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# The Status and Rights of Refugees Under International Law: New Issues in Light of the Honecker Affair

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## ARTICLES

# THE STATUS AND RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW: NEW ISSUES IN LIGHT OF THE HONECKER AFFAIR

FRANCISCO ORREGO VICUÑA\*

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## I. INTRODUCTION - HUMANITARIAN CONCERNS AND THE EVOLVING LAW OF HUMAN RIGHTS

Under the rubric of human rights protection within international law, the status and treatment of refugees have become prominent issues. This prominence is due to humanitarian concerns which underlie the structure of international law.<sup>1</sup> Cases of mass influx of refugees have acquired priority in the framework of human rights protection, and they have virtually monopolized the attention of the affected governments.<sup>2</sup> Many of the same crucial issues apply to individual refugees as well.

Within the category of individual refugees, situations involving deposed heads of state have become a particularly troublesome and fragile sub-category.<sup>3</sup> Although cases of deposed authoritarian rulers have been matters of much debate,<sup>4</sup> few schol-

1. On the evolution of the international law of refugees see generally 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1966); 2 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1972); GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991); *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S* (David A. Martin ed., 1986). See also bibliography in OPPENHEIM'S *INTERNATIONAL LAW*, at 891 n.1 (9th ed. 1992).

2. See generally ELIZABETH G. FERRIS, *BEYOND BORDERS: REFUGEES, MIGRANTS AND HUMAN RIGHTS IN THE POST-COLD WAR ERA* (1993); *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* (Ved P. Nanda ed., 1989) [hereinafter *REFUGEE LAW AND POLICY*]; *International Human Rights Law: the New Decade Refugees: Facing Crisis in the 1990's*, INT'L J. REFUGEE L., SPECIAL ISSUE, (Sept. 1990).

3. With regard to proceedings against the late Shah of Iran, see the Algiers Accords of 1981 between Iran and the United States, and particularly Point IV of the Declaration of the Algerian Government, in 20 I.L.M. 224 (1981). For judicial decisions relating to this case and to those of former Presidents Marcos of the Philippines and Duvalier of Haiti see OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 1, at 1043 n.2.

4. Richard Falk, *Accountability, Asylum and Sanctuary: Challenging our Political and Legal Imagination*, in *REFUGEE LAW AND POLICY*, *supra* note 2, at 23-32; reprinted in 16 DENV. J. INT'L L. & POL'Y 199 (1988); see also H.A. Amankwah,

ars have questioned the fact that these rulers are entitled to refugee protection under international law. International law, however, evidences some serious shortcomings in protecting this sub-category of refugees.

The Federal Republic of Germany,<sup>5</sup> the Russian Federation, and Chile recently settled a bitter dispute over the return of Erich Honecker from the Chilean embassy in Moscow to Berlin. The FRG sought Honecker's return so that he could stand trial for crimes allegedly perpetrated while he was Chairman of the State Council of the former German Democratic Republic. Honecker eventually stood trial, though it was terminated on humanitarian grounds in response to Honecker's failing health.

While the discussions amongst the three countries led to a diplomatic solution, unfortunately the parties frequently muted significant legal issues in an attempt to maintain their otherwise good relations. Political convenience, on occasion, took precedence over the need for an objective legal determination.<sup>6</sup> Consequently, the difficulties associated with the implementation of human rights and refugee law became quite apparent.

This article examines the international legal issues raised in the Honecker affair as this tripartite dispute unfolded; particularly, the protection of human rights under treaties and covenants. Part II examines human rights issues, focusing on the law of refugees. Part III discusses the law of state succession, with particular emphasis on how the downfall of the GDR and the break-up of the Soviet Union played a major role in Honecker's seeking of asylum. Part IV focuses on the status of a temporary guest at a foreign embassy, a status which Honecker held during his time at the Chilean embassy in Moscow. Part V looks at the concept of non-refoulement as it relates to the Honecker affair and in terms of Article 13 of the Covenant on Civil and Political Rights. Parts VI and VII explain the way Honecker's case may have evolved had previously established means of dealing with refugee problems been followed (i.e., judicially controlled extradition proceedings). Finally, Part VIII explores alternative solutions that might have worked in

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*Extradition and Asylum in International Law Revisited: The Dikko Affair*, 15 MELANESIAN L.J. 154 (1987).

5. The Federal Republic of Germany (FRG) is referred to as the FRG or Germany. The former German Democratic Republic is referred to as the GDR.

6. See *infra* part VIII.

Honecker's case and may work in the future. These alternatives are based upon legal principles which should always govern refugee and human rights issues.

## II. THE STATUS OF "REFUGEE" AND THE QUESTION OF THE FEAR OF POLITICAL PERSECUTION

Honecker's status as a refugee under international law was the first issue of dispute among the three governments. After leading the GDR for twenty-eight years, Honecker was ousted on October 18, 1989. Shortly thereafter he sought refuge in a Soviet military facility in the locality of Beelitz, East Germany. From Beelitz, Honecker was flown to Moscow in a Soviet military aircraft.<sup>7</sup>

The lawfulness of seeking and having refuge granted in a Soviet military base in the GDR caused much debate in this case.<sup>8</sup> The granting of refuge in foreign military facilities is not *per-se* contrary to international law, since this particular form of protection has been recognized on a number of occasions in emergency situations.<sup>9</sup> The primary issue is the compatibility of such protection with the treaties then in force.<sup>10</sup>

In analyzing this situation, two distinct time frames are relevant: (1) the period before the fall of the GDR, and (2) the period after the fall. The Soviet Union first granted refuge when the GDR was still in existence. This meant that the Treaty of September 20, 1955, governed relations between the Soviet Union and the GDR at the time.<sup>11</sup> In light of this and other ar-

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7. Stephen Kinzer, *Honecker Taken to Soviet Union; Germany Demands His Return*, N.Y. TIMES, Mar. 15, 1991, at A1.

8. See Kay Hailbronner, *Legal Aspects of the Unification of the Two German States*, 2 EUR. J. INT'L L. 18, 24 (1991); see also *Germans Now Imply They'll Push Harder for Honecker Return*, N.Y. TIMES, Aug. 29, 1991, at A22 [hereinafter *Germans Imply*] (reporting on the German government's position).

9. For references to asylum or refuge in "military camps," see the Treaty on Political Asylum and Refuge, Montevideo, Aug. 4, 1939, art. 2; Convention on Asylum, Habana, 1928, art. 2; Convention on Political Asylum, Montevideo, 1933, art. 1; Convention on Diplomatic Asylum, Caracas, Mar. 28 1954, art. 1; reprinted in Marjorie M. Whiteman, 6 DIG. INT'L L. 432-37 [hereinafter *Conventions*]. For the situation of vessels of war, see *id.* at 498-502.

10. See *infra* text accompanying notes 11 and 14.

11. Treaty Concerning Relations Between the Union of Soviet Socialist Republics and the German Democratic Republic, Sept. 20, 1955, U.S.S.R.-G.D.R., 226 U.N.T.S. 208 [hereinafter 1955 U.S.S.R.-G.D.R. Treaty].

rangements, Soviet military bases in various East European countries could hardly be considered as the normal type of "visiting" force known in NATO and other such military alliances. The Soviet forces were part of a larger and more complex political association — a relationship not always compatible with the concept of sovereignty and jurisdiction of the host state. The granting of refuge in this political context, however, was not surprising in view of the close connection Honecker had with the Soviet leadership throughout his political career.<sup>12</sup>

Honecker's flight to Moscow, which took place after the reunification of Germany,<sup>13</sup> needs separate examination. The FRG argued that the granting of refuge in this situation was in violation of the Treaty on the Conditions for the Temporary Presence and the Modalities of the Scheduled Withdrawal of Soviet Armed Forces (hereinafter "1990 Treaty").<sup>14</sup> Germany and the Soviet Union had signed this treaty on October 12, 1990, and it had provisionally applied since October 3, 1990.<sup>15</sup>

Under the 1990 Treaty, Soviet forces had to respect and comply with German laws and regulations. In particular, Soviet forces had to observe German laws and regulations relating to public order and security within the assigned military premises. In essence, there was no general waiver of German jurisdiction regarding such military facilities.<sup>16</sup> This arrangement is similar to the practice observed among Western nations where military facilities are afforded a special type of functional immunity. This immunity, however, does not include the power to grant refuge to persons subject to the jurisdiction of the host state and can be considered an interference with its sovereignty. Thus, the above arrangement ensures the unimpeded operation of such facilities except in regard to those issues impacting the host state's sover-

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12. See MARTIN MCCAULEY, *THE GERMAN DEMOCRATIC REPUBLIC AND THE SOVIET UNION IN HONECKER'S GERMANY* 147 (David Childs ed., 1985).

13. The German Democratic Republic acceded to the Federal Republic of Germany at midnight on Oct. 2-3, 1990; see OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 1, at 135-141 (discussing the situation of Germany under international law since 1945).

14. Treaty on the Conditions for the Temporary Presence and the Modalities of the Scheduled Withdrawal of Soviet Armed Forces, Oct. 12, 1990, F.R.G.-U.S.S.R., BGBl, 1990-II, 1654.

15. *Id.*

16. See Torsten Stein, *External Security and Military Aspects of German Unification*, 51 ZAÖRV 464 (1991).

eignty.

Germany's argument needs to be considered in light of two other issues. First, whether the 1990 Treaty applied to a situation of refuge granted before its implementation, or whether the preexisting laws and practices continued to govern such refuge.<sup>17</sup> Given the political context, Germany could not expect that the Soviet Union would surrender a refugee of Honecker's standing.<sup>18</sup> The second issue concerns a question of fact: was the German government given ample notice of the Soviet authorities' decision to fly Honecker to Moscow? The Soviets gave the German government approximately 60-90 minutes notice before Honecker left for Moscow on March 13, 1991.<sup>19</sup> Apparently, Soviet authorities considered this amount of time reasonable for German officials to interpose objections. The German government, however, believed such notice to be insufficient for a decision to block the flight.<sup>20</sup>

Serious legal implications follow from these arguments as to the status of Honecker as a refugee. In Germany's view, Honecker was not entitled to refugee status nor to any other form of protection under international law. Considering Honecker to be an ordinary fugitive from justice, Germany felt he should be returned for judicial prosecution and consequently, requested his return from the Soviet Union.<sup>21</sup> The Soviet Union, however, did not agree at the time that Honecker should be treated as an ordinary fugitive.<sup>22</sup> Chile echoed the Soviet sentiments when Honecker later sought refuge in the Chilean Em-

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17. On the question of state succession in Germany, see generally Stefan Oeter, *German Unification and State Succession*, 51 ZAÖRV 349 (1991) and Hailbronner, *supra* note 8, at 30-37. See Stein, *supra* note 16, at 466 n.67. But see 1955 U.S.S.R.-G.D.R. Treaty, *supra* note 11 (this treaty is not considered among those treaties qualifying for state succession).

18. *Gorbachev is Reported Firm on not Extraditing Honecker*, N.Y. TIMES, Nov. 18, 1991, at A6 (statement made by President Mikhail S. Gorbachev to the effect that Honecker should not be returned to Germany).

19. See Kinzer, *supra* note 7; Francis X. Clines, *Honecker's Move to Moscow Causes Uproar in Germany*, N.Y. TIMES, Mar. 16, 1991, at A6.

