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THE LAW OF DIPLOMATIC ASYLUM—A CONTEXTUAL APPROACH

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INTRODUCTION

On June 19, 2012, the Ecuadorian embassy to London welcomed an unusual guest: the activist Julian Assange sought and was granted asylum on mission premises.¹ Assange had risen to notoriety as the founder of WikiLeaks, the website that had published thousands of classified U.S. diplomatic cables² and documents relating to the armed conflicts in Iraq and

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1. Sylvia Hui & Gonzalo Solano, *Ecuador Says WikiLeaks Founder Seeking Asylum*, ASSOCIATED PRESS, June 19, 2012.

2. David Leigh, *How 250,000 US Embassy Cables Were Leaked*, THE GUARDIAN (Nov. 28, 2010, 1:14 PM), <http://www.theguardian.com/world/2010/nov/28/how-us-embassy-cables-leaked>. For more information on this incident, see Ben Quinn, Patrick Kingsley & Jason Rodrigues, *WikiLeaks Cables: You Ask, We Search*, THE GUARDIAN (Dec. 15, 2010, 10:59 AM), <http://www.theguardian.com/world/blog/2010/dec/15/wiki-leaks-you-ask-we>

Afghanistan.³ But Assange was also wanted for questioning by the authorities of Sweden after two women accused him of sexual assault when he had visited the country.⁴

Assange himself claimed that he had been secretly indicted in the United States and was at risk of eventually being extradited to that state.⁵ In that context, the Foreign Minister of Ecuador pointed out that the United States still had the death penalty for “espionage and sedition.”⁶

The event soon bore all the hallmarks of a major international incident. In the course of the summer, the British Foreign Office resorted to strong language, stating that Britain was allowed “to take actions in order to arrest Mr. Assange in the current premises of the Embassy.”⁷ Ecuador, on the other hand, received support from the Organization of American States (OAS), whose foreign ministers approved a resolution supporting the “inviolability of diplomatic premises,”⁸ as well as from the Union of South American Nations (UNASUR), which referred to the “sovereign right of States to grant asylum.”⁹

In a statement published on the day Assange had been given shelter, the Ecuadorian embassy emphasized that its decision should “in no way be interpreted as the Government of Ecuador interfering in the judicial processes of either the United Kingdom or Sweden.”¹⁰ But it is its potential for interference that has given diplomatic asylum a certain significance in the field of diplomatic relations—to that degree that it provided the International Court of Justice (ICJ) with one of very few opportunities to

search.

3. *Ecuador Says WikiLeaks Founder Assange Is Seeking Asylum*, CNN (June 19, 2012, 8:27 PM), <http://www.cnn.com/2012/06/19/world/europe/ecuador-assange-asylum/>.

4. Hui & Solano, *supra* note 1; *Ecuador Says WikiLeaks Founder Seeking Asylum*, *supra* note 3.

5. Jill Lawless, *UK: Assange Is Beyond Our Reach In Ecuador Embassy*, ASSOCIATED PRESS, June 20, 2012.

6. Hui & Solano, *supra* note 1.

7. Richard Alleyne, *WikiLeaks: Julian Assange Will Take Britain to the 'World Court'*, THE TELEGRAPH (Aug. 17, 2012, 11:55 AM), <http://www.telegraph.co.uk/news/uknews/9482433/Wikileaks-Julian-Assange-will-take-Britain-to-the-World-Court.html> (illustrating Britain’s reference to domestic law, *i.e.*, the Diplomatic and Consular Premises Act 1987).

8. *Julian Assange: OAS Partially Supports Ecuador*, INDIA BLOOMS NEWS SERVICE, Aug. 25, 2012.

9. *Unasur Backs Ecuador's Asylum Offer to Assange*, XINHUA NEWS AGENCY (Aug. 20, 2012, 11:59:45 AM), http://news.xinhuanet.com/english/world/2012-08/20/c_131795981.htm. The Bolivarian Alliance for the Americas likewise expressed support for Ecuador. *Id.* For the UNASUR statement, see *UNASUR Supports the Sovereign Right of States to Grant Asylum*, GOBIERNO BOLIVARIANO DE VENEZUELA (Aug. 20, 2012, 8:27 PM), http://guyana.embajada.gob.ve/index.php?option=com_content&view=article&id=628%3Aun-asur-respalda-el-derecho-soberano-de-los-estados-de-conceder-asilo-&catid=3%3Anoticias-de-venezuela-en-el-mundo&Itemid=19&lang=en.

10. Statement, Embassy of Ecuador in London, Statement on Julian Assange (June 19, 2012), available at <http://www.ecuadorembassyuk.org.uk/news/statement-on-julian-assange>.

discuss interference by diplomatic missions. In the *Asylum Case*, the Colombian Embassy in Lima had provided refuge to the Peruvian politician Victor Haya de la Torre, in January 1949. While the court was primarily concerned with specific asylum rules recognized in Latin America,¹¹ it also had the opportunity to refer to the grant of diplomatic asylum in general and held it to be “an intervention in matters which are exclusively within the competence of that State.”¹²

Nor would it be appropriate to consider such intervention a “mere” question of morality or *courtoisie*. In 1957 when the International Law Commission (ILC) debated its draft code on “Diplomatic Intercourse and Immunities”—the basis for the 1961 Vienna Convention on Diplomatic Relations (VCDR)¹³—it decided to include an Article on duties of diplomatic agents and made express reference to their obligation to refrain from interference.¹⁴ This Article, with minor modifications, was accepted at the Diplomatic Conference at Vienna in April 1961 and today forms the second sentence of Article 41(1) VCDR.¹⁵ In so doing, state parties made it clear that they considered conduct of this kind not only a violation of good practices, but also a violation of international law; and there is further evidence that they jealously guard the rights that the rule seeks to protect.¹⁶ If a receiving state believes that such conduct has occurred, the consequences can be severe: in recent years, allegations of interference have led to warnings, expulsions, and even to the total severance of diplomatic ties.¹⁷

11. *See infra*, Part II.A.1.

12. *Asylum Case* (Colom./Peru), 1950 I.C.J. 266, 275 (Nov. 20).

13. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR].

14. For the original wording of the rule, *see* Rep. of the Int’l Law Comm’n, 9th Sess., Apr. 23–June 28, 1957, *reprinted in* [1957] 1 Y.B. Int’l L. Comm’n 143, ¶ 57, U.N. Doc. A/CN.4/Ser.A/1957/ [hereinafter 1 Y.B. Int’l L. Comm’n (1957)].

15. United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, Mar. 2–Apr. 14, 1961, UN Doc. A.CONF.20/14/Add.1, at 87.

16. Charges of interference have been raised in a wide variety of fields. *See, e.g.*, Karl E. Meyer, *The Editorial Notebook; The Diplomat’s Tightrope*, N. Y. TIMES, July 26, 1988, *available at* <http://www.nytimes.com/1988/07/26/opinion/the-editorial-notebook-the-diplomat-s-tightrope.html> (the case of the U.S. Ambassador to Argentina, Spruille Braden, who in 1946 delivered ‘pointedly partisan speeches’ during elections in that country); Alexander MacLeod, *British Hang On in Tug of War over Canada’s Constitution*, CHRISTIAN SCI. MONITOR, Feb. 13, 1981, *available at* <http://www.csmonitor.com/1981/0213/021356.html/%28page%29/3> (the case of the British High Commissioner to Canada, Sir John Ford, who was accused of interference over an attempt at lobbying two members of the Canadian New Democratic Party); *Soviet Ambassador Expelled*, NZHISTORY.NET (Oct. 23, 2013), <http://www.nzhistory.net.nz/page/soviet-ambassador-expelled> (the case of the Soviet Ambassador to New Zealand, who in 1980 was expelled for allegedly giving money to a pro-Soviet party in the receiving state).

17. This happened, for example, in relations between Nauru and Taiwan in 2002. Ko Shu-Ling, *Paraguay Reaffirms Relations with Taiwan*, TAIPEI TIMES Aug. 20, 2002, at 3, *available at* <http://www.taipeitimes.com/News/taiwan/archives/2002/08/20/0000164880>. This

Among the various fields of potential interference, the grant of asylum on diplomatic premises occupies a special position. Unlike, for instance, lobbying activities, its impact is direct—especially if the receiving state intended to exercise jurisdiction over the person who was seeking asylum and who has now been withdrawn from its reach. Granting diplomatic asylum is an act that usually generates strong publicity and forces a reaction by the receiving state. It is also a phenomenon that has been the bane of receiving states throughout diplomatic history; with some commentators tracing its roots to the beginnings of permanent diplomacy more than 500 years ago.¹⁸ Among those to whom diplomatic asylum was granted, are illustrious names—in 1961, the former Cuban President Manuel Urrutia sought asylum in the Venezuelan embassy (in the disguise of a milkman),¹⁹ and in 1992, the former Peruvian President García found refuge in a building of the Colombian embassy in that country.²⁰ In 1956, one of the most celebrated cases of diplomatic asylum occurred when the U.S. embassy in Budapest granted asylum to the Hungarian Cardinal Mindszenty. The cardinal was to stay in the embassy for nearly fifteen years.²¹

But in spite of the prominence, which the phenomenon of diplomatic asylum had attained over the years, the VCDR does not expressly mention it. Early in the codification history, Columbia suggested in the Sixth Committee of the General Assembly that the ILC's work should also extend to this question.²² But that suggestion was not successful; most Committee members held the view that this was a separate topic²³ that could more appropriately be considered under the “general question of asylum.”²⁴

For a topic they were not supposed to discuss, the ILC spent a

option has also been discussed by commentators on the Assange case. See Carl Gardner, *Julian Assange: Can Ecuador's Embassy be Stripped of its Diplomatic Status?*, THE GUARDIAN (Aug. 16, 2012, 7:14 AM), <http://www.guardian.co.uk/commentisfree/2012/aug/16/julian-assange-diplomatic-status-ecuador-embassy>.

18. Susanne Riveles, *Diplomatic Asylum as a Human Right: The Case of the Durban Six*, 11 HUM. RTS. Q. 139, 144 (1989). For an early case of diplomatic asylum, see U.N. General Assembly, *Question of Diplomatic Asylum: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/10139 (Part II) (Sept. 22, 1975) [hereinafter Sec-Gen Report (2)].

19. Alfred G. Cuzán, *Fidel Castro: A Machiavellian Prince?*, 9 CUBA IN TRANSITION 178, 185 (1999), available at <http://www.ascecuba.org/publications/proceedings/volume9/pdfs/cuzan.pdf>.

