions of diplomatic missions are non-exhaustively enumerated in Article 3(1) of the Vienna Convention. This list deliberately omits the grant of diplomatic asylum as one of the premises' functions.[167] States may, however, additionally define the functions of diplomatic premises in bilateral or multilateral agreements according to Article 41(3) Vienna Convention.[168] Although the Caracas Convention expands these functions to include granting diplomatic asylum, this grant of asylum must meet the requirements of the same Convention. That this was not the case has been argued above.[169] As a result, the premises have not been used in a manner compatible with its functions. Mexico has, consequently, also violated Article 41(1) and (3) Vienna Convention.

d) Alleged Violation of the Principle of Non-intervention

Ecuador, finally, also argues that Mexico violated the principle of non-intervention by sheltering Glas (aa) and due to a statement from the Mexican President (bb). The prohibition of intervention in domestic affairs is part of customary international law[170] and also enshrined in Articles 2(b) and

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[165] ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 36.
[166] Article 3(1) Vienna Convention.
[167] *Denza*, pp. 141–142; *Wagner, Raasch and Pröpstl*, p. 170.
[168] Article II establishes the right of every state to grant asylum. Article I establishes that such asylum shall be respected by the territorial state.
[169] See above C.III.2.a.
[170] As the ICJ notes, the 'principle is not, as such, spelt out in the [United Nations] Charter' but it is a 'corollary of the principle of the sovereign equality of States' (ICJ, *Military and Paramilitary Activities in and against Nicaragua [Nicaragua v. United States of America],* Merits [1986] ICJ Rep 14, pp. 106-107). See also the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, understood to reflect customary international law (UNGA Res *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* of 24/10/1970, UN Doc. A/RES/2625(XXV).

19 Organization of American States (OAS) Charter[171] It is, thus, binding upon Mexico. The prohibition requires that states refrain 'from coercively influencing the *domaine réservé* of another State.'[172] A violation, therefore, requires that the state exercises coercive influence on the *domaine réservé* of another state without justification.[173]

aa) Grant of Asylum

Indeed, a core issue regarding diplomatic asylum is the question of whether it amounts to prohibited intervention in the internal affairs of the territorial state.[174] The argument goes as follows: Law enforcement pertains to the *domaine réservé* of a state, and the diplomatic missions are still part of the host state's territory.[175] Therefore, individuals present within the premises are still subject to that state's (the 'territorial states') jurisdiction.[176] By *de facto* withdrawing an individual from the law enforcement of the territorial state through sheltering them in the (inviolable) diplomatic premises, the sending state interferes with the *domaine réservé* of the territorial state. In other words, a state practically removes the individual from the territorial state's (and its jurisdictions') *reach*, contrary to the latter state's sovereignty.[177]

Granting diplomatic asylum, therefore, amounts to a 'derogation' from the territorial state's sovereignty over the individual and, must be made in accordance with a legal basis to be determined in each case.[178] The Caracas Convention foresees such a derogation. However, where the requirements of the Convention are not met – as argued above – granting asylum amounts, in the ICJ's reasoning, to an unlawful intervention.

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[171] Charter of the Organization of American States (30 April 1948) 119 UNTS 3 entered into force 13 December 1951. See also the Preamble and Article 3(e) of the Charter.
[172] *Kriener*, MPEPIL 2023, para. 1.
[173] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, pp. 107-108. See also ibid para. 3.
[174] See, for another example, the case of *Juan Guaidó Payandeh and Saake*, Verfassungsblog 2019. See for an extensive examination of this issue *Carrie*, pp. 46–54.
[175] See regarding the common misconception that embassies are part of foreign territory: *d'Aspremont*, MPEPIL 2009, para. 3.
[176] *Payandeh and Saake*, Verfassungsblog 2019.
[177] ICJ, *Asylum Case*, p. 274-275. See also ibid; *Wagner, Raasch and Pröpstl,* pp. 170–171; *Carrie*, pp. 48–49.
[178] ICJ, *Asylum Case*, p. 274-275.