20. *Id.* (statement made by the Soviet Foreign Ministry to the effect that German Chancellor Helmut Kohl had been told "several hours" in advance of the flight taking Honecker to Moscow, and the Statement made by a German spokesman referring to an advance notice of 90 minutes).

21. See *Germans Imply, supra* note 8 (statement by Mr. Dieter Vogel, Mr. Kohl's spokesman, to the effect that the German cabinet agreed to send a message to Moscow demanding Honecker's return).

22. See *infra* part III.A.

bassy in Moscow.<sup>23</sup>

The application of the International Covenant on Civil and Political Rights<sup>24</sup> became a central issue in the ensuing discussions and negotiations between the three governments. A generally accepted definition of a refugee under international law<sup>25</sup> is as follows:

The core elements in general international law define a refugee as a person outside his or her country of origin, who is unable or unwilling to return there owing to a well-founded fear of being persecuted on grounds of race, religion, nationality, social group, or political opinion.<sup>26</sup>

Definitions used in other human rights conventions are generally in agreement with these core elements.<sup>27</sup> On occasion, the definitional scope of "refugee" has been enlarged based upon humanitarian grounds.<sup>28</sup>

Honecker fully complied with the definitional requirement of being "outside his . . . country of origin," particularly after he entered the Soviet Union. The second core element of "fear" is more difficult to ascertain due to its subjective character. The definition, however, attempts to give the question of "fear" a somewhat objective test by requiring it to be "well-founded."<sup>29</sup>

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23. See *infra* part IV.

24. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, (adopted by U.N. General Assembly Resolution 2200 (XXI), 6 I.L.M. 368 (1967)) [hereinafter Civil and Political Rights Covenant].

25. GOODWIN-GILL, *supra* note 1, at 1-19; Toby D.J. Mendel, *Problems with the International Definition of a Refugee and a Possible Solution*, 1 DALHOUSIE J. LEGAL STUD. 7 (1992).

26. GOODWIN-GILL, *supra* note 1, at 216.

27. See United Nations Convention Relating to the Status of Refugees, *opened for signature* July, 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 2545, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; see also Alberto Colella, *Les Reserves à la Convention de Genève (29 Juillet 1951) et au Protocole de New York (31 Janvier 1967) sur le Statut des Réfugiés*, 35 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 446 (1989). Both Chile and the Federal Republic of Germany are parties to the 1951 Refugee Convention and 1967 Protocol, GOODWIN-GILL, *supra* note 1, at 304.

28. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention]; see also Declaration of Cartagena, *reprinted in* Inter-Am. C.H.R. 180, OEA/Ser. L/V/II.66, doc. 10 rev. 1 (1985) (recommending the concept of refugee to include victims of generalized violence and other circumstances which at the time were prevalent in Central America).

29. James Crawford and Patricia Hyndman, *Three Heresies in the Application of*



Since the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees do not contain a definition of "political persecution," individual states are largely free to make their own interpretations,<sup>30</sup> leading to increasingly restrictive decisions.<sup>31</sup> Additionally, because a determination that a potential refugee's fear is "well-founded" raises the issue of passing judgment on the internal policies or events in a given country, many states may refrain from granting refugee status on these terms in order to avoid offending the refugee's country of origin.<sup>32</sup>

The question of establishing a "well-founded fear" was particularly troublesome in Honecker's case. No one doubts that the rule of law strictly governs Germany, ruling out arbitrary persecution. Under the circumstances, however, it was very difficult to justify Germany's assertion that Honecker was just an ordinary fugitive from justice. Honecker sought refuge from a series of wholly political events, namely the demise of his own government, the fall of the Berlin Wall—the most abject symbol of the Cold War—the reunification of Germany, and the disappearance of the GDR. However much one differs with Honecker's views and methods, in light of such a political climate, anyone in his position would fear a judgment delivered by his adversaries

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*the Refugee Convention*, 1 INT'L J. REFUGEE L. 155, 157-58.

30. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 65 (1989).

31. See generally T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5 (1991); Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 29 VA. J. INT'L L. 33 (1988); Andrew Pau and Nathan J. Diamant, *Narrowing "Political Opinion" as Grounds for Asylum*, 33 HARV. INT'L L.J. 610 (1992); *Persecution Based on Political Opinion: Interpretation of the Refugee Act of 1980*, 25 CORNELL INT'L L.J. 231 (1992); Barry Sautman, *The Meaning of "Well-Founded Fear of Persecution" in United States Asylum Law and in International Law*, 9 FORDHAM INT'L L.J. 483 (1985-86); Robert C. Sexton, *Political Refugees, Non-refoulement and State Practice: A Comparative Study*, 18 VAND. J. INT'L L. 731 (1985); Tali Flam Wendrow, *Asylum: Has "Well-Founded Fear of Persecution" been Defined?*, 66 U. DET. L. REV. 139 (1988); Michael E. Yates, *The Well-Founded Fear of Persecution Standard in Asylum Proceedings: The Promise of Solace for Refugees After INS v. Cardoza-Fonseca (107 S. Ct. 1207)*, 19 LOY. U. CHI. L.J. 217 (1987). For a report on judicial decisions on the issue of a well-founded fear of persecution see also OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 893, n.11.

32. See Crawford and Hyndman, *supra* note 29, at 158.

at home or abroad.<sup>33</sup> In general, whether or not states make a formal determination about a refugee's status, a refugee cannot be considered merely a fugitive from justice. States must constantly enforce and protect an individual's human rights.

The question of Germany's criminal charges against Honecker was an important factor in this discussion. The charges were based on Honecker's alleged abuse of power, corruption, and possible responsibility for the death of a number of persons attempting to cross the Berlin Wall.<sup>34</sup> Early decisions ordering his detention on these grounds, however, could not be enforced due to the strong opposition of Soviet military personnel at the facilities where Honecker had taken refuge.<sup>35</sup> Whether these charges amounted to ordinary crimes devoid of political significance, as Germany argued,<sup>36</sup> or whether they amounted to the persecution of political ideas, as Honecker claimed, was also a matter of debate.<sup>37</sup>

The fact that a trial might have political impact should not affect its legitimacy or lawfulness. Similarly, states must not overlook the reasonable political concerns of those seeking refuge.<sup>38</sup> Due to internal legal complexities, Germany did not spec-

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33. The danger of persecution is not restricted to governmental attitudes, but has been held to include also persecution "at the hands of private persons or non-governmental groups." OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 894, n.11.

34. See Kinzer, *supra* note 7.

35. *Id.* (When German officials tried to serve the arrest warrant, "Soviet officers at the hospital said they were not authorized to allow Honecker's release without orders from the Supreme Commander of the Western Group of Soviet Forces"). *Id.*

36. See Stephen Kinzer, *Honecker is Focus at Trial in Berlin: With Border Guards in Court 3 Weeks, Debate is Over Ex-Chief's Culpability*, N.Y. TIMES, Sept. 18, 1991, at A9 (comparisons were made with Nazi criminals; see the statement by Mr. Reinhard Goehner, senior official at the German Ministry of Justice, to the effect that "the same justice used to judge Nazi criminals must be applied here").

37. Stephen Kinzer, *Senior East Germans Go On Trial; Critics Ask if Such a Case is Just*, N.Y. TIMES, Nov. 13, 1992, at A8 (Honecker was of the view that criminal charges against him were "not about legality, but about political revenge, power and anti-Communism"); Mikhail Gorbachev: "We should be guided by the principles of humanism," MOSCOW NEWS, Aug. 5, 1992, (Mikhail Gorbachev expressed the view that the matter should be handled under the "principles of humanism"); John Tagliabue, *Soviets Protest Bonn Arrest of Leaders in East*, N.Y. TIMES, May 24, 1991, at A7 (the Soviet Union also protested to Germany the arrest of senior leaders of the former GDR on the argument that their actions "had to be viewed against the backdrop of cold-war conflicts, and . . . they could not form the basis for criminal prosecution").

38. See *supra* note 33 and accompanying text; see also GOODWIN-GILL, *supra*

ify the charges under which it was requesting Honecker's return until very late in the process of this dispute. To some extent, this compromised Germany's credibility when asserting that it fully observed due process of law.<sup>39</sup>

During the early stages of reunification, the fate of deposed GDR leaders could have been favorably resolved by diplomatic channels or otherwise, particularly in Honecker's case. This is especially true if the humanitarian concerns underlying refugee law and the protection of individuals under international law had guided those determinations. These humanitarian considerations explain why the evaluation of a request for political refuge always rests with the state petitioning for such protection. Other states cannot, and should not, consider a determination to grant refuge as unfriendly.<sup>40</sup> Subsequently, however, neither Chile nor the Russian Federation resolved Honecker's situation in his favor.

### III. EFFECT OF STATE SUCCESSION ON REFUGEE STATUS

Important questions of state succession arose in connection with Honecker's situation both in Germany and Russia. In the former, these questions were prompted by the reunification process, while in the latter, the issue related to what extent the duties of the Soviet Union devolved on the Russian Federation as the successor state.<sup>41</sup> Both Germany and the Russian Federation were or became bound by a number of major multilateral conventions relating to the international protection of human rights, including the International Covenant on Civil and Politi-

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note 1, at 31-46.

39. *La Cancillería Manejó el Caso Como una Comedia de Errores*, EL MERCURIO (Chile), July 30, 1992, at C4 [hereinafter *La Cancillería*] (the charges against Honecker were formalized on June 3, 1992, 14 months after his departure for Moscow).

40. As stated in the preamble of the 1967 Declaration of Territorial Asylum, the grant of asylum "cannot be regarded as unfriendly by any other State." Declaration of Territorial Asylum, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6912 (1967); see also OAU Convention, *supra* note 28, art. II(2); The Caracas Convention on Territorial Asylum, Dec. 29, 1954, art. 1, OAS Official Records, OER/Ser.X/1 Treaty Series, No. 34, reprinted in GOODWIN-GILL, *supra* note 1, at 290; see generally GOODWIN-GILL, *supra* note 1, at 225-226.

41. See generally OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 208-244 (discussing the current status of the law of state succession).

cal Rights.<sup>42</sup> It is only fair to assume that despite the vagueness surrounding most issues of state succession with regard to treaties, covenants, and other agreements, those agreements dealing with human rights and other humanitarian commitments should devolve on the successor state in a manner more stringent than might otherwise be the case. A number of basic rules reflected in the provisions of such humanitarian treaties constitute obligations well established under customary international law. Consequently, they will bind the new state independent of any international succession law.

#### A. *State Succession in Germany and Problems with German Legislation*

A number of problems with German law as it relates to international law arose in this case. The most complex of these problems was the question of the law applicable to the criminal charges which Honecker would face upon his return to Germany. Under the law of state succession, the applicable law would be that of the successor state<sup>43</sup> — in this instance, the FRG. The law of the FRG took effect from the moment of unification, with the prior state of the GDR succeeding to that law. It is not clear, however, whether FRG laws could apply to events that took place in connection with this case prior to unification.

Although the law of state succession is uncertain on this point, the basic principle of non-retroactivity of criminal law provides a clearer legal answer. One of Germany's central constitutional principles is that the state can only prosecute a person for a crime which it has recognized as an offense prior to the act.<sup>44</sup> This, of course, was the fundamental argument in Honecker's defense — that any wrongdoing ought to be judged according to the legislation in force at that time in the GDR.<sup>45</sup>

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42. See *supra* text accompanying note 24.

43. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 215-16.