20. *Ex-Peruvian President Garcia Arrives in Colombia for Asylum*, L.A. TIMES, June 3, 1992, available at http://articles.latimes.com/1992-06-03/news/mn-661_1_peruvian-president-alan-garcia.

21. Dan Balz, *A Lengthy Stay for 2 Chinese Dissidents?*, WASH. POST, June 13, 1989, at A25; Leslie C. Green, *Trends in the Law Concerning Diplomats*, 19 CANADIAN Y.B. INT'L L. 132, 144 (1981); Alex Last, *Fifteen Years Holed Up in an Embassy*, BBC, <http://www.bbc.co.uk/news/magazine-19470470> (last updated Sept. 5, 2012, 7:05 PM).

22. *Diplomatic Intercourse and Immunities: Memorandum Prepared by the Secretariat*, [1956] 2 Y.B. INT'L L. COMM'N 131, ¶ 10, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

23. *Id.* See also 1 Y.B. INT'L L. COMM'N (1957), *supra* note 14, at 2, ¶ 7.

24. 1 Y.B. INT'L L. COMM'N (1957), *supra* note 14 at 2, ¶ 7 (paraphrasing by Sandström).

surprising amount of time on it,²⁵ with one member, Fitzmaurice, going so far as to suggest the inclusion of an article to prohibit the granting of shelter on mission premises to persons charged with offenses under local law.²⁶ Fitzmaurice was not successful in that endeavor, but it is clear that the members of the Commission were aware that omitting such an important issue would create a gap in their work.²⁷ A little defiant mention of asylum made its way into the commentary to the draft articles, but it did not contain any significant elaboration on its concept or its implications for diplomatic interference.²⁸

The United Nations revisited the topic of diplomatic asylum in 1974, during a debate in the Sixth Committee.²⁹ Following these discussions, the General Assembly invited member states to submit their opinions on the issue to the Secretary-General and requested the latter to prepare a report before the thirtieth session of the General Assembly.³⁰

The two-part report was published on September 22, 1975.³¹ It ran nearly 100,000 words, and it provided a detailed reflection on the development and the concept of diplomatic asylum. But it was as far as the United Nations was ever able to go in its effort to elaborate on the subject. On December 15, 1975, the General Assembly resolved to give further consideration to this topic “at a future session.”³² But to this date, no universal convention on diplomatic asylum has come into existence, nor has there even been a set of ILC draft articles on this matter. The views expressed by U.N. member states in the 1970s, certainly attested to a significant differing of opinion on diplomatic asylum; and some authors have suspected that states in general felt that the time had not been “ripe” for the codification of this subject.³³

That, however, means that diplomatic asylum, at least where general international law is concerned, remains an ill-defined concept whose boundaries are anything but certain. On that level, the notion of diplomatic asylum, as well as its legal assessment—including the very question of

25. *See id.* at 54–58, 220–21.

26. Fitzmaurice’s article envisaged certain exceptions: in cases in which shelter was necessary to “save life or prevent grave physical injury in the face of an immediate threat or emergency,” or where such shelter was recognized “by any established local usage,” and where the offenses were political in nature. *Id.* at 54, ¶ 33.

27. *See id.* at 55, ¶¶ 45, 50; at 56, ¶¶ 59, 62.

28. In the context of Draft Article 40, the ILC referred to certain special agreements, which contain rules on the granting of asylum. *Documents of the Tenth Session*, [1958] 2 Y.B. Int’l L. Comm’n 104, U.N. Doc. A/CN.4/Ser.A/1958/Add.1 [hereinafter 2 Y.B. Int’l L. Comm’n (1958)]. *See also infra* Part II.A.1.

29. U.N. General Assembly, *Question of Diplomatic Asylum: Rep. of the Secretary-General*, U.N. Doc. A/10139 (Part I) (Sept. 2, 1975), ¶ 2 [hereinafter Sec-Gen Report (1)].

30. G.A. Res. 3321 (XXIX), at 148, U.N. Doc. A/RES/3321 (Dec. 14, 1974).

31. *See* Sec-Gen Report (1), *supra* note 29; Sec-Gen Report (2), *supra* note 18.

32. G.A. Res. 3497 (XXX), U.N. Doc. A/RES/3497 (Dec. 15, 1975).

33. Anthea J. Jeffery, *Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights*, 1 S. AFR. J. ON HUM. RTS. 10, 16 (1985).

whether the grant of asylum constitutes a form of interference—is left to customary international law, the determination of which is, in this context, fraught with doubt.

This Article deals with the status that the grant of diplomatic asylum enjoys under international law. Essential to this analysis is an exploration of the rules that protect the interests of the receiving state and thus carry a negative impact on the assessment of a diplomatic decision to this effect. That includes the ban on interference itself but also includes other restrictive rules that the VCDR codified in the interests of the receiving state.

These restrictive norms are, however, not the only provisions that apply in a situation of diplomatic asylum. The fact is too often ignored that the sending state may also pursue legitimate interests by adopting the relevant decision, and there may be powerful grounds on which these interests can be based. That includes the possible existence of obligations that the receiving state owes *erga omnes*, but also the presence of obligations that the sending state may face under specific human rights regimes and that may compel it to take protective action when these rights have come under threat.

A diplomatic mission that finds itself in a situation of this kind will therefore be faced with two sets of divergent rules without the availability of a fast and easy formula that allows a decision on this question in all circumstances. The problem cannot be solved by subordinating one system to the other—for instance, by stating that the ban on interference always has to win out against obligations to secure human rights.³⁴ What is needed, is a contextual view that acknowledges the values and interests that gave rise to the divergent norms and that reaches a decision by identifying their respective weight in light of the impact that the adoption or omission of the diplomatic measure creates.

The subsequent Sections will identify these divergent norms and will present methods to resolve their co-existence. This examination is primarily concerned with diplomatic asylum in the narrow sense: the focus is therefore not on consular asylum, which is subject to a different regime.³⁵ However, incidents involving consular asylum are included as illustrations, where they share common ground with their counterpart in diplomatic law.

This Article will deal with the conduct of diplomatic missions and their agents; it will primarily address the question of whether they are entitled to grant asylum on diplomatic premises. That is not the same as the question whether a refugee may be entitled to asylum on mission premises—the individual asylum seeker may be subject to a different set of norms.

The term “refugee” in this Article is employed to denote a person seeking diplomatic asylum and is limited to that context. It is thus used without prejudice to the question of whether that person, in the

34. Although such approaches have been suggested in the past, *see infra*, Part III. A.

35. For the rule of non-interference, see Vienna Convention on Consular Relations art. 55(1), April 24, 1963, 596 U.N.T.S. 261 [hereinafter VCCR]. For the ban on the use of the premises of the consular mission in any manner incompatible with the exercise of consular functions, see *id.*, art. 55(2).

circumstances of the given case, meets the relevant definitions that refugee law adopts for that term.³⁶

Finally, it is worth recalling one of the basic tenets of diplomatic law: diplomatic immunities exist independent of the fulfillment of diplomatic duties.³⁷ Even a negative assessment of the lawfulness of the grant of asylum can therefore not limit immunities due to the diplomatic mission under the VCDR, and it could not possibly constitute a justification for receiving states wishing to resort to violations of the Convention in order to obtain custody of the asylum seeker.³⁸

I. OF BANS AND RESTRICTIONS: DOES INTERNATIONAL LAW PROHIBIT DIPLOMATIC ASYLUM?

While no article of the VCDR deals specifically with diplomatic asylum, the Convention does contain two norms in particular that have a direct and *prima facie* limiting effect on this practice. The first of them is the ban on interference itself; that norm is enshrined in the general provision on duties of diplomatic agents (Article 41(1) VCDR), which reads: “Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.”³⁹

But the VCDR does not offer any clarification on the concept of interference,⁴⁰ and it certainly does not dwell on the question of whether sheltering refugees on mission premises falls within its scope. The ICJ, too, has not been able to provide a detailed examination of this phenomenon. In the *Asylum Case* mentioned above, the court did not offer objective

36. For an overview of the relevant definitions which have been employed in this field of law, see Vienna Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 243; UNHCR Handbook, Global Human Rights Education Association, <http://www.hrea.org/learn/tutorials/refugees/Handbook/intro.htm>.

37. For an early discussion of this principle, see the comments of ILC member Padilla Nervo in 1 Y.B. Int'l L. Comm'n (1957), *supra* note 14, at 143, ¶ 56. Other members of the ILC expressly supported his position. See *id.* at 148, ¶¶ 24, 30.

38. See Case Concerning United States Diplomatic and Consular Staff in Tehran (*Hostages Case*) (U.S. v. Iran), 1980 I.C.J. 40, ¶ 86 (May 24), in which the court found that the rules of diplomatic law “constitute a self-contained régime” and declared that the sanctions that the VCDR itself puts at the disposal of the receiving state for the abuse of immunities “are, by their nature, entirely efficacious.”

39. VCDR, *supra* note 13, art. 41(1).

40. The Convention is in that regard more general than some of the historical draft codes on diplomatic law, which sometimes provided examples for the conduct of interference. See, e.g., PASQUALE FIORE, INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION OR THE LEGAL ORGANIZATION OF THE SOCIETY OF STATES (E.M. Borchard trans., 1918) (1890), reprinted in 26 AM. J. INT'L L. 153, 160, ¶ 482 (Supp. 1932); International Law Association, Report of the Thirty-Fourth Conference, Vienna, Austria, 1926, *Proposed Codification of the Law Regarding the Representation of States* (1926) (by Lord Phillimore) [Phillimore's Draft Code], reprinted in 26 AM. J. INT'L L. 177, 180, ¶ 34 (Supp. 1932).

parameters for its rather general view that asylum is a form of “intervention.” All the same, the finding must count as one of the most explicit considerations of diplomatic interference by the ICJ.⁴¹ The ICJ’s next opportunity came only thirty years later in the Tehran Hostages Case, in which it merely listed interference among the “abuses of [diplomatic] functions”⁴² and acknowledged that it was difficult to determine exactly when the diplomatic function of observation would involve acts such as espionage or interference.⁴³

Among writers on diplomatic law, opinions about scope and boundaries of interference vary widely. At different times, the concept has been held to embrace the “[r]endering of aid or active assistance . . . in favour of a party in the national elections,”⁴⁴ the organization of a secret police and the kidnapping of dissidents who live in the receiving state,⁴⁵ espionage,⁴⁶ and even the assassination of opponents and involvement in the preparation of terrorist acts.⁴⁷

Both the wording of the VCDR and a consideration of its *travaux préparatoires* allow for only one clear restriction to the concept of interference: as opposed to previous treaties in diplomatic law,⁴⁸ the ban of interference under the Vienna Convention does not extend to the foreign affairs of the receiving state,⁴⁹ though it may be difficult to carry the distinction between “internal” and “external” affairs into practice.