While some legal scholars have concluded the same,[179] others have argued that such an understanding of diplomatic asylum would be contrary to the history and practice of Latin American states.[180] As former ICJ Judge Alvarez maintained in his dissenting opinion to the *Asylum Case*, the relevant law on diplomatic asylum should be interpreted in conformity with the Latin-American experience.[181] He argued that the premises must be treated as territory of the state of refuge (a legal fiction).[182] According to this reasoning, the grant of asylum could not amount to a prohibited intervention since the individual is already deemed to be on the territory of the state of refuge. Some scholars have endorsed this interpretation.[183] This view, however, conflicts with today's generally accepted view that the premises are still part of the territorial state's territory.[184] It also stands in stark contrast with the majority of the ICJ's understanding of diplomatic asylum and the principle of non-intervention. The Brazilian Judge before the ICJ, Judge Azevedo, in turn, argued in his dissenting opinion in the *Asylum Case* that 'the reciprocity' of the institution of diplomatic asylum (adopted by the Latin American States) deprives it 'of any aspect of intervention.'[185] One could also question whether the – unwritten – principle of non-intervention would not have to be interpreted in light of the relevant State Parties' practice, given that the law applicable before the ICJ is

[179] *Payandeh and Saake,* Verfassungsblog 2019; *Brunner*, Verfassungsblog 2024.
[180] *Quintana and Uriburu*, Mexico and Ecuador at the ICJ: A Plea for Taking the Latin American Experience Seriously, https://www.ejiltalk.org/mexico-and-ecuador-at-the-icj-a-plea-for-taking-the-latin-american-experience-seriously/ (last accessed 20 October 2024).
[181] Dissenting Opinion by Judge *Alvarez*: ICJ, *Asylum Case*, p. 297. See also the dissenting opinion by Brazilian Judge *Azevedo*, pp. 332, 333; Dissenting Opinion by Judge *Caicedo Castilla* (Translation), pp. 359, 378.
[182] Dissenting Opinion by Judge *Alvarez*, ICJ, *Asylum Case*, p. 292.
[183] *Quintana and Uriburu*, Mexico and Ecuador at the ICJ: A Plea for Taking the Latin American Experience Seriously, https://www.ejiltalk.org/mexico-and-ecuador-at-the-icj-a-plea-for-taking-the-latin-american-experience-seriously/ (last accessed 20 October 2024). Against this *Carrie*, p. 50.
[184] Regarding the legal fiction see *Ronning*, pp. 6–7. See also the Committee of Experts for the progressive codification of international law (1925-1928), Volume 2, p. 105, available on https://digital.nls.uk/league-of-nations/archive/191486802?mode=transcription (last accessed 6 November 2024), noting that '[i]t is perfectly clear that exterritoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of a State X are on territory which is foreign from the point of view of the State in question. There are sound practical as well as theoretical reasons for abandoning the term "ex-territoriality", for the mere employment of this unfortunate expression is liable to lead to errors and to legal consequences which are absolutely inadmissible.'
[185] Dissenting Opinion by Judge *Azevedo*, ICJ, *Asylum Case*, p. 343.

the law applicable between the Parties to the proceedings.[186] This would arguably allow for a more coherent approach.[187] Against this, it must be recognised that – partially responding to such concerns – the majority of the ICJ argued in the *Asylum Case* that the principle of non-intervention is also 'firmly established' in Latin America and should, therefore, not be disregarded, even in cases of diplomatic asylum granted by Latin American states.[188] Admittedly, the ICJ in the *Asylum Case* precedes the entry into force of the Caracas Convention, but it is unlikely that the ICJ will rule differently this time. According to the ICJ, Mexico's conduct would, thus, amount to prohibited intervention in Ecuador's internal affairs.

bb) Statements by Mexico's Head of State

Ecuador also argues that Mexico violated the principle of non-interventions because its head of state made 'false and injurious statements' about the elections in Ecuador, calling their legitimacy 'into question'.[189] The latter had referred to the assassination of a presidential candidate, indicating that his assassination had suspicious effects on who was leading the polls.

Clearly, the electoral process is a matter of the state's *domain réservé,* and an intervention would not be justified.[190] But the statements would also have to amount to 'coercive influence'. There is much debate about which measures qualify as 'coercive', apart from the use of force and support to armed insurgents – which are not in question here.[191] Indeed, the statements of the Mexican head of state may be understood as aiming to influence the public perception about certain candidates. In recent times – especially with regard to Russian campaigns – it has been discussed whether

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[186] Article 38(1) ICJ Statute. One could also question whether Latin American states are *persistent objectors* to the application of non-intervention in cases of diplomatic asylum. Indeed, the state's objection to the formation of a customary rule can be expressed in actions rather than declarations (i.e. here, the practice of granting diplomatic asylum). The Latin American practice, however, dates back to the 19th century, after the States gained independence, and, thus, succeeds the formation of the principle of non-intervention.

[187] Unfortunately, the ICJ has not (yet) recognized regional customary international law with regard to diplomatic asylum.