44. Basic Law of the Federal Republic of Germany (1949), Peaslee, CONSTITUTIONS OF NATIONS: EUROPE (1968), at 386, art. 103 (2). The same principle is recognized in Article 7 of the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221; see also Florence Massias, *Control of Aliens*, in THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 31, 35-36 (M. Delmas-Marty ed., 1992).

45. See Kinzer, *supra* note 37 (interview of Honecker's chief defense lawyer, which also refers to the opinion of *Die Zeit* asserting that the trial was "on the

The 1990 Treaty and constitutional arrangements leading to the unification of Germany shed some light on this matter, but did not establish conclusive rules. Under the Treaty on the Final Settlement with Respect to Germany of September 12, 1990, the United States, Great Britain, France, and the Soviet Union terminated their rights and responsibilities with regard to Germany and Berlin.<sup>46</sup> Consequently, Germany re-acquired complete sovereignty in both domestic and international affairs.<sup>47</sup> This arrangement also ended the discussion about succession to the legal personality of the Third Reich and the question of statehood of both the FRG and the GDR.<sup>48</sup> The accession of the former GDR *Länder*<sup>49</sup> to the FRG took place under the provisions of Article 23 of the Federal Constitution. The Unification Treaty of August 31, 1990 established the conditions and effects of such a step.<sup>50</sup> The parties left open to flexible arrangements questions of state succession with regard to treaties of the GDR, including those treaties which had linked the GDR with the Soviet Union.<sup>51</sup>

The unification discussions addressed the question of unifying the legal systems of both the FRG and the GDR. Following the general approach of state succession, one alternative was to extend the legislation of the FRG to the whole of Germany with minor exceptions. Germany also explored an inverse solution, namely keeping in force the legislation of the GDR for a transitional period, with some adjustments. Article 8 of the Unification Treaty basically followed the first approach. Article 9, however, allowed for the continuing force of some aspects of GDR legislation, particularly in the areas of *Länder* law and federal legislation, relating to matters not yet uniformly regulated.<sup>52</sup>

Criminal law issues became particularly troublesome in this

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borderline of justice" because of the prosecutors ignoring the principle of non-retroactivity).

46. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 (1990).

47. Hailbronner, *supra* note 8, at 20.

48. *Id.* at 31-32.

49. *Länder* [State member of the German Federation].

50. Treaty of the Establishment of German Unity, Sept. 28, 1990, BGBI. II 889 translated in 30 I.L.M. 457 (1991) [hereinafter Unification Treaty].

51. Treaty on Good Neighborliness, Partnership and Co-operation, F.R.G.-U.S.S.R., Nov. 9, 1990, 30 I.L.M. 504; see also Hailbronner, *supra* note 8, at 32-36.

52. Unification Treaty, *supra* note 50, at 509.

context.<sup>53</sup> In light of the principle of non-retroactivity, criminal offenses committed in the GDR would have to be prosecuted under the criminal laws of the former GDR. There were, however, many cases where prosecutors had difficulty classifying certain acts as crimes. Such difficulties arose in the trial of former border guards for homicide. The guards claimed that they were acting under Service Regulation 30/10, commonly known as the "order to shoot," and pled the excuse of superior order. The German courts, however, did not accept such an excuse on the grounds that the order was manifestly illegal and in violation of international law as it related to the rights regarding free movement and personal freedom. Still more complex difficulties arose in the prosecution of former GDR spies, particularly in view of the fact that spies from the FRG did not face similar prosecution for the same illegal acts. Here again the question of retroactivity and discrimination came before the courts.<sup>54</sup> Judicial decisions on these issues will, to an important extent, further unification and harmonization of the legal system of Germany. A decision of the Honecker case on its merits would have made an important contribution to the clarification of the criminal law aspects involved. However, the trial was suspended before reaching that stage.<sup>55</sup>

Until recently, German legislation and practice on the status of refugees and asylum was one of the most liberal on the European continent, inspired by higher humanitarian considerations.<sup>56</sup> Admittedly, the German government did not consider Honecker a political refugee, nor did it consider nationals of the GDR refugees under German law. However, some of the German arguments and determinations made regarding the legal status of Honecker abroad, and the humanitarian protection Chile

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53. On the constitutional and international law aspects of the criminal proceedings against Honecker and related events, see generally Jorg Polakiewicz, *Verfassungs-Und Volkerrechtliche Aspekte der Strafrechtlichen Ahndung des Schufwaffeneinsatzes an der Innerdeutschen Grenze*, in *EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT*, June 5, 1992, at 177; Dieter Blumenwitz, *Zur Strafrechtlichen Verfolgung Erich Honeckers. Staats-Und Volkerrechtliche Fragen*, *DEUTSCHLAND-ARCHIV* 569 (1992).

54. On these cases and related litigation in Germany, see Dirk Ehlers, *The German Unification: Background and Prospects* 15 *LOY. L.A. INT'L & COMP. L.J.* 804 (1993); see also comment by Ian Buruma, *The Spymaster in a Kangaroo Court*, *N.Y. TIMES*, Dec. 8, 1993, at A25.

55. See *infra* text accompanying note 199.

56. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 968, n.10(2).

extended to him, were inconsistent with the principles and basic rules of German legislation and practice. In fact, Article 16(2)(2) of the Basic Law<sup>57</sup> provides that the politically persecuted enjoy the right of asylum, broadly defined to include admission into territory, non-extradition, and non-refoulement.<sup>58</sup> In addition, the FRG is a party to the 1951 Refugee Convention, which provides for a secondary system for the protection of refugees in that country.<sup>59</sup>

Extradition for political offenses is not admitted under the German Extradition Act of 1929, except in cases of a wilful offense against human life.<sup>60</sup> Similarly, the Law on International Assistance in Criminal Matters does not permit extradition for a political act (nor acts in connection with such), and is also based on the principle of non-refoulement. The principle of non-refoulement appears prominently in the Aliens Act of 1965.<sup>61</sup> Under German law, however, extradition will be granted in connection with acts of genocide, murder, or manslaughter.<sup>62</sup> An important exception to these basic principles relates to "grave matters of public safety," which allows for a refugee's expulsion under certain circumstances.<sup>63</sup>

Since the enactment of the 1982 Asylum Procedure Law, German authorities have relied on the constitutional concept of asylum and not on the 1951 Refugee Convention definition of a refugee.<sup>64</sup> At first, it appears that the constitutional approach had a wider scope than the 1951 Refugee Convention's definition. The Federal Administrative Court established that the

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57. *Supra* note 44.

58. ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 26 (1980).

59. Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 385 (1990); *see also* Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 531 (1993).

60. GRAHL-MADSEN, *supra* note 58, at 26.

61. *Id.*

62. Law on International Assistance in Criminal Matters, Dec. 23, 1982, 24 I.L.M. 945 (1985); *see also* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 968 n.10(2).

63. *See generally* GOODWIN-GILL, *supra* note 1, at 15, 33, 177-80 (discussing German legislation and jurisprudence relating to refugees).

64. *See* Reinard Marx, *The Criteria for Determining Refugee Status in the Federal Republic of Germany*, 4 INT'L J. REFUGEE L. 151 (1992) (discussing the 1982 Asylum Procedure Law and its relationship with the 1951 Refugee Convention).

refugee definition encompassed all cases of "political persecution."<sup>65</sup> Later, more restrictive trends emerged. Qualifying under the constitutional regime meant that Germany would accord a better status to refugees than under the 1951 Refugee Convention.<sup>66</sup> The Aliens Act of 1990 corrected this dual approach to some extent. This act implemented the principle of non-refoulement at the national level. However, it has been noted that the objective standard of proof relating to a clear probability of persecution, which the German courts have developed, is not consistent with the standard established under Article 1A(2) of the 1951 Refugee Convention.<sup>67</sup>

The European Convention on Human Rights also influenced Honecker's case, since Germany is a prominent participant in this system of protection.<sup>68</sup> Although the European Convention does not provide for the right to asylum, it is based on important humanitarian considerations affecting refugees.<sup>69</sup>

The German Constitution and the 1951 Refugee Convention established a thorough process of review under German legislation to protect all rights guaranteed therein.<sup>70</sup> This process has gradually weakened over the past decade in light of mass immigration and other refugee related crises. As a result, the opportunities and scope of judicial review for refuge have diminished, expediting the departure of rejected applicants.<sup>71</sup> The amendment of the Basic Law concerning asylum has also restricted the review process.<sup>72</sup>

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65. *Id.* at 152 (referring to the Decision of the Federal Administrative Court of Oct. 7, 1975).

66. *Id.* at 153.

67. *Id.* at 168-69; see STENBERG, *supra* note 30, at 113-14 (discussing the restrictions introduced by the 1987 amendments to the Asylum Procedure Law).

68. See M. Delmas-Marty, *supra* note 44, at 121-29 (discussing the application of the European Convention on Human Rights in Germany).

69. Fullerton, *supra* note 31, at 105-09; Bruce C. Bailey, *Conflicting Trends in Western European Refugee Policies*, in Nanda, *supra* note 2, at 60-61.

70. Ignaz Seidl-Hohenveldern, *Federal Republic of Germany*, in *INDIVIDUAL RIGHTS AND THE STATE IN FOREIGN AFFAIRS* 243, 253-54 (E. Lauterpacht & J. Collier eds., 1977).

71. GOODWIN-GILL, *supra* note 1, at 177; Bailey, *supra* note 69, at 58-59; see also Daniel Kanstroom, *Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 *YALE J. INT'L L.* 155 (1993).

72. Res. E-1 on Asylum Policy, 3d Cong. of the Christian Democratic Union of Germany, Düsseldorf, para. 3 (1992). See also Michael W. Devine, *German and EC Asylum Law*, 6 *GEO. IMMIGR. L.J.* 873 (1992); Gerald L. Neuman, *Buffer Zones*



In practice, Germany has introduced a streamlined and accelerated process for the settlement of applications. This practice contrasts with Germany's traditional system of review, particularly in cases where Germany is not the country of first refuge,<sup>73</sup> or where refugees come from countries where there is no political persecution. In light of these restrictive trends in German policy and legislation on refugees and asylum, one could hardly expect German authorities to be sympathetic toward Honecker's status as a refugee or potential asylum seeker abroad.

### B. State Succession in Russia

Given the assurances of political solidarity by the Soviet leadership,<sup>74</sup> Honecker's refuge in Moscow initially seemed secure. However, a unique feature of this case was that two of the main states involved in the matter—the GDR and the Soviet Union—ceased to exist in the midst of the dispute. The former acceded to the FRG at midnight on October 2, 1990,<sup>75</sup> and the latter dismembered in 1991 into a number of separate states—the Russian Federation being recognized as the successor of the Soviet Union under international law.<sup>76</sup>

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*Against Refugees, Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503 (1993). The Basic Law was amended on June 28, 1993, BGB1 I, 1002; the asylum procedure was amended on June 30, 1993, see ASYLVLfG, BGB1 I, 1061.

73. See generally Martin, *supra* note 1, at 73-84 (regarding the question of the country of first refuge of asylum); Morten Kjaerum, *The Concept of Country of First Asylum*, 4 INT'L J. REFUGEE L. 514 (1992).