The concept of interference that emerges from these considerations, remains broad; it is best understood as behavior adopted by a beneficiary of diplomatic privileges and immunities that introduces an outside element into the internal matters of the receiving state, and by so doing, causes a disturbance. The grant of diplomatic asylum would certainly fall within that perimeter; the alien element in this context is formed by the limited imposition of jurisdiction of the sending state on the territory of the receiving state. But a comprehensive view of diplomatic interference will also have to take into account the potential existence of justifications; a

41. See *supra* text accompanying note 12.

42. *Hostages Case*, 1980 I.C.J. 38, ¶ 84.

43. *Id.* ¶ 85. In 2009, a case that reached the court involved questions both of interference and diplomatic asylum. See Application Instituting Proceedings by the Republic of Honduras Against the Federative Republic of Brazil (*Honduras Application*) (Hond. v. Braz.), ¶ 5 (Oct. 28, 2009), available at <http://www.icj-cij.org/docket/files/147/15935.pdf>. However, the case was withdrawn by the State of Honduras before it reached decision stage. See *infra* text accompanying note 259.

44. BISWANATH SEN, A DIPLOMAT’S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 90 (1988).

45. 4 CHARLES ROUSSEAU, LES RELATIONS INTERNATIONALES 167 (1980).

46. 1 OPPENHEIM’S INTERNATIONAL LAW 1068 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

47. *Id.* at 1068–69.

48. See Havana Convention on Diplomatic Officers art. 12, Feb. 20, 1928, 155 L.N.T.S. 259.

49. See 1 Y.B. Int’l L. Comm’n (1957), *supra* note 14, at 145, ¶ 76.

valid assessment of the underlying diplomatic behavior can only emerge through the application of a mechanism that resolves the divergence between norms that justify and norms that prohibit the relevant conduct.⁵⁰

The duty of non-interference is joined by a second norm that can claim applicability in cases of diplomatic asylum: Article 41(3) of the VCDR specifically addresses the use of mission premises and imposes further obligations on diplomatic agents. It reads: “The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.”⁵¹

It is in connection with this article that the ILC availed itself of a rare opportunity to mention asylum: in the commentary to the text, the Commission noted that “among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises.”⁵² Treaties of this kind have come into existence on a regional level—most prominently, in the Latin American region (an issue to which this examination will return).⁵³

The commentary by itself does not provide clarification on the position taken by international law on the granting of diplomatic asylum. In fact, the very question whether such an act would be encompassed by the “functions of the mission” has proven to be a challenging issue.

VCDR Article 3(1) provides a list of five functions, which, to a significant degree, emanate from customary international law.⁵⁴ But that list, which refers to the tasks of representation, protection of interests of the sending state and its nationals, negotiation, observation, and the promotion of friendly relations, does not expressly address the case of diplomatic asylum.⁵⁵ On the other hand, the list is open-ended, and the wording of paragraph one makes it clear that the enumerated tasks were included as examples only.⁵⁶

Yet the acceptance of an additional function with applicability for the international community as a whole, would need to fulfill all the requirements of a rule of general customary law, including consistency and generality of state practice as well as the existence of *opinio juris*. Such

50. On the co-existence of divergent interests and its assessment in international law, see *infra* Parts II, III.

51. VCDR, *supra* note 13, art. 41(3).

52. 2 Y.B. Int'l L. Comm'n (1958), *supra* note 28, at 104, art. 40, commentary, ¶ 4.

53. See *infra* Part II.A.1.

54. EILEEN DENZA, *DIPLOMATIC LAW* 35 (2008).

55. It is, under specific circumstances, possible that a mission can rely on these “traditional” functions when offering asylum to a refugee. For instance, the protection of interests of nationals of the sending State may be involved if the receiving State proposed to exercise jurisdiction over this group of persons. See VCDR, *supra* note 13, art. 3(1)(b).

56. The article begins with the words: “The functions of a diplomatic mission consist *inter alia* in” VCDR, *supra* note 13, art. 3(1) (emphasis in original).

evidence is difficult to adduce, at least with regard to the claim that the grant of diplomatic asylum in general, and without any further qualifications, is to be accepted as a *sui generis* diplomatic task. Opinions on this matter have traditionally shown a wide degree of variation.

The U.S. State Department emphasized as early as 1930 that the “affording of asylum is not within the purposes of a diplomatic mission.”⁵⁷ ILC Member Scelle, by contrast, talked during the 1957 round of the Commission’s debates about the granting of asylum as “an essential, traditional, and, in his opinion, praiseworthy, function of missions.”⁵⁸ Where state practice is concerned, the fact remains that several states have consistently voiced opposition to the institution of diplomatic asylum, including members of the international community who have been particularly active in the field of diplomatic relations.⁵⁹

But it is this prevailing disagreement on the evaluation of diplomatic asylum that has led some authors to conclude that it is simply not possible to derive a positive assessment from the rules of international law on that issue. Anthea Jeffery thus speaks of a “grey area” of international law and states that there is neither a “recognized right” of asylum, nor an “express prohibition against it.”⁶⁰

That however, is a simplification of the matter. It is an opinion that is based on the premise that the absence of precise rules on a topic of international law points to the existence of a vacuum. What it fails to take into account is that there might be more general norms and principles that may have an impact on the granting of asylum without having been specifically designed to address the situation in question. In the *Asylum Case*,⁶¹ the ICJ made reference to the most pertinent of these principles when it understood the grant of diplomatic asylum as a decision which derogated from the “territorial sovereignty” of the receiving state.⁶² But this line of reasoning has also come under attack; Australia, in her submission to the Secretary-General pursuant to the 1974 General Assembly Resolution, pointed out that concerns about derogations from sovereignty could be raised “against every evolving rule of customary international law and against every treaty commitment,” as each of these constituted a restriction of the powers of the state.⁶³

57. Richard L. Fruchtermann, *Asylum: Theory and Practice*, 26 JAG J. 169, 174 (1972) (quoting Instructions from Dep’t of State to American Diplomatic Officers in Latin America (Oct. 2, 1930)).

58. 1 Y.B. Int’l L. Comm’n (1957), *supra* note 14, at 221, ¶ 90. In his statement, Scelle did not differentiate between the general practice of granting asylum and the practice prevailing in Latin America. *Id.*

59. On the views of the Soviet Union in that regard, see Riveles, *supra* note 18, at 157. For a discussion regarding other States’ views in this regard, see Jeffery, *supra* note 33, at 16.

60. Jeffery, *supra* note 33, at 28.

61. See *supra* text accompanying note 11.

62. *Asylum Case (Colom./Peru)*, 1950 I.C.J. 266, 274–75 (Nov. 20).

63. Sec-Gen Report (1), *supra* note 29, ¶ 6, Australia ¶ 8.

That may be a valid observation, but if states restrict their sovereignty through treaties or customary law, they do so with the awareness that they are creating or adhering to a legally binding rule. The same considerations apply to the right of territorial jurisdiction as an emanation of sovereignty; if the claim is made that this right has to receive a restrictive interpretation because diplomatic asylum has made an inroad into its scope, strong evidence is required to bolster this assertion.

In that regard, however, the observations outlined above apply. The fact remains that it is difficult to show agreement within the international community to the effect that such an inroad has been accepted, at least where an absolute and unqualified right to grant diplomatic asylum is concerned. Such a limitation would be tantamount to declaring that diplomatic premises are the territory of another state, and that is exactly not the route that diplomatic law has taken; under its modern understanding, mission premises are still considered territory of the receiving state.⁶⁴

To that degree, therefore, the view of the ICJ still carries validity; the grant of asylum constitutes, at least *prima facie*, “intervention” in matters of the receiving state. In that context, articles 41(3) and 41(1) of the VCDR appear as norms that support the general principle on which the findings of the court were based: the jurisdiction of the receiving state as an emanation of its rights as a sovereign member of the international community.

Whether customary law embraces a grant of asylum under more particular circumstances—for instance, when humanitarian concerns are at issue—is a different question and one that will be discussed in the following Section. But it is also possible that international law recognizes norms that, while not specifically constructed to deal with the issue of asylum, may have an impact on situations in which shelter has been provided on diplomatic premises. The existence of rules of this kind may introduce a new perspective to the evaluation of the underlying diplomatic conduct and thus requires further examination.⁶⁵ But the basic premise that the consideration of the restrictive norms yields, is the fact that the receiving state’s right to territorial jurisdiction retains its prominent place in general international law, and that diplomatic asylum, in the absence of justifying circumstances, constitutes a breach of that right.

II. CHINKS IN THE ARMOR: WHEN INTERNATIONAL LAW CALLS FOR DIPLOMATIC ASYLUM

A. Deliberate deviations from the ban on asylum

The protection that territorial jurisdiction enjoys under general customary law does not prevent individual states from choosing a more

64. See DENZA, *supra* note 54, at 15; 2 Y.B. Int’l L. Comm’n (1958), *supra* note 28, at 94–95, art. 18, commentary, ¶ 3.

65. See *infra* Part II.B.

restrictive concept of jurisdiction in their mutual relations. Jurisdiction is a right and not a duty, and states are therefore free to forego its exercise where the practice of diplomatic asylum is concerned. Evidence for a decision of this kind can derive from specific treaties, but also from customary law if, in specific situations, it accords diplomatic asylum treatment that allows for a derogation from the sovereignty of the receiving state.

Both options have played a role in state practice and academic debate on diplomatic asylum. What they have in common is the fact that they do not establish a general exception to the jurisdiction of the territorial state that would apply regardless of the circumstances of the case. They rather constitute concepts whose existence, if accepted, would lead to a justification if specific parameters apply. Two options of this kind require closer analysis: the practice of asylum as adopted in Latin America and the possibility of the existence of a limited right to diplomatic asylum under customary law.