[188] ICJ, *Asylum Case*, p. 285.

[189] ICJ, Application Instituting Proceedings, Mexico v. Ecuador, 29 April 2024, para. 48.

[190] See in detail *Wheatley*, DJCIL 2020, p. 161.

[191] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, p. 107. *Kriener*, MPEPIL 2023, para. 27.

disinformation campaigns, which deliberately target foreign election processes, may qualify as coercion.[192] These measures, however, usually include coordinated actions, such as for example, cyber operations, and go beyond isolated statements. At this stage, consensus in international law only appears to be *emerging* that direct and coordinated efforts, such as 'tampering with electoral infrastructure' should qualify as coercive, not, however, isolated statements by the head of state.[193] Due to the lack of coercive action, Mexico, therefore, did not violate the principle of non-intervention.

One may, however, discuss whether any 'interference' (without being necessarily coercive) may suffice to constitute a violation of international law.[194] Indeed, UNGA Res 36/103 prohibits both interferences and interventions.[195] However, the ICJ has not referred to the latter Resolution in its landmark ruling (the Nicaragua judgment). Instead, the Court referred to 'coercion' as the 'very essence'[196] of prohibited intervention. Furthermore, the Resolution has since been given 'little normative value'.[197] Thus, coercion appears to be a determinative criterion, which cannot be dispensed with. In conclusion, even though the statements are without doubt out of place, it is hardly arguable that the high threshold required to qualify as 'coercive' has been met by the statements alone. The statements as such, therefore, do not amount to prohibited intervention.

e) Conclusion

Ecuador's claims are partially well-founded. The grant of asylum to Glas was contrary to the Caracas and Montevideo Conventions as well as to the Vienna Convention and amounted to prohibited intervention in internal affairs. If Glas were still in the Embassy, he would have to be surrendered to Ecuadorian law enforcement agents. This is no longer the case. Ecuador may, however,

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[192] Ibid p. 37.
[193] Ibid p. 38.
[194] Ibid pp. 46–47.
[195] UN, GA Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 19811, Annex, Point II(c) and (k).
[196] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, p. 108.
[197] *Hofer*, CJIL 2017, 175 (185).

request assurances and guarantees of non-repetition,[198] in particular, since further individuals have been granted diplomatic asylum by Mexico in Ecuador.[199]

IV. Final Considerations

Based on this analysis, both states have violated international law, albeit to varying degrees, in their handling of Glas's situation. Beyond this specific case, the situation highlights the broader challenge of reconciling Latin American practice with general customary international law. In the *Asylum Case*, the ICJ resolved this tension in favour of general international law, and it is likely to do so again in the *Glas case*. The principle of non-intervention applies irrespective of Latin American particularities. However, the question remains whether a more nuanced approach could be feasible.

D. Conclusion

A comparison of the Latin American and the European approaches to diplomatic asylum reveals both the benefits and limitations of its recognition and its codification: While the European approach remains highly restrictive and ambiguous, prioritising mutual recognition in judicial matters, the Latin American approach is shaped by historical necessity and has led to a treaty-based yet idealistic institution. However, this codification has not shielded it from disputes, as concerns over state sovereignty and non-intervention persist. Still, only its formal recognition ensures that states remain engaged in its practice. The challenge remains to address disputes over the interpretation of relevant treaties through appropriate negotiations or dispute settlement mechanisms, rather than through unilateral actions that blatantly disregard international law. It is hoped that the ICJ's forthcoming judgments will provide clarity that strengthens the institution in practice rather than restricting its use.

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[198] See Article 30(b) Draft Articles on Responsibility of States for Internationally Wrongful Acts. See also *Stoica*, *Remedies before the International Court of Justice: A Systemic Analysis* (Cambridge University Press 2021) 68–70.
[199] *Berlanga Vasile*, XXI AMDI 2021, 973 (974–975).

Finally, the availability of diplomatic asylum as a last resort for politically persecuted individuals is not merely a legal mechanism but a fundamental safeguard against repression. Returning to the context of Guatemala in 1954; many of my grandfather's colleagues were not as fortunate as him and fell victim to repressive measures enacted under the so-called 'Preventive Penal Law Against Communism', which imposed the death penalty for various political activities, including labour union activities.[200] In times of backlash against human rights, democratic rule and independent institutions, the continued recognition of diplomatic asylum remains essential – not only to safe-guard individual lives but also to uphold principles of justice, the rule of law and the protection of democratic governance in times of crisis.

[200] *Schlesinger and Kinzer,* p. 221.

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