74. See *supra* note 18; see also *supra* note 17.

75. See *supra* text accompanying note 13.

76. See Armenia-Azerbaijan-Belarus-Kazakhstan-Kyrgyzstan-Moldova-Russian Federation-Tajikistan-Uzbekistan-Ukraine: Agreements Establishing the Commonwealth of Independent States, Done at Minsk, Dec. 8, 1991, and at Alma Ata, Dec. 21, 1991, translated in 31 I.L.M. 139 (1992) (discussing the succession of the U.S.S.R.); Decision by the Council of Heads of State of the Commonwealth of Independent States, Alma Ata, Dec. 21, 1991, reprinted in 31 I.L.M. 151 (1992) (on the Russian continuance of the USSR membership in the United Nations, the Security Council and other international organizations); see also the reference to the letter addressed by the Russian Federation to the U.N. Secretary General on Dec. 24, 1991, 31 I.L.M. 138 (1992); Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486 (1992) (on EEC policy of recognition); Statement on the Future Status of Russia and Other Former Soviet Republics, European Political Cooperation, Brussels, Dec. 23, 1991, Press Release 133/91.

The fall of the Soviet Union resulted in numerous legal changes bearing consequences for Honecker. Most prominent was the new Russian leadership's withdrawal of political support for the continuation of Honecker's refuge in their country. The Russian authorities promptly expressed their willingness to return Honecker to the German government.<sup>77</sup> The Russian government even issued an ultimatum giving Honecker forty-eight hours to leave the country.<sup>78</sup>

The basic formal arguments Russia invoked in justifying its measures were: (1) that Honecker had illegally entered the former Soviet Union, and (2) that his presence had been solely under the personal protection of former President Mikhail Gorbachev.<sup>79</sup> These arguments do not withstand close legal scrutiny. First, it was evident that the Soviet Union decided at an official level to take Honecker out of Germany. This decision included the use of military aircraft, the notification of the German government, and later, the availability of other Soviet resources to facilitate his stay in Moscow. Next, however autocratic the Soviet Union might have been, state decisions were not a personal affair. Since the Soviet Union granted refuge, this was sufficient to establish a legal situation binding the Soviet state. Even if Honecker had illegally entered the Soviet Union, this would not necessarily alter his status as a refugee under international law.

The rules relating to non-refoulement<sup>80</sup> as a fundamental obligation of humanitarian nature are specifically examined further below. The Russian Federation could be legally bound by the decisions adopted by the Soviet Union in relation to Honecker's refuge and by the rules of international law which automatically come into play as a consequence of the presence of

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77. Kinzer, *supra* note 36 (Russian officials, including President Boris N. Yeltsin, expressed their willingness to send Honecker back to Germany).

78. *Russians Order Honecker to Leave*, N.Y. TIMES, Dec. 12, 1991, at A12 (a decree expelling Honecker was issued by the Russian authorities on Nov. 15, 1991; a forty-eight hour ultimatum was given on Dec. 10, 1991).

79. *Moscú Argumenta Ingreso Ilegal de Honecker a Rusia*, EL MERCURIO, May 6, 1992, at A1 (statement by the Chilean Foreign Minister before a parliamentary committee of the House of Representatives on May 5, 1992).

80. See Wendy L. Fink, Note, *Joseph Doherty and the I.N.S.: A Long Way to International Justice*, 41 DEPAUL L. REV. 927 (1992) (discussing "non-refoulement" as the right of a refugee not to be returned to a country where he or she may face persecution); see *infra* part V.A for further discussion on non-refoulement.

a refugee in a country.<sup>81</sup>

#### IV. THE STATUS OF "TEMPORARY GUEST" AT A FOREIGN EMBASSY

Political developments in Russia made Honecker's situation in Moscow untenable. It was at this point that he and his wife decided to seek refuge in the Chilean embassy in Moscow. This prompted another unique international law quandary where the diplomatic protection of a third country intervened to safeguard the rights and well-being of a refugee.<sup>82</sup> While a large number of GDR nationals flooded the embassies of the FRG in a number of Eastern European countries throughout the 1980s seeking admission, the situation was different in that it involved refugees that were considered German nationals.<sup>83</sup>

The legal status created in Honecker's case was complex. His was not strictly a case of diplomatic asylum, since he did not formally request such status. Nevertheless, his situation implicated the law governing diplomatic asylum. The Chilean government, after considerable domestic debate, defined Honecker's refuge as that of "temporary guest" of the Chilean embassy. Although international law does not define the status of "temporary guest" of a foreign embassy, currently there is a considerable practice relating to this type of refuge and the protection it entails. "Temporary guest" status can be considered a type of temporary refuge.<sup>84</sup> The concept of temporary refuge, and the protection it affords an individual, is well established under international law.<sup>85</sup>

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81. See Owen Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 60 (1993).

82. *Declaración de la Cancillería sobre Caso de Erich Honecker*, EL MERCURIO, Mar. 11, 1992, at A1. Honecker and his wife took refuge in the Chilean Embassy on Dec. 11, 1991, immediately before the expiration of the ultimatum referred to in *supra* note 78. See Statement by the Chilean Foreign Ministry of Mar. 10, 1992.

83. In 1989, over 1,000 GDR nationals camped on the grounds of the Federal Republic's embassy in Prague seeking admission into the Federal Republic of Germany, OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 1083 N.3.

84. See generally GOODWIN-GILL, *supra* note 1, at 114-21, 207-09 (discussing temporary refuge status).

85. Deborah Perluss and Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551-626 (1986). In the case of the refuge of Sargent Mikó in the Spanish Embassy in Equatorial Guinea in 1983, the Spanish Minister of Foreign Affairs, while not recognizing a right to diplomatic asylum since

The country of "first refuge" —the Soviet Union— did not provide this type of temporary refuge. Rather, Chile provided this protection when it intervened in the "second stage" of Honecker's failed "first refuge."<sup>86</sup> Honecker and his advocates attempted to secure a safe and lasting refuge for him in other countries including North Korea, Cuba, and some former Soviet Republics. These efforts failed due to Germany's strong opposition.<sup>87</sup> Gradually, it became clear that the only solution Russia would accept was the return of Honecker to Germany. The Chilean protection had become a bar to the exercise of both Russian and German jurisdiction. Chile justified this protection on humanitarian grounds in accordance with Chile's long-standing tradition of granting refuge and asylum in cases of political distress.<sup>88</sup>

The specific measures Chile should have adopted in this instance became the subject of a prolonged domestic debate. Opinions ranged from the immediate termination of Honecker's

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this would be contrary to state sovereignty, emphasized the "international recognition of the practice that diplomatic missions of all countries can grant refuge to those seeking it." See JOSE A. PASTOR RIDRUEJO, *CURSO DE DERECHO INTERNACIONAL PÚBLICO Y ORGANIZACIONES INTERNACIONALES* 238-39 (1991).

86. As concluded by the Executive Committee of the Office of the United Nations High Commissioner for Refugees on the situation of refugees without a country of asylum:

Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present country of asylum due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favorable consideration to his request for asylum.

Conclusion No. 15 (XXX)(k), 34 U.N. GAOR, Supp. No. 12A, at 17, U.N. Doc. A/34/12/Add 1. (1979); see also S. Choudhury, *Third Country Asylum*, 141 *NEW L.J.* 1564 (1991).

87. *Pyongyang Offers Honecker Refuge: Invitation Reported to be for Treatment — Not Asylum*, *N.Y. TIMES*, Dec. 15, 1991, at A24 (referring to a North Korean offer of "temporary refuge for medical treatment" and the German opposition to Honecker fleeing to another country).

88. Statement by the Chilean Foreign Ministry of Mar. 10, 1992, *supra* note 82. Chile has an established tradition of granting refuge and asylum in cases of political distress. Among recent examples in Latin America are former President Alfredo Stroessner of Paraguay in 1989 (Latin America's longest ruling dictator), Jean-Robert Sabalat in 1991 (former foreign minister of the government of the ousted Haitian President Jean-Bertrand Aristide), Victor Polacl Merel and Augusto Vargas Prade in 1992 (both were implicated in the failed coup attempt against Peruvian President Fujimori). See also Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 *NOTRE DAME L. REV.* 1455, 1484 (Chile's national anthem names Chile as the "asylum against oppression").

stay at the Chilean Embassy,<sup>89</sup> to the granting of asylum on a permanent basis.<sup>90</sup> This domestic debate was influential in shaping the position that Chile would take during the process. However, the pressure Germany exerted ultimately resulted in Chile's refusal to grant asylum. Initially, the Chilean government expressed support for granting Honecker refuge in Chile on humanitarian grounds and allowing him to settle in the country, but this led to a renewed protest by Germany.<sup>91</sup> Honecker's admission into Chile was then conditioned upon him obtaining a valid German passport, a document which the German government was unwilling to issue.<sup>92</sup> International law, however, has consistently facilitated the travel of refugees lacking a national passport.<sup>93</sup> Some states have even argued that if a refugee obtains a national passport, he might lose "refugee" status.<sup>94</sup>

The Chilean government identified three primary legal issues in negotiations with both Germany and Russia for the resolution of Honecker's situation as a temporary guest of the Chilean embassy.<sup>95</sup> The first issue was that Germany needed to present specific and formal charges against Honecker as a basis to demand his return. Germany had not brought formal charges due to the difficulty of organizing the domestic legal proceedings and gathering all the necessary evidence; this was an essential

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89. See Odette Magnet, *Yo no Habría Aceptado a Honecker*, LA NACIÓN (Chile), Aug. 8, 1992, at 4 (statement by Professor Rodrigo Díaz that Honecker should not have been admitted to the Chilean embassy).

90. *PS Estima Involucrado Principio del Derecho al Asilo en Caso Honecker*, EL MERCURIO, Aug. 5, 1992, at C3 (statement by the President of the Chilean Socialist Party that the "right to asylum" was affected by the handling of the Honecker affair).

91. *La Cancillería, supra* note 39; *Germany Protests to Chile for Sheltering East German*, N.Y. TIMES, Mar. 6, 1992, at A1 (statement by the Chilean government of Feb. 19, 1992).

92. Reference to such condition was made by the Statement of the Chilean Foreign Ministry *supra* note 82, par. 1. Under the 1972 German Passport Law, a passport may be refused on the ground of attempting to escape criminal prosecution and other reasons under §7(1)(2).

93. See 1951 Refugee Convention, *supra* note 27, at art. 28; see also Agreement Relating to the Issue of a Travel Document to Refugees, 11 U.N.T.S. 84 (1946).

94. *Gabriel M. (Refugee) Case*, 43 I.L.R. 182 (1965); *Spanish Refugee Case, id.* at 184, in OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 894 n.11; see also Louis-Antoine Aledo, *La Perte du Statut de Réfugié en Droit International Public*, 95 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 371 (1991).

95. *Dice Declaración de Cancillería: "Objetivos y Criterios Se Han Cumplido a Cabalidad,"* EL MERCURIO, July 30, 1992, at A12 (statement by the Chilean Ministry of Foreign Affairs of July 29, 1992).

step in justifying Germany's legal claim.<sup>96</sup> Germany finally presented formal charges on June 3, 1992, just a few weeks prior to Honecker's return to Germany. Germany never made a formal request of extradition, and only demanded the expulsion of Honecker. If Germany had followed strict extradition procedures, the time frame for the evaluation of the claims, as in any judicial procedure, would have been longer.

The second legal issue was Honecker's status as a former head of state. Chile, however, never explained this element. Chile could have been referring to a claim of immunity in relation to official acts of a head of state, which is a well-established rule of international law.<sup>97</sup> This would hardly have been acceptable to Germany, however, in the political context explained above. Moreover, the FRG never recognized the GDR as a sovereign state. While this would not have changed the application of international law to this matter, it is likely that Honecker's status as a former head of state resulted in the courtesy and dignity extended to him by Germany upon his return. In addition, both Germany and Russia consented to Chile's diplomatic protection of Honecker when he was admitted to a Moscow hospital for a medical examination.<sup>98</sup> These courtesies were extended despite the German government's denial that it would treat Honecker differently from any other person jailed for criminal offenses.<sup>99</sup>

The third and fundamental legal issue Chile posed in this case related to the guarantees that should be observed in the

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96. See *supra* text accompanying note 17.

97. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 1043-44; see e.g. United States: Protection of Diplomats Act, 18 U.S.C. §1116 (with particular reference to §116(b)(1), which defines a 'foreign official' as "a Chief of State . . . or any person who has previously served in such capacity, and any member of his family . . .").

98. Mr. Honecker was admitted to the diplomatic area of Botkin Hospital in Moscow on February 24, 1992, for medical examinations, after which he returned to the Chilean embassy on March 3, 1992. EL MERCURIO, July 30, 1992, at C4. The medical examination reported that Mr. Honecker did not suffer a terminal illness. This accelerated his return to Germany and influenced the change of policy by the Chilean government as to his protection in the Chilean embassy. A faked diagnosis was denounced by former head of state Mikhail Gorbachev. Mrs. Honecker also denounced a fake diagnosis. Subsequent medical examinations in Bonn and Santiago confirmed Mr. Honecker's terminal illness. Mr. Honecker died in Santiago on May 29, 1994.

99. Stephen Kinzer, *Honecker Flown to Berlin to Face Criminal Charges*, N.Y. TIMES, July 30, 1992, at A6 (on the arrival of Honecker in Germany and his imprisonment).

event of a decision leading to Honecker's expulsion. The guarantee issues concerned the principles of refuge, asylum, and extradition. Chile insisted upon the application of Article 13 of the International Covenant on Civil and Political Rights, a treaty binding on all three states involved.<sup>100</sup> This proved to be more difficult than anticipated. The discussions, negotiations, and outcome of this complex humanitarian and international situation revealed some of the shortcomings of Article 13 and the present system of human rights protection.

#### V. NON-REFOULEMENT AS A FUNDAMENTAL PRINCIPLE OF INTERNATIONAL LAW

It is generally admitted that states have broad discretionary powers to expel aliens; however, this power is not absolute.<sup>101</sup> Customary and conventional international law has gradually limited state discretion to prevent abuse and arbitrariness in the expulsion of aliens.<sup>102</sup> Some states have attempted to perfect mechanisms for reviewing expulsion decisions in order to safeguard the basic rights of aliens under international law.<sup>103</sup> This trend may reverse, though, as the international legal community introduces new restrictions in response to the increasing incidence of mass refugees.<sup>104</sup>

On many occasions, the use of discretionary powers of deportation has led to the return of individuals to their country of origin in a *de facto* manner. This result might not occur under judicial procedures such as extradition. Furthermore, the issue of acquiring jurisdiction over an individual in a manner contrary to international law has become a contentious point, especially in light of state sponsored international kidnapping.<sup>105</sup>

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100. *Respuesta a Alemania: Chile Condiciona La Salida de Erich Honecker*, EL MERCURIO, May 29, 1992, at A1 (statement by the Minister Secretary-General of the Chilean government of May 28, 1992); see also, EL MERCURIO, Apr. 11, 1992, at A1 (an earlier reference to government sources).

101. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 940.

102. *Id.* at 941.

103. *Id.*

104. Fullerton, *supra* note 31, at 36.

105. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). For the Canadian and Mexican briefs in this case, see 31 I.L.M. 919, 934, respectively; see also Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992); Malvina Halberstam, *In Defense of*

There is a fundamental humanitarian concern underlying the opposition to the practice of arbitrary returns. The core guarantee of refugee rights under international law is the doctrine of non-refoulement. Non-refoulement ensures that no refugee "should be returned to any country where he or she is likely to face persecution or danger to life or freedom."<sup>106</sup> Several international conventions establish the non-refoulement principle, including Articles 32 and 33 of the 1951 Refugee Convention (covering both legal and illegal refugees),<sup>107</sup> the International Covenant on Civil and Political Rights,<sup>108</sup> and Article 3 of the United Nations Convention Against Torture.<sup>109</sup> The European Community has also adopted conventions relying on this principle, namely, the 1955 European Convention on Establishment and the 1957 European Convention on Extradition.<sup>110</sup>

While the European Convention on Human Rights<sup>111</sup> does not include a general obligation of non-refoulement,<sup>112</sup> Protocol No. 7 to that convention specifically requires states to observe given guarantees in cases where the country in question decides to expel the individual.<sup>113</sup> A number of recommendations adopted by organs of the Council of Europe have emphasized the need to include a general obligation of non-refoulement in the

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*the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736 (1992); Stephanie A. Re, "The Treaty Doesn't Say We Can't Kidnap Anyone" - Government Sponsored Kidnapping as a Means of Circumventing Extradition Treaties, 44 WASH. U. J. URB. & CONTEMP. L. 265 (1993); Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833 (1993).

106. GOODWIN-GILL, *supra* note 1, at 69.

107. 1951 Refugee Convention, *supra* note 27, at art. 32 ("The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order"); *id.* at art. 33(1) ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

108. See Civil and Political Rights Covenant, *supra* note 24.

109. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, *opened for signature* Dec. 10, 1984, 39 U.N. GAOR, Supp. No. 51, at 198, art. 3(1).

110. European Establishment Convention, Dec. 13, 1955, 529 U.N.T.S. 142-185.

111. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, Europ. T.S. No. 5, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

112. Kay Hailbronner, *Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, in Martin, *supra* note 1, at 123, 131.

113. European Convention on Human Rights, *supra* note 111, at Protocol No. 7.



European Convention.<sup>114</sup> The Inter-American Convention on Human Rights<sup>115</sup> and the Organization of African Unity also have established non-refoulement guarantees.<sup>116</sup>

In addition, the United Nations High Commissioner for Refugees has called attention to the need to observe the "recognized principle of non-refoulement." This includes non-rejection at the frontier and the question of granting asylum in countries which are not the country of "first refuge."<sup>117</sup> Important private proposals emphasize that "the principle of non-refoulement is the cornerstone in the protection of refugees, whether or not lawfully admitted into the receiving state."<sup>118</sup> The International Law Association<sup>119</sup> also discussed proposals in particular reference to compensation issues.<sup>120</sup>

States consider national security and public order as justifications for derogating the non-refoulement principle. The current trend under international law, however, is to narrow state discretion. A new "national security" test limits the discretionary power of member states of the European Convention on Human Rights and the European Economic Community. The threat to national security and public order must be present, genuine, sufficiently serious, and affect a fundamental interest of society.<sup>121</sup>

The extensive application of non-refoulement under both international and domestic law solidly implies that non-

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114. Hailbronner, *supra* note 112, at 131-132.

115. Inter-American Convention on Human Rights, Nov. 22, 1969, art. 22, reprinted in 9 I.L.M. 673.

116. See OAU Convention, *supra* note 28, art. 2.

117. See, e.g., Conclusion No. 15 (XXX) of the Executive Committee of the High Commissioner's Programme on "Refugees Without a Country of Asylum," 34 U.N. GAOR, Supp. No. 12A, at 17, 18 U.N. Doc. A/34/12/Add.1 (1979); Conclusion No. 22 (XXXII) and Protection of Asylum-Seekers in Situations of Large-Scale Influx, 36 U.N. GAOR, Supp. No. 12A, at 17, U.N. Doc. A/36/12/Add.1 (1981); see also IAIN GUEST, REPORT BY THE LAWYER'S COMMITTEE FOR HUMAN RIGHTS, THE UNHCR AT 40: REFUGEE PROTECTION AT THE CROSSROADS (1991).

118. Luke T. Lee, *Draft Declaration: Principles of International Law on Mass Expulsion*, 78 AM. SOC'Y OF INT'L L. PROC., Prin. 8, 345 (1984).

119. LUKE T. LEE, INTERNATIONAL LAW ASSOCIATION, 1986 REPORT OF THE COMMITTEE ON THE LEGAL STATUS OF REFUGEES 542.

120. Lee, *supra* note 118, at Prin. 6; LUKE T. LEE, INTERNATIONAL LAW ASSOCIATION DRAFT DECLARATIONS OF PRINCIPLES OF INTERNATIONAL LAW ON COMPENSATION TO REFUGEES AND COUNTRIES OF ASYLUM 676 (1988).

121. Massias, *supra* note 44, at 43-46; see also GOODWIN-GILL, *supra* note 1, at 95-97.

refoulement has become a rule of customary international law.<sup>122</sup> This view is not unchallenged: "[S]tate practice, particularly as shown by the asylum laws of Western Europe, the United States, and Canada, does not support non-refoulement of all humanitarian refugees as a norm of customary international law."<sup>123</sup> On the other hand, those who face torture or inhuman or degrading treatment certainly qualify as refugees under customary international law.<sup>124</sup> Only one reported judicial decision has held that the practice of non-refoulement does not amount to a rule of customary international law.<sup>125</sup>

In addition to non-refoulement, there has been a significant evolution towards perfecting the guarantees for review of expulsion decisions. These guarantees reinforce the limits on a state's discretion to expel refugees.<sup>126</sup>

#### A. *The Issues of Non-Expulsion and Non-Refoulement in the Honecker Case*

Germany, Russia, and Chile are all parties to the International Covenant on Civil and Political Rights. Given that, Chile invoked Article 13 of the treaty during negotiations relating to Honecker's refuge.<sup>127</sup> Article 13 refers specifically to the question of guarantees for review of an expulsion decision, in addition to setting forth the elements states must observe in expulsion matters. In the Honecker case, the legal issues were closely related to non-refoulement. Article 13 states that:

[A]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall,

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122. GOODWIN-GILL, *supra* note 1, at 97-100; STENBERG, *supra* note 30, at 279-280.

123. Hailbronner, *supra* note 112, at 123.

124. *Id.* at 124.

125. *State of Japan v. Mitsuyo Kono and Takao Kono*, 59 I.L.R. 472 (Tokyo High Ct. 1971) (Japan).

126. See generally Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, in Martin, *supra* note 1, at 103; see also 1985 U.N. Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, U.N. GAOR, 40/144 [hereinafter 1985 U.N. Declaration]; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 909.

127. *Suscrito por Bonn y Moscú: Gobierno Invoca Pacto de ONU en Caso Honecker*, EL MERCURIO, Apr. 11, 1992, at A1.

except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>128</sup>

After Germany presented formal charges and formally requested Honecker's deportation, international law required Russian authorities to apply Article 13. Article 13 would have facilitated an end to Honecker's status as a "temporary guest" of the Chilean embassy. Honecker's questionable status as an alien "lawfully" in Russian territory was raised as a bar to applying Article 13 in his case.<sup>129</sup> Furthermore, the Russian government originally maintained that the decree of expulsion issued on November 15, 1991, was still in force, and the German request for expulsion was formally accepted by diplomatic note dated July 23, 1992.<sup>130</sup> Four days later, Russia gave Honecker twenty-four hours to present his views on the German request for expulsion.<sup>131</sup> Russia offered no independent review for this procedure.

Honecker refused to comply with Russia's request. Upon notification of the Russian authorities' decision to expel him, he acknowledged such notification "under protest."<sup>132</sup> On the same day, Honecker also was notified that the Chilean government no longer considered him a temporary guest and he would have to leave the Chilean embassy within three hours.<sup>133</sup> Arrangements were made for his transfer to the jurisdiction of the Russian authorities.<sup>134</sup> Russia immediately expelled and returned

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128. Civil and Political Rights Covenant, *supra* note 24 at art. 13.