1. The prevailing practice in Latin America

Latin American states have traditionally allocated a more significant position to diplomatic asylum than that existing in other regions of the world. However, even in this area, the existence of a rule of customary law allowing for shelter on mission premises, has been doubted.⁶⁶ Jeffery for instance expressed the view that *opinio juris* as a required element of customary law is missing, and bases this view on the ICJ judgment in the *Asylum Case*.⁶⁷

That, however, appears to be a misreading of the court's opinion. The main concern of the ICJ in that regard was not the existence of the principle of diplomatic asylum in local customary law, but the much narrower question of whether the State granting asylum can unilaterally determine the nature of the offense of which the person seeking asylum is accused.⁶⁸

And the nature of the offense matters; it does not appear that Latin American practice allows for the granting of asylum in cases where the refugee seeks to escape the exercise of territorial jurisdiction for "common" (as opposed to political) offenses.⁶⁹ If however the alleged offense of the asylum seeker is political in nature, the prevailing evidence suggests that Latin American states do accept a right to grant asylum on embassy premises. The basis for this is not only constituted by numerous examples of state practice (in the 1974 debates of the 6th Committee, Colombia pointed out that three of her presidents owed their lives to the grant of diplomatic

66. See S. PRAKASH SINHA, *ASYLUM AND INTERNATIONAL LAW* 238 (1971).

67. Jeffery, *supra* note 33, at 14.

68. See *Asylum Case (Colom./Peru)*, 1950 I.C.J. 266, 273 (Nov. 20).

69. This at any rate is the way in which the practice has been reflected in various treaties on diplomatic asylum that were concluded by American states. See *infra* text accompanying note 80.

asylum)⁷⁰ and corroborated by the views of expert commentators on this subject,⁷¹ but it also derives support from the text of subsequent treaties, which codified the relevant norm of customary law.

While these treaties took the general principle of asylum in Latin America as their starting point, they were also able to address questions on which customary law had not been able to provide a satisfactory degree of clarity (including the above mentioned issue of the determination of the nature of the offence).⁷² Given their detail and comprehensiveness, they are the most sophisticated instruments on diplomatic asylum that have yet emerged in international law with effect for a multitude of states.

Treaties of this kind go back to the 19th century; the 1889 Montevideo Treaty on International Penal Law already addressed the right to grant asylum on premises of the diplomatic mission.⁷³ The following fifty years saw the conclusion of three treaties that gained particular importance for the regulation of diplomatic asylum in the Latin American region: the Havana Convention on Asylum of 1928;⁷⁴ the Montevideo Convention on Political Asylum of 1933;⁷⁵ and the Montevideo Treaty on Political Asylum and

70. Jeffery, *supra* note 33, at 23. *See also* Cuzán *supra* note 19, at 185 (discussing the 1961 case of Manuel Urrutia); Jonathan Kandell, *Argentines Given Embassy Refuge*, N. Y. TIMES, Sept. 25, 1974, at 13 (the 1974 case of Dr. Rodolfo Puiggrós, a university rector and member of the Peronist left, granted asylum in the Mexican Embassy in Argentina); John Reichertz, *Peronist Holds Latin American Record for Asylum*, UNITED PRESS INT'L, Sept. 3, 1981 (the 1976 case of Juan Abal Medina, a Peronist politician, granted asylum in the Mexican Embassy in Argentina); John Enders, *Official Accused Of Drug Trafficking Removed As Military Academy Head*, ASSOCIATED PRESS, March 30, 1981 (the 1981 case of Hugo Cespedes, former Defence Minister of Bolivia, who sought asylum in the Brazilian Embassy in Bolivia); Oswaldo Bonilla, *Sandinista Military Doctor Requests Political Asylum*, UNITED PRESS INT'L, Nov. 30, 1985 (the 1985 case of Lt. Roberto Granera, a military doctor who was apparently disappointed with the Sandinista regime, and requested asylum in the Venezuelan embassy in Nicaragua); Former *Noriega Associates Allowed to Leave Country*, UNITED PRESS INT'L, May 11, 1991 (the 1990 case of Luis Gomez, a former Panamanian legislator, granted asylum in the Cuban embassy in Panama); *Ecuador's Gutierrez Makes First Statements Since Taking Shelter in Embassy*, BBC MONITORING AMERICAS, Apr. 23, 2005, available at ProQuest, Doc. ID. 460229523 (the 2005 case of Lucio Gutierrez, former president of Ecuador, granted asylum in the Brazilian embassy in Quito).

71. *See* Sec-Gen Report (2), *supra* note 18, ¶¶ 15, 35. *See also* 1 Y.B. Int'l L. Comm'n (1957), *supra* note 14, at 220–21, ¶¶ 82, 83, 87, 93 (contributions of various members of the International Law Commission who, arguably with the Latin American context in mind, emphasized that a right to grant asylum was not necessarily dependent upon the existence of a treaty to that effect).

72. *Asylum Case*, 1950 I.C.J. at 277. For an illustration of the regulation in contemporary law, *see infra* note 78, art IV.

73. Treaty on International Penal Law art. 17, Jan. 23, 1889, available at <http://www.refworld.org/docid/3ae6b3781c.html> [hereinafter Montevideo Treaty on International Penal Law].

74. Convention on Asylum, Feb. 20, 1928, 132 L.N.T.S. 323 [hereinafter Havana Convention on Asylum].

75. Convention on Political Asylum, Dec. 26, 1933, reprinted in 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 435–36 (1968) [hereinafter Montevideo Convention on Political Asylum].

Refuge of 1939.⁷⁶

In the wake of the *Asylum Case*, another initiative for the codification of diplomatic asylum was launched,⁷⁷ which resulted in the signing, in March 1954, of the Convention on Diplomatic Asylum (the “Caracas Convention”), to which fourteen American states have become party.⁷⁸

Recurring themes in these conventions are: the limitation of the right to asylum to persons charged with political offenses,⁷⁹ the express exclusion from the remit of asylum of persons accused of “common offenses,”⁸⁰ the duty to notify the territorial state of the grant of asylum,⁸¹ and the right to require safe exit for the refugee.⁸² Some of the conventions recognize that a danger of interference may also be created by allowing the asylum seeker to carry out certain acts on mission premises⁸³ and therefore contain rules limiting the conduct that the refugee is allowed to adopt.⁸⁴

However, once the conditions for diplomatic asylum under these

76. Treaty on Political Asylum and Refuge, Aug. 4, 1939, reprinted in WHITEMAN, *supra* note 75, at 432–34 [hereinafter Montevideo Treaty on Political Asylum and Refuge].

77. On the codification history of the Caracas Convention, see Sec-Gen Report (2), *supra* note 18, ¶¶ 74–79.

78. Convention on Diplomatic Asylum, March 28, 1954, 1438 U.N.T.S. 101, available at <http://www.oas.org/juridico/english/treaties/a-46.html> [hereinafter Caracas Convention].

79. Montevideo Convention on Political Asylum, *supra* note 75, arts. 2–3; Havana Convention on Asylum, *supra* note 74, art. 2; Montevideo Treaty on International Penal Law, *supra* note 73. The Montevideo Treaty on Political Asylum and Refuge contained somewhat more liberal rules and allowed asylum for “persons pursued for political reasons or offenses, or under circumstances involving concurrent political offenses, which do not legally permit of extradition.” Montevideo Treaty on Political Asylum and Refuge, *supra* note 76, art. 2. See also the Caracas Convention on Diplomatic Asylum which allowed asylum for “persons being sought for political reasons or for political offenses,” Caracas Convention, *supra* note 78, art. 1.

80. Caracas Convention, *supra* note 78, art. 3; Montevideo Treaty on Political Asylum and Refuge, *supra* note 76, arts. 2–3; Montevideo Convention on Political Asylum, *supra* note 75, art. 1; Havana Convention on Asylum, *supra* note 74, art. 1. The Montevideo Treaty on International Penal Law states that refugees charged with “non-political” offenses shall be surrendered to the local authorities. Montevideo Treaty on International Penal Law, *supra* note 73, art. 17.

81. Caracas Convention, *supra* note 78, art. 8; Montevideo Treaty on Political Asylum and Refuge, *supra* note 76, art. 4; Havana Convention on Asylum, *supra* note 74, art. 2; Montevideo Treaty on International Penal Law, *supra* note 73, art. 17. The Montevideo Convention on Political Asylum does not contain a provision on notification. However, the treaty cannot be considered in isolation: its declared purpose was to provide a definition of “the terms of the one signed at Havana.” Montevideo Convention on Political Asylum, *supra* note 75, pmbl. It therefore did not seek to deviate from Article 2 of that convention.

82. Caracas Convention, *supra* note 78, arts. 5, 11–13; Montevideo Treaty on International Penal Law, *supra* note 73 art. 17. See also Montevideo Treaty on Political Asylum and Refuge, *supra* note 76, art. 6; Havana Convention on Asylum, *supra* note 74, art. 2. The Montevideo Convention on Political Asylum does not contain an express reference to this right, but the considerations outlined *supra*, note 81, are applicable here as well.

83. See *infra*, text accompanying note 251.

84. Caracas Convention, *supra* note 78, art. 18; Montevideo Treaty on Political Asylum and Refuge, *supra* note 76, art. 5; Havana Convention, *supra* note 74, art. 2.

conventions are fulfilled, the territorial state, if it is party to them, is obliged to recognize it and is bound by the commitments that the treaties impose. In that regard, state parties have agreed to a deviation from general customary law: they recognize an exception to the principle of territorial jurisdiction under circumstances that they themselves have specified.

2. A right to grant diplomatic asylum under general customary law?

From time to time, the claim has been raised that there are other forms of asylum on mission premises that may have attained the status of customary law. Reference is occasionally made to the granting of asylum in cases in which humanitarian concerns for the refugee exist and in which the affording of shelter might be limited to the time period in which these concerns are present.⁸⁵

Cases of “mob violence”—situations in which the refugee finds himself pursued by parts of the population before he reaches the haven of the embassy—are prime examples for scenarios of this kind.⁸⁶ But even in cases of this kind, it is difficult to adduce evidence for the claim that a customary right to grant asylum exists. As far as the objective aspects of the alleged right are concerned, it has to be noted that the practice of asylum in these circumstances is hardly generally and consistently applied—there are of course numerous cases of mob violence that did not induce diplomatic missions to act.

Nor is it clear that there is *opinio juris* among the international community as to the acceptance of such a right. Some states do appear to allow for this exception where their own diplomatic missions are concerned; the United States, for one, while generally opposed to a right to asylum, has in the past expressed a more generous attitude towards “uninvited fugitives whose lives are in imminent danger from mob violence,” as long as the danger was still ongoing.⁸⁷

General Assembly Resolution 3321, which had invited members of the United Nations to express their views on diplomatic asylum,⁸⁸ had also mentioned the “humanitarian” aspects of that matter,⁸⁹ and several states referred to this facet of asylum in their replies.⁹⁰ But not all of them were

85. See, e.g., Riveles, *supra* note 18, at 158 (referring to persons “under threat of life and limb”). Fruchtermann, *supra* note 57, at 170 (referring to persons whose lives are endangered “because of unlawful action such as mob violence”).

86. One illustration is the 1986 case of Jener Cotin—a former official of the Duvalier regime in Haiti, who had been attacked by a mob and found refuge in the Brazilian embassy. Associated Press, *Ex-Duvalier Police Chief Granted Asylum in Brazil*, Feb. 24, 1986; S. Beaulieu, *Former Duvalier Supporters Said to Flee Haiti*, UNITED PRESS INTERNATIONAL, Feb. 24, 1986.

87. Fruchtermann, *supra* note 57, at 174; see also Riveles, *supra* note 18, at 157 (regarding the U.S. view on the Mindszenty case).

88. See *supra* text accompanying note 30.

89. G.A. Res. 3321, *supra* note 30, *pmb.*, ¶ 2.

90. The submissions of Argentina, Australia, Belgium, Denmark, Jamaica, and

happy to base a customary right to grant asylum on humanitarian concerns.

Some states were quite clear in their restrictive interpretation of the law; despite the resolution's reference to humanitarian aspects, they reiterated their position that diplomatic asylum, in the absence of special agreements, was simply not recognized in international law. That for instance was the position by Czechoslovakia, who at the same time pointed out that she was "fully aware of the humanitarian aspects of the institution of asylum."⁹¹

Acceptance of a customary right to grant asylum on humanitarian considerations would thus be fraught with difficulties, beginning with the very question of whether "humanitarian concerns" are capable of an interpretation that yields a sufficient degree of precision to allow the assumption of a rule with normative character. The replies to the General Assembly Resolution certainly suggest that states harbored widely varying ideas of what the "humanitarian aspects" of asylum should encompass.⁹²

The fact bears observing that even within the Latin American institution of diplomatic asylum, reasons of humanity are, by themselves, not sufficient to establish a right to give refuge on mission premises. The significant feature of diplomatic asylum, as it appears in the relevant treaties, is that the persons seeking asylum are accused of political offenses or pursued for political reasons.⁹³ If humanitarian reasons had been the decisive factor, diplomatic asylum would have been opened to those accused of "common offences" as well⁹⁴—even the common criminal might, after all, be threatened with mob violence.

Humanitarian considerations, it appears, do not easily induce consensus on their suitability as a basis for diplomatic asylum. The most that can be said, based on the positive statements issued by some states on this matter,⁹⁵ is that this is an area of international law that is in development.⁹⁶ There might even be evidence for a nascent norm of customary law, but at present, international law does not appear to recognize a right to diplomatic asylum based on these considerations alone.

Uruguay are such examples. See Sec-Gen Report (1), *supra* note 29, ¶ 6.

91. *Id.* Several other states expressed similarly restrictive opinions. See *id.* (the positions of Bahrain and Poland).

92. Denmark for instance spoke of exposure to an "imminent physical threat," Liberia would have let "imminent personal danger of persecution on account of race, religion, nationality, membership of a particular social group and political opinion" suffice, Pakistan made clear that "imminent danger to life" qualified as a basis for the grant of diplomatic asylum, but not "danger to liberty," and Uruguay talked about a "duty" to grant asylum "for reasons based on human rights." *Id.*

93. See *supra* text accompanying note 79.

94. See *supra* text accompanying note 80.

95. See *supra* text accompanying note 90.

96. See also Sec-Gen Report (1), *supra* note 29 (regarding Pakistan's reply to General Assembly Resolution 3321. Pakistan's position was that the matter was "essentially *de lege ferenda*").

B. Rules of international law exercising a permissive impact on the situation

In the absence of a deliberate decision to restrict the reach of interference in cases of diplomatic asylum, the possibility cannot be discounted that there may be rules of international law which, while not specifically constructed to deal with this subject, have an impact on cases of this kind.

Such rules are typically embedded within a wider framework that exists largely independently of rules of diplomatic law—norms for example, which pertain to a people’s right to self-determination. Identifying the existence of rules of this kind is not the same as claiming that a specific right to asylum exists under customary law. It merely means that there are interests on the side of the sending state that must be considered, but it does not yet define the relationship between these interests and the receiving state’s interest in the general prohibition of asylum.⁹⁷

Such divergent interests are frequently derived from human rights law; reference has thus been made to the lives of the refugees that might be in danger,⁹⁸ to their physical integrity,⁹⁹ to their liberty,¹⁰⁰ and to their freedom from persecution or discrimination.¹⁰¹ That these interests represent rights of the individual refugees cannot be denied.¹⁰² But the mere reference to human rights does not mean that foreign agents have the duty—or even the right—to protect them.¹⁰³ Indeed, the traditional view on human rights

97. See *infra* Part III.

98. R v. Secretary of State (*B & Others*), [2004] EWCA (Civ) 1344, [88], [2005] Q.B. 643 [88] (appeal taken from Q.B.); U.N. GAOR, 30th Sess., 6th Comm. at 134 (Australia) and 138 (Italy), UN Doc. A/C.6/SR.1551. See also Green, *supra* note 21, at 143; Jeffery, *supra* note 33, at 26.

99. U.N. GAOR, 30th Sess., 134 (Australia), UN Doc. A/C.6/SR.1551; *B and Others*, [2004] EWCA (Civ) 1344, [88].

100. See Jeffery, *supra* note 33, at 26.

101. U.N. GAOR, 29th Sess., 6th Comm, 241 (Australia), U.N. Doc. A/C.6/SR.1505. See also Riveles, *supra* note 18, at 158.

102. For the right to life, see European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], American Convention on Human Rights art. 4, Nov. 21, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. For the right to physical integrity, see *expressis verbis* ACHR art. 5. Where the ECHR is concerned, the European Court of Human Rights (EctHR) has read this right into the right to a “private life.” See *X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 239, ¶22 (1985); *Glass v. United Kingdom*, 39 Eur. Ct. H.R. 341, 359, 70 (2004). That right is guaranteed in ECHR art. 8; ICCPR art. 17. For the right to liberty of the person, see ECHR art. 5; ACHR art. 7; ICCPR art. 9. For freedom from discrimination, see ECHR art. 14; ACHR arts. 1(1), 24; ICCPR arts. 14, 26.

103. There are further consequences that the assumption of such a premise would generate. The rule of non-interference, as enshrined in VCDR, art. 41, *supra* note 13, and the prohibition of the use of force in U.N. Charter art. 2, para. 4, must be considered among the principal safeguards of the principle of territorial integrity. If it is possible to dispense with the applicability of one of these norms because the human rights of individuals have been endangered, there is no reason why it should not be possible to dispense with the other as well. In the literature, some authors have indeed gone as far as to consider the granting of

involvement by diplomatic agents had been restrictive; in 1979, the editors of Satow's *Diplomatic Practice* still pointed out that heads of missions must "on no account" occupy themselves "with the interests of any but the subjects or *ressortissants* . . . of [their] own sovereign or state, and especially not with those of the subjects of the local sovereign."¹⁰⁴ While that view is not uncontested today,¹⁰⁵ it is still not the (threatened) human rights violation on its own that triggers a right to act. What is required is a clear mandate under international law that allows the state and its agents to take action.

The most prominent example for a situation of this kind arises if the matter concerns an obligation that the receiving state owes *erga omnes*.¹⁰⁶ In view of rights affected by *erga omnes* obligations, the ICJ pointed out that "all States can be held to have a legal interest in their protection."¹⁰⁷ While many *erga omnes* rights will therefore affect primarily internal affairs of the receiving state, that state is not able to claim that these matters fall *exclusively* within its own domain. If however the underlying matters are thus externalized, a possibility for action by the sending state and its agents has come into existence.¹⁰⁸

1. *Erga omnes* obligations owed by the receiving state.

It is true that reference to *erga omnes* obligations is typically made where human rights in the receiving state are involved. But the human rights violations that are considered in this context tend to be very specific. Protection from slavery and racial discrimination for instance,¹⁰⁹ the prohibition of torture,¹¹⁰ and the outlawing of genocide¹¹¹ have all been accepted as norms carrying *erga omnes* character. Furthermore, given the connection between international crimes and serious human rights

diplomatic asylum as a form of a wider alleged right to "humanitarian intervention," which includes the military aspects of that concept. Jeffery, *supra* note 33, at 24, 26.

104. SATOW'S GUIDE TO DIPLOMATIC PRACTICE 450 (Lord Gore-Booth ed., Longman Grp. Ltd, 5th ed. 1979).

105. For a change in direction, see SATOW'S DIPLOMATIC PRACTICE 153 (Ivor Roberts ed., Oxford Univ. Pres, 6th ed. 2009).

106. *Barcelona Traction, Light & Power Co. (Belg. v Spain)*, Judgment, 1970 I.C.J. 32, ¶ 33 (Feb. 5).

107. *Id.*

108. It is true that the "beneficiaries" of *erga omnes* obligations will be the states themselves, but where states in international relations make use of diplomatic missions as their organs, diplomats are able to invoke these rules on their behalf. At the same time, they have to observe the limitations that international law imposes on the sending state. See *Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 1, 44, art. 6, commentary, ¶ 4 U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *State Responsibility Articles*] (referring to diplomatic and consular missions as 'State organs').

109. *Barcelona Traction*, 1970 I.C.J. 32, ¶ 34.

110. *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 151 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

111. *Barcelona Traction*, 1970 I.C.J. 32, ¶ 34.

violations,¹¹² there may be good reason to follow those authorities on international criminal law who suggest that the suppression of all international crimes should be considered an obligation *erga omnes*.¹¹³

Of particular importance in the context of diplomatic asylum is the concept of self-determination, which finds mention in the Charter of the United Nations,¹¹⁴ and whose character as a right has been clarified in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹⁵ The ICJ has affirmed in several decisions that self-determination carries *erga omnes* character,¹¹⁶ and that invites the possibility that diplomatic agents could rely on it when granting asylum on embassy premises. Its particular significance lies in the fact that its boundaries are drawn wide: ICCPR and ICESCR refer in this regard to a people's right to "freely determine their political status and freely pursue their economic, social and cultural development."¹¹⁷ Beyond that, it is clear that the realization of self-determination presupposes the existence of other human rights,¹¹⁸ including not only the "classical" political rights—chief among them, the right to vote and to stand in elections,¹¹⁹ but presumably also freedom of assembly and association and freedom of expression.¹²⁰

On the other hand, self-determination is a group right, and its beneficiaries are entities that fulfill the criteria of a "people."¹²¹ If

112. See *Prosecutor v Brđanin and Talić*, No. IT-99-36-T, Decision on Motion by Radoslav Brđanin for Provisional Release, n. 61 (Int'l Crim. Trib. for the Former Yugoslavia July 25, 2000).