129. See *supra* note 79 and accompanying text.

130. Russian Ministry of Foreign Affairs, Note No. 418 (July 23, 1992) (on file at the Institute of International Studies of the University of Chile); Embassy of the Federal Republic of Germany in Moscow, Note Verbale No. 001387 (July 22, 1992) (on file at the Institute of International Studies of the University of Chile).

131. Chilean Embassy in Moscow, Notification by the Chilean Special Negotiator to Honecker made on July 27, 1992, referring to the twenty-four hour period granted by the Russian government for having his views in writing (on file at the Institute of International Studies of the University of Chile).

132. Chilean Embassy in Moscow, Notification by the Chilean Special Negotiator to Honecker made on July 29, 1992, acknowledged "under protest" in writing by Mr. Honecker (on file at the Institute of International Studies of the University of Chile).

133. *Caso Honecker: Los Misterios de la Verdad*, EL MERCURIO, Aug. 9, 1992, at D1.

134. EL MERCURIO, *supra* note 95 (statement by the Chilean Ministry of Foreign

him to Germany.<sup>135</sup>

In the days immediately preceding his expulsion, Honecker<sup>136</sup> presented to the Russian authorities a document prepared by his lawyers requesting: (1) territorial asylum in Russia, and (2) that if this was not granted, he be allowed to proceed to a third country of his choice.<sup>137</sup> In that document he also requested the derogation of the decree ordering his expulsion. Most importantly, he requested that any decision to return him to Germany be made pursuant to the due process of extradition, thereby entitling him to be defended by a Russian lawyer of his choice. The Russian authorities did not accept any of these petitions. Honecker submitted these documents to both the Russian President and the President of the Russian Parliament. This was apparently considered an intervention in internal politics due to the conflict already unfolding between those two leaders.<sup>138</sup> This internal political conflict ended in open confrontation some months later.<sup>139</sup>

### *B. The Meaning and Extent of Article 13 of the Covenant on Civil and Political Rights*

The handling of this situation does not appear to correspond to the present state of international human rights protection. Specifically, the application of Article 13 of the Covenant on Civil and Political Rights has a different meaning and scope in current international practice. Although this provision deals mainly with expulsion procedures, Article 13 is not devoid of a substantive meaning. For example, a comment by the United Nation's Human Rights Committee states, "[I]ts purpose is clear-

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Affairs of July 29, 1992).

135. *Id.*

136. Kinzer, *supra* note 99.

137. Document prepared by Honecker's lawyers in Germany addressed to President Boris Yeltsin, delivered in Berlin on July 24, 1992, and reiterated by a letter from Honecker to the Russian Foreign Minister (July 27, 1992) (both on file at the Institute of International Studies of the University of Chile).

138. *Pidió Su Salido de Embajada: Yeltsin Acusó a Honecker de Conspiración*, EL MERCURIO, Aug. 6, 1992, at A1 (President Yeltsin would have accused Honecker of conspiring in Russian political affairs during his stay at the Chilean Embassy and considerations of national security would have been invoked in justification of his expulsion, according to the version given by the Chilean Foreign Minister in the House of Representatives).

139. *Id.*

ly to prevent arbitrary expulsions."<sup>140</sup> The committee has also stated that, "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one."<sup>141</sup>

A general comment adopted by the Human Rights Committee on Article 13 states, "[I]f the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13."<sup>142</sup> In this regard, it was immaterial whether Honecker was lawfully or unlawfully in Russia. In order to prevent arbitrary expulsions, such comments allow only those expulsions carried out "in pursuance of a decision reached in accordance with law."<sup>143</sup> The effectiveness of the rights recognized has helped to establish the existence of full facilities for pursuing a remedy against expulsion.<sup>144</sup>

The concept of due process in the context of human rights typically includes the following minimum requirements: "(a) knowledge of the case against one, (b) an opportunity to submit evidence to rebut that case, and (c) the right to appeal against an adverse decision before an impartial tribunal independent of the initial decision-making body."<sup>145</sup> Similarly, in the European Convention on Human Rights case law and the interpretation of European Economic Community Directive No. 64/221, the avail-

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140. *Report of the Human Rights Committee*, U.N. GAOR, 41st Sess., Supp. No. 40, at 19, U.N. Doc. A/41/40 (1986) [hereinafter *Human Rights Committee Report*]; see also Jean Dhommeaux: *Le Comité des Droits de l'Homme: 10 Ans de Jurisprudence*, 33 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 447 (1987); Stig Jagerskiöld: *The Freedom of Movement*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 7, 182-84 (Louis Henkin ed., 1981) (with reference to art. 13); Alfred de Zayas et al., *Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee*, 28 GERMAN Y.B. INT'L L. 9 (1985), reprinted in *Centre for Human Rights*, Geneva, Reprint No. 1, Sept. 1990.

141. *Human Rights Committee Report*, *supra* note 140, at 19; see also Rüdiger Wolfrum, *The Progressive Development of Human Rights: A Critical Appraisal of Recent UN Efforts*, in *DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG* 67, 83 (1985).

142. *Human Rights Committee Report*, *supra* note 140, at 18.

143. *Id.* at 19. For cases of application of Article 13 before the Human Rights Committee see Case No. 58/1979, Rep. 1981, Annex XBII, para. 10.1; Case No. 173/1984, Rep. 1985, Annex XIII, para. 4; and Case 155/1983, Rep. 1987, as reported in Dhommeaux, *supra* note 140, at 469 n.142.

144. See *supra* note 141 and accompanying text.

145. GOODWIN-GILL, *supra* note 1, at 159-160.

ability of remedies has been identified as a core guarantee against any expulsion decision relying on national security or public order. This is coupled with the obligation to notify the refugee of the grounds on which the decision is based and the availability of appeal.<sup>146</sup> While European Economic Community law does not require the intervention of a court or members of the judiciary, it concludes that:

[T]he essential requirement is that it should be clearly established that [the competent] authority is to perform its duties in absolute independence and is not to be directly or indirectly subject, in the exercise of its duties, to any control by the authority empowered to take the measures provided for in the directive.<sup>147</sup>

In addition to the comments and decisions related to the application of Article 13, one should bear in mind that this provision is the outcome of the long legal evolution of human rights protection. The preparatory work leading to the adoption of Article 13 evidences the close association of human rights guarantees with non-refoulement, non-expulsion, asylum, and extradition.<sup>148</sup> To this extent, the above treaties are also relevant for correctly understanding and interpreting Article 13, particularly in reference to the 1951 Refugee Convention. It is in light of these developments that the Executive Committee of the 1951 Refugee Convention recommended that states should employ expulsion only in very exceptional cases. In any event, the individual affected by an expulsion measure should be entitled to seek refuge in a third country.<sup>149</sup>

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146. Massias, *supra* note 44, at 46-50. The EEC Council Directive No. 64/221 of Feb. 25, 1964, refers to the "co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health," Council Directive 850/64, 1963-1964 O.J. SPEC. ED. 117.

147. Massias, *supra* note 44, at 50. The European Court of Human Rights has also held that an effective remedy requires a superior court to review and overturn a decision on asylum. *Case of Vilvarajah and others v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) (1992) [Judgment of October 30, 1991].

148. See generally MARC J. BOSSUYT, GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 267 (1987).

149. GOODWIN-GILL, *supra* note 1, at 83; United Nations Documents, *supra* note 117.

## VI. ASYLUM AND THE SEARCH FOR LASTING SOLUTIONS

The close connection between refuge, non-expulsion, non-refoulement, and territorial asylum is evident in Honecker's case.<sup>150</sup> Ever since these forms of protection have been understood to include the duty of non-rejection of refugees at the frontier,<sup>151</sup> admission in state territories has followed as a matter of course. However, this admission may only be on a temporary basis until the parties find a lasting solution. Whether such a step is called "temporary refuge" or "temporary asylum" is somewhat immaterial since, by any name, it is still a form of legal protection extended to individuals under international law.<sup>152</sup> It follows that once the individual is under the jurisdiction of the receiving state, his entitlement to a full recognition of human rights will follow irrespective of the condition of his alienage or lawfulness in that state's territory.<sup>153</sup>

In line with the foregoing argument, under present international law, no state is under the obligation to refuse admission of refugees, or much less, to expel a refugee to the prosecuting state.<sup>154</sup> These obligations can only arise in terms of very specific treaties, often dealing with extradition, or under treaties which exclude certain categories of crimes from the benefits relating to refugee status.

While temporary forms of protection have been developed under international law, the same has not happened with asylum or other categories of lasting solutions.<sup>155</sup> It would be entirely logical that temporary measures be followed by long term

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150. See generally HAGUE ACADEMY OF INTERNATIONAL LAW, CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *THE RIGHT OF ASYLUM* (1989); GERASSIMOS FOURLANOS, *SOVEREIGNTY AND THE INGRESS OF ALIENS* (1986).

151. GOODWIN-GILL, *supra* note 1, at 74-78.

152. See generally S. PRAKASH SINHA, *ASYLUM AND INTERNATIONAL LAW* (1971); J. Symonides, *Territorial Asylum*, 15 POLISH Y.B. INT'L L. 217 (1986) (discussing asylum in current international law).

153. See *supra* note 106 and accompanying text; 1985 U.N. Declaration, *supra* note 126.

154. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 901.

155. GOODWIN-GILL, *supra* note 1, at 121-123; Jeffrey Dillman, *International Refugee and Asylum Law*, 34 HOWARD L.J. 51 (1991); Tamas Foldesi, *The Right to Move and its Achilles' Heel, the Right to Asylum*, 8 CONN. J. INT'L L. 289 (1993).

remedies, but this is not always the case. The granting of asylum remains a discretionary decision of governments. These decisions are sometimes influenced by foreign policy interests which may supersede the proper application of international law.<sup>156</sup>

Under treaty arrangements developed among Latin American countries, states have affirmed to a greater extent the right to receive asylum. However, the language and conditions of such rights are not always clear.<sup>157</sup> The same is true of asylum rights as enshrined in numerous national constitutions.<sup>158</sup> Important international instruments, such as the Universal Declaration of Human Rights<sup>159</sup> and the 1967 United Nations Declaration on Territorial Asylum,<sup>160</sup> are also open to interpretation as to the nature and extent of asylum rights.

In any event, the growing pressure arising from situations of mass influx of refugees<sup>161</sup> has prompted a reaction regarding

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156. Note, *Prisoners of Foreign Policy: An Argument for Ideological Neutrality in Asylum*, 104 HARV. L. REV. 1878 (1991).

157. INTERNATIONAL COMMISSION OF JURISTS, *THE APPLICATION IN LATIN AMERICA OF INTERNATIONAL DECLARATIONS AND CONVENTIONS RELATING TO ASYLUM* (1975); KEITH W. YUNDT, *LATIN AMERICAN STATES AND POLITICAL REFUGEES* (1988); see *Conventions*, *supra* note 9; see also Whiteman, *supra* note 9, at 428-495 (on the practice of diplomatic asylum in Latin America); see generally *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Nov. 20) (discussing Latin American regional customs on asylum).

158. See, e.g., COST. [Constitution] art. 10 (Italy); GRUNDGESETZ [Constitution] art. 16 (F.R.G.); see also comments in OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 902. For discussion of the German constitutional amendments, see *supra* note 72.

159. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, U.N. Doc. A/811, reprinted in 43 AM. J. INT'L L. 127 (Supp.) (1949).

160. Declaration on Territorial Asylum, G.A. Res. 2312, U.N. GAOR, U.N. Doc., (1967), reprinted in GOODWIN-GILL, *supra* note 1, at 275. See also the Draft Convention on Territorial Asylum, United Nations Conference on Territorial Asylum, Geneva, Jan. 10 - Feb. 4, 1977, reprinted in GOODWIN-GILL, *supra* note 1, at 277.

161. See generally REFUGEES AND THE ASYLUM DILEMMA IN THE WEST (Gil Loescher ed., 1992); LAWYERS COMMITTEE FOR HUMAN RIGHTS, REFUGEE REFOULEMENT: THE FORCED RETURN OF HAITIANS UNDER THE U.S.-HAITIAN INTERDICTION AGREEMENT (1990); Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993); David A. Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 CORNELL INT'L L.J. 753 (1993); Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants' Rights*, 26 CORNELL INT'L L.J. 695 (1993); Robert L. Newmark, *Non-refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L.Q. 833 (1993); see also *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993), reprinted in 32 I.L.M. 1039 (1993).



the future of new forms of lasting protection. New forms of protection include a new role for asylum, the intervention of international humanitarian organizations, and more extensive programs based on international cooperation leading to resettlement in a variety of countries. These enhanced forms of international cooperation have sometimes been the outcome of parallel restrictive policies enacted by certain governments.<sup>162</sup> Individual cases, however, as opposed to collective situations, are still very much dependent upon discretionary elements.

The effect of unrestrained discretion and foreign policy interests in the determination of individual asylum cases was readily apparent in Honecker's case. Since the Russian government did not recognize Honecker's status as a refugee, there was no chance whatsoever of Russia seriously considering his application for political asylum, nor approving his petition to proceed to a third country. It should be noted, however, that although the Covenant on Civil and Political Rights does not provide for the right of asylum in express terms, it does not preclude such right. This was very much present in the preparatory work of Article 13. The fact that current international law places so much emphasis on non-expulsion and non-refoulement issues amounts indirectly to the recognition that asylum will have to somehow intervene at some stage in the process of handling protected persons.

The relationship between this kind of protection and diplomatic asylum came to the fore the very moment Honecker

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162. See *supra* note 32 and accompanying text. With particular reference to the United States, see Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205 (1989); Mary Scott Miller, *Aliens' Right to Seek Asylum: The Attorney General's Power to Exclude "Security Threats" and the Role of the Courts*, 22 VAND. J. TRANSNAT'L L. 187 (1989). With particular reference to the European Community see ANDREW CLAPHAM, HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW (1991); HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: METHODS OF PROTECTION (Antonio Cassese et al. eds., 1991); Terje Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum*, 2 INT'L J. REFUGEE L. 361 (1990); Kay Hailbronner, *Perspectives of a Harmonization of the Law of Asylum After the Maastricht Summit*, 29 COMMON MKT. L. REV. 917 (1992); Kay Hailbronner, *The Right to Asylum and the Future of Asylum Procedures in the European Community*, 2 INT'L J. REFUGEE L. 341 (1990); James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719 (1993); Andre Nayer, *La Communauté Européenne et les Réfugiés*, 22 REVUE BELGE DE DROIT INTERNATIONAL 133 (1989); Christian Tomaschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257 (1992).

sought refuge in the Chilean embassy in Moscow. This is not surprising particularly in light of Chile's long-standing humanitarian policy on diplomatic asylum.<sup>163</sup> Honecker's status was described as that of a "temporary guest." "Temporary guest" status was a common practice during the first years of military rule in Chile, where a large number of persons requested asylum in foreign embassies in Santiago. The asylum seekers went to a number of European embassies whose governments did not recognize diplomatic asylum under international law, but which granted the requested protection in view of pressing humanitarian considerations.<sup>164</sup>

An important question raised in this context is whether there really is much difference between the protection extended to a "guest" and that extended to a person who has been granted diplomatic asylum, particularly when adopting the assumption that pressing humanitarian considerations are present in either case. In both instances, which will normally last until the conditions of local political turmoil calm down or the protected person is granted safe-conduct to leave the country, the bar raised to the exercise of local jurisdiction is similar. Dupuy interestingly distinguishes between the granting of refuge (or diplomatic asylum) and territorial asylum. Refuge, or diplomatic asylum, can be considered a matter of fact, while territorial asylum is a matter of law.<sup>165</sup> However, neither situation can ignore the humanitarian objectives of the institution.

It is inconceivable that a State would surrender a refugee to local authorities endangering the refugee's basic human rights. Theoretically, this could happen in the absence of a treaty or customary rules providing for asylum rights. Even coercive mea-

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163. See generally OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 1082-1085 (discussing diplomatic asylum and practice).

164. *Id.* at 1084. *Report of the Ad-Hoc Working Group on Chile*, U.N. Comm'n on Hum. Rts., U.N. Doc. A/10285 (1975), *Id.* at 54-93. This document reports on the Chilean government's position recognizing a legal duty to grant safe conduct only to those persons having obtained asylum in embassies of countries parties to the 1954 Caracas Convention on Diplomatic Asylum, *supra* note 9, but that in practice such safe conducts were granted to all those having obtained asylum in foreign embassies in general, including European embassies.

165. Pierre-Marie Dupuy, *La Position Française en Matière d'Asile Diplomatique*, 22 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 743, 748, 752 (1976); see also OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 1084.

asures could be adopted to that effect.<sup>166</sup> In practice, this would violate humanitarian concerns presently shaping international law; this is hardly a realistic possibility. This explains why most recent cases of diplomatic asylum or refuge in foreign embassies have been handled with such deference to humanitarian concerns.<sup>167</sup> These concerns have modified traditional international law in this area.

A Russian official apparently made a threat to storm the Chilean embassy to put an end to Honecker's refuge.<sup>168</sup> This would have constituted an outright violation of international law leading to the immediate severance of diplomatic relations between the Russian Federation and Chile. Significantly, these relations had only recently been re-established after many years of bitter confrontation.<sup>169</sup> One German author suggested the possibility of adopting measures against Chile. His argument was that Chile was breaking international law by extending any form of diplomatic protection to Honecker.<sup>170</sup>

States are presently extending the law and practice of diplomatic asylum. This is more the natural outcome of humanitarian concerns and values on which the concept of diplomatic asylum is founded, than specific treaties in this area. The terminology applied to this form of protection does not really matter. The basic guarantees associated with non-expulsion and non-refoulement will apply equally to diplomatic asylum, without prejudice to the protected person's finding a permanent place of refuge or asylum. The practice of Latin American countries has

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166. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 1083.

167. *Id.* at 1084 (referring to the asylum of Professor Fang Lizhi in the U.S. embassy in Peking in 1989-1990 and other leading contemporary cases).

168. *Soviet Disarray: Pyongyang Offers Honecker Refuge*, N.Y. TIMES, Dec. 15, 1991, at A24 (the Russian Minister of Justice, Nikolai Fyodorov, expressed that if Honecker did not leave Russia by Monday, Dec. 16, 1991, "mechanisms to compel compliance with the Government's decision will be initiated").

169. Forcing entry into a foreign embassy to remove a refugee is at the very least legally doubtful. See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 1083-1084 n.9 (referring to the case of the Venezuelan embassy in Uruguay and other situations which led to the severance of diplomatic relations). In 1906, the police surrounded the Chilean embassy in Brussels, after the son of the *Chargé d'affaires*, who was charged with murder, took refuge there. *Id.* at 1083 n.8.

170. Blumenwitz, *supra* note 53, at 568 (considering that diplomatic asylum or refuge constituted a violation of Russian sovereignty); *Germany Protests to Chile for Sheltering East German*, N.Y. TIMES, Mar. 6, 1992, at A12 (the government of Bonn also ordered its ambassador in Santiago to protest what it called "a violation of international law").

certainly been influential in this process of development; however, the current concern for human rights and other humanitarian values transcends any particular region. These principles have found substantive expression in the world community, leading in practice to new legal developments.

Given Chile's long-standing tradition for respecting diplomatic asylum and other similar forms of protection, both active and passive, the termination of Honecker's refuge and his return to Germany were criticized domestically.<sup>171</sup> The temporary protection Chile extended to Honecker, however, was not devoid of significant consequences. Germany presented formal charges. Thereafter, doctors were able to establish the nature of Honecker's illness, which was later decisive to the outcome of his trial in Berlin.

#### VII. EXTRADITION, ALTERNATIVE PROCEDURES, AND THE RULE OF LAW

The application of extradition procedures in Honecker's case would have provided a procedure entirely consistent with international law, with a legal court examining the case's merits. Germany, however, did not request that Russia extradite Honecker, only that it expel him. The lack of an extradition treaty between the two countries might partly explain this circumstance. However, extradition can take place even in the absence of treaty arrangements based on comity, reciprocity, and the application of general principles of law.<sup>172</sup> Honecker himself requested that the Russian government require Germany to use normal extradition procedures.<sup>173</sup>

All extradition systems include non-extradition principles for political offenders. However difficult the question of defining a specific political crime, such crimes are broadly understood to include crimes with a political motive or political purpose. They

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171. *Acuerdo con Rusia y Alemania: Encontradas Opiniones sobre Solución Chilena a Honecker*, EL MERCURIO, July 30, 1992, at A1 (criticism expressed by the Socialist Party, the Communist Party and the Parties in the Centre-Right); EL MERCURIO, *supra* note 133 (of particular concern was the fact that Russian security agents were allowed to enter the Chilean embassy at the time Honecker was notified of the termination of protection).

172. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 952.

173. *See supra* note 137 and accompanying text.

also include situations where political considerations may affect the punishment of ordinary crimes.<sup>174</sup> Ever since the leading cases *In re Castioni*<sup>175</sup> and *In re Ezeta*<sup>176</sup> (the latter involving a former head of state), crimes incidental to or forming a part of political disturbances and the struggle for power were held not to be subject to extradition.<sup>177</sup> Within this broad purview, Honecker could have found enough ground for his defense as a political offender. There are contemporary restrictions on this judicial policy but the restrictions have generally been limited to terrorism and include specific offenses. This is evidenced by the 1985 United Kingdom-United States Supplementary Extradition Treaty.<sup>178</sup>

The non-refoulement principle is also closely linked to extradition, as evidenced by major multilateral conventions<sup>179</sup> and national legislation on extradition.<sup>180</sup> The following comment regarding European communist states is, nonetheless, paradoxical: "[Y]et the political offence exception, so closely related to principles of protection of refugees, finds no place in the extradition arrangements existing between such states."<sup>181</sup> Conversely, crimes "connected with Communist movement[s]" have been occasionally excluded from extradition by treaties between for-

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174. SINHA, *supra* note 152, at 170-188; see also OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 965; see generally *Major Contemporary Issues in Extradition Law: a Panel*, 84 AM. SOC'Y INT'L L. PROC. 389 (1990).

175. *In re Castioni*, 1 Q.B. 149 (1981) (formed the basis for U.S. case law concerning extradition and the political offense exception).

176. *In re Ezeta*, 62 F. Supp. 972 (N.D. Cal. 1894) (Ezeta was a former president of El Salvador sought for criminal prosecution); see Scott C. Barr, *The Dilemma of the Political Offense Exception: To Which Acts Should it Apply?*, 10 HAMLINE J. PUB. L. & POL'Y 141 (1989); see also Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767 (1992).