113. See Larissa van den Herik, *A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara Before the Dutch Courts*, 7 J. INT'L CRIM. JUST. 1117, 1129 (2009).

114. U.N. Charter, *supra* note 103, art. 1, para. 2 (naming the purposes of the United Nations and referring to the objective of developing friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples").

115. ICCPR, *supra* note 102, art. 1(1) ("All peoples have the right of self-determination"). The same wording appears in the International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

116. *East Timor (Port. v Austl.)*, 1995 I.C.J. 90, ¶ 29 (June 30); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion)*, Advisory Opinion, 2004 I.C.J. 199, ¶¶ 155-56 (July 9).

117. ICCPR, *supra* note 102, art. 1(1); ICESCR, *supra* note 115, art. 1(1).

118. THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 98 (1997).

119. ICCPR, *supra* note 102, art. 25; ACHR, *supra* note 102, art. 23. See also First Protocol to the European Convention on Human Rights art. 3, March 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol 1 to ECHR]. For a critical view, see Daniel Thürer, *Self-Determination*, in 4 ENCYCLOPEDIA OF PUB. INT'L L., 364, 367 (Rudolf Bernhardt ed., 2000).

120. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 32 ¶ 55 (Oct. 16); *Socialist Party and Others v. Turkey*, 1998-III Eur. Ct. H.R. 24, 24-25, ¶ 45 (1999).

121. U.N. Charter, *supra* note 103, art. 1(2); ICCPR, *supra* note 102, art. 1(1); Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/5217 (Oct. 24, 1970), 5th Principle [hereinafter Friendly Relations Declaration]. See also Reference re Secession of Quebec, [1998] 2 S.C.R. 281, ¶ 123 (Can.)

diplomatic asylum is therefore granted, because the rights of only a select few individuals have come under threat, self-determination could not easily be invoked as a basis for that action. There are certain qualifications to that rule: it is not uncommon that the receiving state targets individuals precisely because of their relevance for the group—the leaders of the group, say, or prominent journalists—and that restrictions of their rights then affect the exercise of self-determination by the collective. In situations of this kind, diplomatic action whose immediate benefits are felt by individuals, can still relate to the (threatened) breach of an *erga omnes* obligation.

An example is the 2008 case of the Zimbabwean opposition leader Morgan Tsvangirai, who in June of that year sought refuge in the embassy of the Netherlands in Harare.¹²² Tsvangirai himself stated that threats to his security existed, and these claims were confirmed by third parties.¹²³ But his request for shelter followed a campaign of widespread political violence against the opposition,¹²⁴ and there could have been little doubt that a threat to the Zimbabwean people's right to "freely determine their political status" existed. The decision by the embassy therefore went beyond the protection of the right of one individual; it benefited the people in whose interest the right had been established.¹²⁵

The decision to offer diplomatic assistance can rely on particularly strong grounds if the sending state can invoke not only a right, but also a positive duty to act. The identification of such duties in international law

(referring to the definition of "people"); ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 4–5 (1996).

122. *Mugabe Rival Takes Refuge in Embassy*, L.A. TIMES, June 24, 2008, available at <http://articles.latimes.com/2008/jun/24/world/fg-zimbabwe24>.

123. *Troops Hunt for Tsvangirai*, MODERN GHANA (June 25, 2008, 3:27 PM), <http://www.modernghana.com/news/171489/1/troops-hunt-for-tsvangirai.html>.

124. *Mugabe Rival Takes Refuge in Embassy*, *supra* note 122. *see also Troops Hunt for Tsvangirai*, *supra* note 123.

125. A further limitation to the exercise of self-determination is established through the fact that the territorial integrity of the receiving State is likewise recognized in international law. *See Friendly Relations Declaration*, *supra* note 121, pmb. ¶ 15; U.N. Charter, *supra* note 103, art. 2, para. 4; Organization for Security and Cooperation in Europe, Conference on Security and Co-operation in Europe: Final Act art. 1(a)(I), Aug. 1, 1975, 14 I.L.M. 1292. A distinction is therefore commonly made between the "external" and the "internal" aspects of self-determination, and it appears accepted today that (outside the context of colonial or foreign oppression) self-determination has to be primarily realized internally, i.e., through a people's pursuit of its "political, economic, social and cultural development." *Secession of Quebec*, [1998] 2 S.C.R. 281, ¶ 126. A right to external self-determination exists only as a last resort, if internal self-determination has been denied. Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT'L & COMP. L. 547, 553 (2009); *see Secession of Quebec*, [1998] 2 S.C.R. 281, ¶ 138. External self-determination can be realized, for example, through declaration of independence for the territory on which the people live, its association with another state or its integration with such a State. *See Western Sahara, Advisory Opinion*, 1975 I.C.J. 32, ¶ 57 (Oct. 16); G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541(XV), Principle VI (Dec. 15, 1960). In light of the above, a decision to grant diplomatic asylum to secessionists can therefore not in all circumstances be based on the *erga omnes* character of the right to self-determination.

may be difficult, but the claim has been made that they can exist under specific circumstances in the field of diplomatic—and consular— asylum. The 1984 case of the “Durban Six” is an example that has been discussed in this context.¹²⁶

In September 1984, six refugees turned up at the British consulate in Durban, South Africa and asked Consul Simon Davey for refuge.¹²⁷ They included activists of the United Democratic Front (UDF) and the Natal Indian Congress (NIC)—organizations that had called for a boycott of recent parliamentary elections in South Africa.¹²⁸

The South African system of apartheid formed the background to this case—the new South African Parliament was envisaged as a body containing racially segregated chambers, and the boycott movement was intended to cast doubt on the credibility of the elections.¹²⁹ By the time they requested shelter in the consulate, the activists were sought by the security police of the receiving state.¹³⁰

There were several reasons for the grant of asylum that the consulate could have invoked and that enjoyed recognition under international law. The non-white population of South Africa was, during the existence of apartheid, certainly prevented from exercising its right to internal self-determination (a right that was expressly recognized by the General Assembly for the “peoples of southern Africa”¹³¹). The prohibition of racial discrimination has likewise been recognized as an obligation *erga omnes*,¹³² and the General Assembly had emphasized that the system of apartheid was “necessarily” based on theories of racial discrimination.¹³³ Apartheid also constitutes a crime against humanity, if the relevant elements are in place that international criminal law requires,¹³⁴ and its commission therefore

126. See Riveles, *supra* note 18, at 158.

127. Michael Hornsby & Ray Kennedy, *Fugitives Shelter in British Consulate*, *TIMES* (London), Sept. 14, 1984, at 1.

128. *Id.*

129. Paul Van Slambrouck, *South Africa Arrests Key Opponents of Its New Parliament*, *CHRISTIAN SCI. MONITOR*, Aug. 22, 1984, available at <http://www.csmonitor.com/1984/0822/082219.html>.

130. Hornsby & Kennedy, *supra* note 127.

131. G.A. Res. 2649 (XXV), ¶ 5, U.N. Doc. A/RES/8163 (Nov. 30, 1970).

132. *Barcelona Traction, Light & Power Co. (Belg. v Spain)*, Judgment, 1970 I.C.J. 32, ¶¶ 33-34 (Feb. 5).

133. G.A. Res. 395 (V), pmb., U.N. Doc. A/RES/1548 (Nov. 2, 1950).

134. For today’s regulation, see Rome Statute of the International Criminal Court art. 7(1)(j), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICCSt]; Preparatory Comm’n for the Int’l Crim. Ct., *Report of the Preparatory Commission for the International Criminal Court Part II: Finalized Draft Text of the Elements of Crimes*, art. 7(1)(j), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crime*]. Under the *Elements of Crime*, apartheid requires, *inter alia*, the commission of an inhumane act and a contextual element: the conduct must have been “part of a widespread or systematic attack directed against a civilian population.” See also International Convention on the Suppression and Punishment of the Crime of Apartheid art. 1, Nov. 30, 1973, 1015 U.N.T.S. 243; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against

gives rise to *erga omnes* obligations on this basis as well.¹³⁵

Given this confluence of competing interests, it is perhaps not surprising that some authors have argued strongly in favor of a right of the United Kingdom to provide refuge to the Durban Six—and even for an “obligation to grant diplomatic asylum.”¹³⁶

And international law has, on occasion, recognized such obligations with applicability for all members of the international community. Where the ICJ has identified duties of this kind, they tend to be negative in character—the duty, for instance, not to recognize a situation arising from the commission of an unlawful act.¹³⁷ But in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ went further and found that all States had an obligation to “see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination [was] brought to an end.”¹³⁸ In the case of South Africa, it was the General Assembly that appealed to governments to “provide every assistance . . . to the national movement of the oppressed people of South Africa in their legitimate struggle”¹³⁹ and requested all states to take “more effective action” towards the elimination of apartheid.¹⁴⁰

Erga omnes interests can therefore result in positive obligations on the part of third states, and the view thus appears justified that the grant of diplomatic asylum can, in some situations, be based on a duty incumbent on the sending state.

It is true that the grant of asylum on diplomatic premises goes far beyond, for example, the making of verbal representations to alert the receiving state or the international community to the breach of *erga omnes*

Humanity art. I(b), Nov. 26, 1968, 754 U.N.T.S. 73; G.A. Res. 3068 (XXVIII), U.N. Doc. A/RES/3068 (Nov. 30, 1973); G.A. Res. 2671 (XXV), art. F, ¶ 1, U.N. Doc. A/RES/8106(I) (Dec. 8, 1970); G.A. Res. 2391 (XXIII), Annex, U.N. Doc. A/RES/7342 (Nov. 26, 1968); S.C. Res. 556, ¶ 1, U.N. Doc. S/RES/556 (Oct. 23, 1984).

135. See *supra*, text accompanying note 113.

136. Riveles, *supra* note 18, at 158.

137. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia Advisory Opinion)*, Advisory Opinion, 1971 I.C.J. 16, 58, ¶ 133 (June 21) (on the duty to refrain from any act implying recognition of the legality of the presence of South Africa in Namibia). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion)*, Advisory Opinion, 2004 I.C.J. 136, 200, ¶ 159 (July 9) (referring to a duty “not to recognize the illegal situation” arising from the construction of the wall in Palestine, and the duty “not to render aid or assistance” to maintain the arising situation).

138. *Wall Opinion*, 2004 I.C.J. 136, 200, ¶ 159. See also *Friendly Relations Declaration*, *supra* note 121, G.A. Res. 36/103, Annex, art. 2(III), U.N. Doc. A/Res/36/103/Annex (Dec. 9, 1981). But see *Wall Opinion*, 2004 I.C.J. 136, 219, ¶ 40 (separate opinion of Judge Kooijmans).

139. G.A. Res. 2775 (XXVI), F, ¶ 6, U.N. Doc. A/8504 (Nov. 29, 1971).

140. *Id.* ¶ 8.

obligations.¹⁴¹ That, however, is a question about the degree of action necessary to fulfil the sending state's obligations, rather than a matter relating to the *prima facie* existence of a need to act. It is, after all, entirely possible that the granting of asylum was the only available means to render effective assistance to the protected interest—just as it is possible that, under certain circumstances, less intrusive means would have been at the disposal of that State. These questions will be discussed in more detail in Section III.

2. Human rights obligations owed by the sending state

Another basis for the creation of interests on the side of the sending state in cases of diplomatic asylum, is formed by provisions contained in human rights treaties to which that state is party.

It may seem an unusual suggestion that sending states should be addressees of human rights obligations in the receiving state; traditionally, it is the territorial state that is seen as the guarantor of the rights of its inhabitants. But there are cases in which the question has arisen whether human rights regimes might not impose obligations on sending states in this context as well. A case that reached the English courts in 2003, provides an illustration.

On the morning of July 18, 2002, two little boys—the brothers Alamdar and Muntazer Bakhtiari—turned up at the British consulate in Melbourne and requested asylum.¹⁴² They had arrived in Australia as asylum seekers in 2001 and had, under the Migration Act of 1958, been put in the Woomera Detention Centre.¹⁴³ Woomera was a camp that the Commonwealth Ombudsman had described as a “stark place, lacking warmth or a sense of community.”¹⁴⁴ Others found more graphic words for it.¹⁴⁵ Facilities in the centre were in a poor state and provisions for medical care were

141. The right to make verbal representations if *erga omnes* obligations of the receiving State have been violated appears to be well supported in international law. See *State Responsibility Articles*, *supra* note 108 at 29, art. 48(2), in conjunction with art. 48(1)(b).

142. *R v. Secretary of State (B & Others)*, [2004] EWCA (Civ) 1344, [7], [2005] Q.B. 643 (appeal taken from Q.B.). The case of the Bakhtiari family is a *cause célèbre* in the field of asylum and human rights law as relating to that concept. In 2003, the family's treatment by Australian authorities was considered by the Human Rights Committee from a different perspective (that is, the question of violations of the ICCPR by Australia). See Human Rights Comm., *Mr. Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002, ¶ 9.3, UN Doc. CCPR/C/79/D/1069/2002 (Nov. 6, 2003) [hereinafter *Bakhtiari 2003*]. The transcription of the names varies: in *B and Others*, the brothers are referred to as “Muntazer” and “Alamdar Bakhtiari,” in *Bakhtiyari 2003*, they were referred to as “Mentazer” and “Almadar Bakhtiyari.” For current purposes, the spelling employed by the Court of Appeal will be preferred.

143. *B and Others*, [2004] EWCA (Civ) 1344 [5,7].

144. *Id.* ¶ 90.

145. After visiting Woomera Camp, the leader of the Australian Democrats, Natasha Stott Despoja, called it a “hell-hole.” Patrick Barkham, *PM Calls Asylum Protest Blackmail: Aborigines Throw Their Weight Behind Afghan Hunger Strikers*, THE GUARDIAN (Jan. 25, 2002, 8:56 PM), <http://www.theguardian.com/world/2002/jan/26/immigration.uk>.

inadequate.¹⁴⁶ According to former Woomera guards, violence was an ever-present phenomenon;¹⁴⁷ riots occurred and were put down with tear gas and water cannons.¹⁴⁸ There were reports of sexual violence.¹⁴⁹ Instances in which detainees had harmed themselves were common.¹⁵⁰ The two brothers themselves had reportedly been exposed to tear gas and water cannons, been hit and pushed into razor wire by staff at Woomera, and had on several occasions engaged in acts of self-harm.¹⁵¹ They escaped the camp with thirty-three other detainees around June 29, 2002.¹⁵²

After the boys had reached the British consulate, a decision was made to bring them into the office area of the premises, while the Vice-Consul and the Deputy High Commissioner tried to obtain instructions from their superiors.¹⁵³ The advice eventually received from the Foreign and Commonwealth Office was that grounds to consider a request for asylum existed only in the country of first asylum.¹⁵⁴ The Deputy High Commissioner explained to the boys that they would not be allowed to remain in the consulate, and the brothers then left on their own accord.¹⁵⁵

Following these incidents, the brothers, through representatives, sought judicial review of the decision to deny them asylum and expel them from the premises of the consulate. When the case reached the Court of Appeal of England and Wales, part of the court's considerations turned on issues of human rights law; it was the contention of the claimants that there had been a threat to their rights under Articles 3 and 5 of the European Convention on Human Rights (ECHR, freedom from inhuman or degrading treatment and the right to liberty and security, respectively).¹⁵⁶

The fact that diplomatic and consular premises are located in the territory of the receiving state is not in itself a bar to the applicability of

146. *Four Corners: . . .About Woomera* (Australian Broadcasting Corp. television broadcast May 19, 2003), transcript available at <http://www.abc.net.au/4corners/content/2003/transcripts/s858341.htm>.

147. *Four Corners: The Guards' Story* (Australian Broadcasting Corp. television broadcast Sept. 15, 2008) transcript available at <http://www.abc.net.au/4corners/content/2008/s2365139.htm>. The ABC program also reported that staff at Woomera was not adequately trained for the tasks that awaited them, and some of the persons hired were generally unsuitable for their jobs. *Id.*

148. *B and Others*, [2004] EWCA (Civ) 1344 [11-12].

149. *Four Corners: . . .About Woomera*, *supra* note 146.

150. In January 2002, it was noted that 44 inmates had sewn their lips together; refugees had drunk shampoo and had tried to hang themselves with bed sheets. Barkham, *supra* note 145. See also *B and Others*, [2004] EWCA (Civ) 1344 [91]. It appears that some of the guards too, attempted suicide. *Four Corners: The Guards' Story*, *supra* note 147.

151. *B and Others*, [2004] EWCA (Civ) 1344 [11-12].

152. *Id.* ¶ 7.

153. *Id.* ¶¶ 14, 16.

154. *Law Report: Scope of Duty to Provide Diplomatic Asylum*, THE INDEPENDENT, Nov. 10, 2004.

155. *B and Others*, [2004] EWCA (Civ) 1344 [17].

156. *Id.* ¶ 22.

human rights instruments that the sending state has ratified. Article 1 of the ECHR contains the general obligation of every contracting state to “secure to everyone within their jurisdiction” the rights and freedoms of that convention; it does not, therefore, expressly limit its applicability to the territory of the relevant state. The equivalent phrase in the ICCPR refers to “all individuals within” the state’s “territory and subject to its jurisdiction;”¹⁵⁷ whereas the American Convention on Human Rights (ACHR) refers only to the “jurisdiction” of the relevant state.¹⁵⁸

It is true that the European Court of Human Rights (ECtHR) has, on several occasions, employed an interpretation that underlined the primacy of a territorial application of the convention.¹⁵⁹ On the other hand, an extraterritorial reach has been suggested to the court (and commission) in a variety of cases, ranging from situations in which a specific territory,¹⁶⁰ vessel,¹⁶¹ or prison¹⁶² was under the control of a contracting state to scenarios in which jurisdiction was alleged on the basis of military activities adopted by the relevant state abroad.¹⁶³ In some cases, the court has indeed accepted the suggestion of extraterritorial jurisdiction,¹⁶⁴ and similar findings have been made by the Human Rights Committee (HRC) and the Inter-American Commission on Human Rights with regard to the ICCPR¹⁶⁵ and the ACHR,¹⁶⁶ respectively.¹⁶⁷

157. ICCPR, *supra* note 102, art. 2(1).

158. ACHR, *supra* note 102, art. 1(1).

159. *See, e.g.*, *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 131, ¶ 72; *Medvedyev v. France*, App. No. 3394/03, 51 Eur. H.R. Rep. 39, ¶ 63 (2010); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), at 26, ¶ 86 (1989). For a similar approach to the ACHR, *see* *Alejandro v. Cuba*, Case 11.589, Inter-Am. Comm’n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, doc. 10 ¶ 23 (1999).

160. *See* *Issa v. Turkey*, App. No. 31821/96 (2004), 41 Eur. H.R. Rep. 27, ¶ 63 (2005); *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 23, ¶ 71.

161. *Jamaa*, 2012-II Eur. Ct. H.R. 131, ¶ 67.

162. *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm’n H.R. Dec. & Rep. 72 (1975).

163. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 345, 348-49, 356, ¶¶ 30, 46-49, 74.

164. *See* *Jamaa*, 2012-II Eur. Ct. H.R. 131, ¶ 72 (limiting such jurisdiction to “exceptional cases”); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) ¶ 62 (1995) (“not restricted to the national territory”); *Medvedyev*, App. No. 3394/03, 51 Eur. H.R. Rep. 39, ¶ 64 (2010). Extraterritorial jurisdiction has for instance been accepted in cases where authorities of the contracting State carried out “executive or judicial functions” abroad. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18, ¶ 135 (2011). It has also been recognized in cases of vessels registered in, flying the flag of or being under exclusive control of such a State. *See* *Jamaa*, 2012-II Eur. Ct. H.R. 131, ¶¶ 73, 75; *Medvedyev*, App. No. 3394/03, 51 Eur. H.R. Rep. 39, ¶ 67. It has also been recognized in cases in which a contracting State has effective control over an area outside its lawful territory. *Loizidou*, 310 Eur. Ct. H.R. (ser. A) ¶ 62 (1995).

165. Human Rights Comm., General Comment No. 31: The Nature of the Legal Obligations Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment 31].