177. Barr, *supra* note 176, at 145.

178. United Kingdom-United States: Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Acts of Terrorism, June 25, 1985, 24 I.L.M. 1104 (1985); see also Kathleen A. Basso, *The 1985 U.S.-U.K. Supplementary Extradition Treaty: A Superfluous Effort?*, 12 B.C. INT'L & COMP. L. REV. 301 (1989); Mary V. Mochary, *Extradition and the Political Offense Exception*, 81 AM. SOC'Y INT'L L. PROC. 467 (1987).

179. See European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273; Inter-American Convention on Extradition, Feb. 25, 1981, *reprinted in* 20 I.L.M. 723 (1981); see also Christine Van den Wijngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990).

180. See generally OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 965-969.

181. GOODWIN-GILL, *supra* note 1, at 81.

mer communist states.<sup>182</sup> Therefore, these crimes are normally considered to be political and fall under the protection of extradition treaties and the non-refoulement principle.

Precisely because extradition involves a detailed examination of the law and facts, it can be a slow procedure with uncertain results. On occasion, it becomes a politically or legally impossible exercise. This situation has, from time to time, prompted the need to have recourse to alternative procedures.<sup>183</sup> The most extreme of such alternatives is the abduction of the offender, amounting to a gross violation of international law. In many countries, this has not affected the competence of domestic courts to proceed with the refugee's trial once the state has gained custody.<sup>184</sup> The recent debate prompted by the United States Supreme Court in the case of *United States v. Alvarez-Machain*<sup>185</sup> is not new in light of a number of other precedents. Had Russia taken Honecker by force from the Chilean embassy in Moscow, this would have amounted to an equivalent form of abduction.<sup>186</sup>

There are other ways, albeit less extreme, where international law might be circumvented. One way is to disguise extradition in the form of expulsion or deportation when the substantive or procedural requirements of formal extradition cannot be met.<sup>187</sup> De facto surrender of the offender is another example which "often occurs in the framework of *international relations with subordinate states*" and is also practiced between friendly states.<sup>188</sup> These other alternatives are closely linked to the

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182. SINHA, *supra* note 152, at 181.

183. CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION 51 (1980).

184. *Id.* at 51-54 (with reference to the *Eichmann*, *Argoud*, *Ben Barka*, *Tchombé* and *Dapcevic* cases); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 947-948. See also Jean François Borin, *Abduction and Misled Extradition in Breach of International Law: Analysis of the Individual Under the European Convention on Human Rights*, 37 REVUE HELLENIQUE DE DROIT INTERNATIONAL 23 (1984).

185. U.S. v. Alvarez-Machain, *supra* note 105.

186. N.Y. TIMES, *supra* note 168 and accompanying text.

187. VAN DEN WIJNGAERT, *supra* note 183, at 52 (referring to the Amekrane v. The United Kingdom case, 16 Y.B. EUR. CONVENTION HUM. RTS. 356); Eur. Comm'n on Hum. Rts. (1973) (extradition precluded if torture or other ill treatment is anticipated); see also Michael J. Bowe, *Deportation as de facto Extradition: The Matter of Joseph Doherty*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 263 (1990).

188. VAN DEN WIJNGAERT, *supra* note 183, at 53. The practice between the Republic of Ireland and Northern Ireland has been held to be unlawful. See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 947 n.9.

question of non-expulsion and non-refoulement. On the one hand, they may be regarded as the exercise of a sovereign right. On the other hand, there are rules and standards of international law restricting states' discretion which cannot be ignored. The *Institut de Droit International* has long opposed indirect forms of extradition (*voie détournée*).<sup>189</sup> A German high court has also declared unacceptable expelling a person whose extradition cannot be granted under formal extradition proceedings.<sup>190</sup>

The influence of domestic affairs by means of peaceful measures or policies applied by a foreign government is a new issue under international law.<sup>191</sup> To the extent that such policies pursue the strengthening of human rights or other important international community values, such measures might be justified and even legitimized. Conversely, if such influence is exercised to force the will of a legitimate government in some domestic or international issue to favor the foreign government's desired outcome, its justification and legitimacy are very much open to question under international law.

The protective laws relating to refuge, asylum or extradition allow many procedural variations which states may legally follow. However, states may overstep the legal limits and use discretionary procedures to circumvent the protection intended by international law, thus depriving individuals of their fundamental substantive rights. "[T]he borderline between discretion and arbitrariness, although elastic is nevertheless a real one, and in case of doubt it is for an impartial organ to determine whether it has been overstepped."<sup>192</sup>

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189. Institut de Droit International, Resolution of the Geneva Session, 1892, art. 16, 3 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 222 (1928). For comment on this and other opinions see VAN DEN WIJNGAERT, *supra* note 183, at 56-57.

190. Federal Republic of Germany, High Administrative Tribunal, Münster (OVG Münster), Oct. 1, 1968, as cited by VAN DEN WIJNGAERT, *supra* note 183, at 58-59; see also Bozano Case, 111 EUR. CT. H.R. (Ser. A) (1987).

191. Lori Fisher Damrosch, *Politics Across Borders: Non Intervention and Non Forcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989).

192. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, at 941.

### VIII. CONCLUSION - INDEPENDENT ADJUDICATION: PERFECTING THE IMPLEMENTATION OF HUMAN RIGHTS UNDER INTERNATIONAL LAW

In spite of the meaningful evolution international human rights law has had during the past four decades, both substantively and procedurally, political issues still haunt a field which should be governed by objectivity and the strict rule of law. In truth, this problem affects international law generally. When the rights of individuals are at issue, however, any form of discrimination or selectivity becomes more notorious and less acceptable. Honecker's case well illustrates the shortcomings of international protection for human rights when confronted by the political convenience of interested states.

A number of suggestions were made during the Honecker negotiations to have his case submitted to some form of independent adjudication to minimize political considerations. One such suggestion had Chile granting asylum to Honecker, and admitting him into the country. Germany would then have requested his extradition, and Honecker's fate would then be subject to the Chilean Supreme Court's jurisdiction.<sup>193</sup> This approach was specifically intended to de-politicize the discussion, but the German government withheld approval. A suggestion was also made to take Honecker's case to the United Nations High Commissioner for Refugees or to the International Committee of the Red Cross. This route would allow an independent international organization to deal with his entitlement to protection and the eventual issuance of a travel document in his name.<sup>194</sup> A possible intervention by the United Nations Commission on Human Rights was also mentioned.<sup>195</sup>

This writer suggested having the matter of entitlement to protection submitted to the International Court of Justice or to a special ad hoc arbitration endorsed by the three governments

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193. Mario Valle and Elia Simeone, *Proponen Especialistas: Nuevas Vías de Solución para el Caso Honecker*, EL MERCURIO, Mar. 8, 1992, at A1 (proposal by Professor María Teresa Infante, Director of the Institute of International Studies of the University of Chile).

194. EL MERCURIO, *supra* note 79 (based on diplomatic sources).

195. *Id.*



involved.<sup>196</sup> This arrangement would have provided the benefit of independence, impartiality, and de-politicization. It also would have allowed the International Court of Justice to examine to what extent the status of refugees, asylum, and extradition have been affected by heightened humanitarian concerns evolving in current international law.<sup>197</sup>

Upon his return to Germany, Honecker was imprisoned and appeared to face his trial at a Berlin Criminal Court. His health, however, rapidly declined as the proceedings advanced. On this basis, the Berlin Constitutional Court ruled on January 12, 1993, that the custody of Honecker was contrary to the standard of human dignity enshrined in the German Constitution.<sup>198</sup> The arrest warrants against Honecker were subsequently lifted, allowing Honecker to immediately rejoin his family in Chile.<sup>199</sup>

In addition to domestic law and procedural issues being handled with judicial independence by the German courts of law, the application of due process under international law should have been ensured. Due process issues should have been examined during the many stages that dealt with interpretation and application of fundamental treaties addressing human rights and other related questions.

A number of proposals have been made in order to allow for an independent international body to participate in decisions relating to refugees, asylum, and associated legal matters. These proposals range from the participation of the United Nations High Commissioner for Refugees in national procedures for the determination of the status of refugees,<sup>200</sup> to the preparation of international procedures for the protection of refugees. The lat-

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196. *Id.*

197. The International Court of Justice would certainly be well prepared to deal with human rights issues. See generally Stephen M. Schwebel, *Human Rights in the World Court*, 24 VAND. J. TRANSNAT'L L. 945 (1991).

198. Constitutional Court of Berlin, Decision of Jan. 12, 1993, BERL VERFGH, BESCHL v. 12.1.1993 - VerFGH 55/92; see 1993 NEUE JURISTISCHE WOCHENSCHRIFT, [N.J.W.] 515 (1993) (F.R.G.).

199. Stephen Kinzer, *Germany Frees Ailing Honecker, Who Flies to Chile*, N.Y. TIMES, Jan. 14, 1993, at A3; Stephen Kinzer, "Last Personal Wish:" Punished No More, *Honecker Leaves Germany*, N.Y. TIMES, Jan. 17, 1993, at E2.

200. Goodwin-Gill, *Refugees: The Functions and Limits of the Existing Protection System*, in HUMAN RIGHTS AND PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW, Proceedings of a Conference held in Montreal Nov. 29-Dec. 2, 1987, Canadian Human Rights Foundation, Institute for Research on Public Policy 149, 154 (1988).

ter suggestion would include regional United Nations processing centers<sup>201</sup> and the establishment of an independent committee for ensuring the consistent application of the 1951 Convention on the Status of Refugees.<sup>202</sup> Other proposals refer more specifically to the European region. Those proposals include initiatives such as a suggested European Economic Community directive on the harmonization of national legislation on refugees and asylum. The suggested directive would institute a European Community committee<sup>203</sup> or the appointment of a high official responsible for the European Community policy on asylum rights.<sup>204</sup> The European Consultation on Refugees and Exiles has proposed regional procedural requirements and the establishment of an independent commission to issue opinions in certain cases.<sup>205</sup> Reference has also been made to a possible role for the International Court of Justice.<sup>206</sup>

An independent and impartial international body to adequately judge the many delicate international law issues that arise in a matter of this nature would be highly desirable, especially in light of current international experience. The traditional view that the state from whom asylum is sought or extradition requested has the final word as to the protection required does not seem to provide a safe guarantee. States will need to perfect institutional and procedural guarantees in the years ahead. This includes the operation of Article 13 of the Covenant of Civil and Political Rights, to ensure that the substance of the protection embodied in this and other treaties will be duly safeguarded.

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201. *Id.*, with reference to the Danish draft resolution in the United Nations General Assembly Third Committee on International Procedures for the Protection of Refugees (U.N. Doc. A/C.3/41/L.51, Nov. 12, 1986), 170-171.

202. Tom Clark, *Human Rights and Expulsion: Giving Content to the Concept of Asylum*, 4 INT'L J. REFUGEE L. 189, 203 (1992).

203. Nayer, *supra* note 162, at 143-146.

204. *Id.* at 137-139, with reference to the Vetter Report of 1987 and the European Parliament Resolution thereon of Mar. 12, 1987.

205. European Consultation on Refugees and Exiles, *Fair and Efficient Procedures for Determining Refugee Status: A Proposal*, 3 INT'L J. REFUGEE L. 112 (1991), and comments by Clark, *supra* note 202, at 202-203.

206. EL MERCURIO, *supra* note 194 and accompanying text.