166. *See* *Saldaño v. Argentina*, Petition, Inter-Am. Comm’n H.R., Report No. 38/99, OEA/Ser.L/V/II.95, ¶ 17 (1999); *Alejandro v. Cuba*, Case 11.589, Inter-Am. Comm’n H.R.,

It has always been much more difficult to state precisely which grounds trigger the extraterritorial jurisdiction of a contracting state. The question for instance whether activities by military forces of the relevant state that did not lead to occupation of the territory, can provide grounds for extraterritorial jurisdiction, has given rise to particular controversy.¹⁶⁸ In light of this, it is remarkable that even Chambers, which otherwise adopt a restrictive line on extraterritorial jurisdiction, agree that acts of diplomatic and consular agents are at any rate capable of engaging the jurisdiction of the contracting state.¹⁶⁹

In principle, therefore, a ground for extraterritorial jurisdiction under human rights law might exist if the consular officers of a state—as in the case of the Bakhtiari brothers—decide to hand over refugees to the authorities of the receiving state.¹⁷⁰

In another case concerning extraterritorial asylum, the European Commission of Human Rights was quite explicit on the question of jurisdiction. In September 1988, a group of eighteen citizens of the German Democratic Republic (GDR) turned up at the Danish embassy in (East) Berlin and requested that negotiations be conducted to allow them to leave

Report No. 86/99, OAS/Ser.L/V/II.104, doc. 10 ¶ 23 (1999).

167. The opinion of the HRC is of particular interest, as a literal reading of the ICCPR would allow the conclusion that the terms “territory” and “jurisdiction” in article 2 are cumulative requirements. The HRC adopted a more generous construction and did not consider that article to prevent investigations into allegations that acts committed “on foreign soil” violated the conventional obligations of a State party. *See* U.N. Human Rights Comm., *Burgos v. Uruguay*, Communication No. 52/1987, U.N. Doc. Supp. No. 40 (A/36/40), ¶¶ 12.1-12.3 (1981). *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Wall Opinion*), Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9). *But see Burgos* (separate opinion of Tomuschat, C.). For a similar finding by the Inter-American Commission on Human Rights (hereinafter Inter-Am Commission) regarding the ACHR, *see Saldaño*, Petition, Inter-Am. Comm’n H.R., Report No. 38/99, OEA/Ser.L/V/II.9517, ¶ 17 (1999); *Alejandre*, Case 11.589, Inter-Am. Comm’n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, ¶¶ 23, 24 (1999).

168. It has sparked different assessments by various human rights bodies. *See* General Comment 31, *supra* note 165; *Alejandre*, Case 11.589, Inter-Am. Comm’n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, ¶ 25. *But see Banković*, 2001-XII Eur. Ct. H.R. 345, ¶ 82. But it has also led to divergent case law even within the ECtHR itself. *See R (Al-Skeini and Others) v. Sec’y of State for Def.*, [2005] EWCA (Civ) 1609 [192] (Lord Sedley) (*U.K.*); *Al-Skeini v. Sec’y of State for Def.*, [2007] UKHL 26 [67] (Lord Rodger of Earlsferry) (Appeal taken from Court of Appeal) (*U.K.*).

169. *See Banković*, 2001-XII Eur. Ct. H.R. 345, ¶ 73. *See also Medvedyev*, App. No. 3394/03, 51 Eur. H.R. Rep. 39, ¶ 65; *Al-Skeini*, 53 Eur. H.R. Rep. 18, ¶ 134; *Jamaa*, 2012-II Eur. Ct. H.R. 131, ¶ 75. *Cf. Saldaño*, Petition, Inter-Am. Comm’n H.R., Report No. 38/99, OEA/Ser.L/V/II.9517, ¶ 20 (1999) (for the ACHR system).

170. Newspaper reports stated that the boys were “taken to a detention centre by more than a dozen Australian federal police officers” on the evening of July, 18. Matthew Brace, *British Diplomats Turn Away Boys Claiming Asylum*, THE TIMES, July 19, 2002. The fact that the potential violations of rights guaranteed under the ECHR would not have been performed by the agents of the sending State, but by agents of the receiving State, does not change the material assessment of this situation. *See infra* text accompanying note 177.

East German territory.¹⁷¹ The Danish ambassador eventually called in the GDR police, who led the refugees away. The subsequent treatment of the refugees included periods of detention, the temporary removal of their children, and, reportedly, long periods of interrogation.¹⁷² Before the European Commission of Human Rights (in the case of *WM v Denmark*), the applicant claimed, *inter alia*, that his right to liberty and security of the person (Article 5 of the ECHR) had been violated when he was transferred to police custody. The Commission declared itself “satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 (Art. 1) of the Convention.”¹⁷³

In the *Bakhtiari* case, the Court of Appeal took a similar view and found that, “while in the consulate, the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of article 1.”¹⁷⁴

However, it also seems quite clear from the judgment that mere presence in the consulate was not a sufficient basis for this finding. There had to be more than that—what was required, was at least some act of assumption of jurisdiction on the part of the officials. The court referred in that context to the fact that the applicants were assured of their safety while they were on the premises and that they were brought from the reception area into the “office” area of the consulate.¹⁷⁵ It is possible to read the decision in *WM v Denmark* in a similar light; in that situation, acts of the officials were involved when they initially allowed the refugees to stay in the embassy while they were carrying out negotiations with authorities of the receiving state.¹⁷⁶

This, indeed, must be the right approach towards establishment of jurisdiction by diplomatic and consular officials. It is consistent with the foundations on which extraterritorial exercise of jurisdiction has been accepted in other circumstances: whatever the nature of the ground—be it authority over occupied territory, control over a vessel, or the running of a prison on foreign soil—it appears that a voluntary act on the side of the relevant state had always contributed to the establishment of jurisdiction. What is more, it would be quite difficult to adduce sufficient evidence to the effect that in the absence of any conduct by the State—for instance, in scenarios in which a diplomatic mission is overrun by refugees—customary international law allocates jurisdiction to an unwilling state.

That acts by diplomatic agents (and consular officers) can establish

171. *WM v. Denmark*, App. No. 17392/90, 73 Eur. Comm’n H.R. Dec. & Rep. 193 (1992).

172. *Id.*

173. *Id.*

174. *R v. Secretary of State (B & Others)*, [2004] EWCA (Civ) 1344 [66], [2005] Q.B. 643 (appeal taken from Q.B.).

175. *Id.* ¶¶ 10, 13, 66.

176. *Id.* ¶ 64.

extraterritorial jurisdiction, does not mean that they will do so in all circumstances. The question in particular has arisen whether the (threatened) violation of just about any human right can trigger jurisdiction of this kind.

It is a difficult point, the more so as the diplomatic officials will not have carried out the human rights violation themselves, but have “merely” made such violations possible, through the surrender of the refugee. The analogy to extradition appears apt.¹⁷⁷ In situations where the person to be extradited faced human rights abuses in the requesting state, the ECtHR declared that the “liability” of the extraditing state is incurred “by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”¹⁷⁸ But the court also found that the extraditing state does not have to be “satisfied that the conditions [. . .] in the country of destination are in full accord with *each* of the safeguards of the Convention.”¹⁷⁹ In a recent judgment, the ECtHR confirmed that in situations where a state exercises control over individuals through agents operating abroad, only rights “that are relevant to the situation” need to be secured, and that Convention rights therefore can be “divided and tailored.”¹⁸⁰

Apart from more fundamental concerns attaching to a pick and mix approach to human rights, this statement fails to provide guidance on the obvious question as to which rights are fortunate enough to survive when a state exercises jurisdiction abroad. Human rights bodies have struggled with this problem.

There appears to be some agreement that genuine threats to the right to life and freedom from torture would involve the jurisdiction of the contracting state.¹⁸¹ In the *Bakhtiyari* case, the Court of Appeal went in a similar direction, but not in a consistent fashion. When discussing the applicability of the European Convention on Human Rights, the court first accepted that the granting of diplomatic asylum was possible if the fugitive faced the “risk of death or injury as the result of lawless disorder,” but shied away from phrasing this as a duty arising from extraterritorial jurisdiction.¹⁸² In the next paragraph, it appeared to accept such a duty in cases where the “immediate likelihood of experiencing serious injury”

177. See *WM. v. Denmark*, App. No. 17392/90, 73 Eur. Comm’n H.R. Dec. & Rep. 193, (1992) (referring to the *Soering* extradition case as a basis for its view that conduct “of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention”).

178. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), ¶ 91 (1989). See also General Comment 31, *supra* note 165, ¶ 12.

179. *Soering*, 161 Eur. Ct. H.R. (ser. A), at 26, ¶ 86 (emphasis added).

180. *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 131, ¶ 74.

181. See General Comment 31, *supra* note 165, ¶ 12; *Soering*, 161 Eur. Ct. H.R. (ser. A), ¶ 88 (referring to ECHR art. 3).

182. *R v. Secretary of State (B & Others)*, [2004] EWCA (Civ) 1344 [88], [2005] Q.B. 643 (appeal taken from Q.B.).

necessitated such protection,¹⁸³ but no longer mentioned situations where a risk of death existed.

Outside the right to life and freedom from torture, the controversy is even more pronounced. In the case of the former East German citizen who had found refuge in the Danish embassy, the European Commission of Human Rights did not, in the end, find that Denmark had deprived the applicant of his right to liberty or security of the person. The Commission considered the treatment, which the applicant received by the GDR authorities, as being not “so exceptional as to engage the responsibility of Denmark”—but provided no authority for this secondary status of the rights whose violation was alleged.¹⁸⁴

In the *Bakhtiari* case, the Court of Appeal likewise rejected the view that there was a requirement under human rights law to grant diplomatic asylum to persons outside situations in which they faced serious injury¹⁸⁵ and specifically stated that a “threat of indefinite detention” was not enough to “justify [. . .] or require” such a grant.¹⁸⁶ It too, did not provide any authority for this exclusion.

The Court of Appeal also suggested a further approach, which is missing in the findings of the European Commission of Human Rights. In the eyes of the judges, international law must “permit” the granting of asylum if it was clear that the receiving state intended to subject the refugee “to treatment so harsh as to constitute a crime against humanity.”¹⁸⁷

It is a strange position. Crimes against humanity come in many hues, and some of them can have less grievous consequences for the individual victim than certain “ordinary” violations of human rights.¹⁸⁸ Even “severe

183. “We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act 1998 to decline to hand over the applicants unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury.” *Id.* ¶ 89.

184. See *WM v. Denmark*, App. No. 17392/90, 73 Eur. Comm’n H.R. Dec. & Rep. 193 (1992). See also *Soering*, 161 Eur. Ct. H.R. (ser. A), at 26, ¶ 86. It is true that the ECtHR in *Soering* did assert that state parties did not have to satisfy themselves that all convention rights were guaranteed by the state requesting extradition, but neither the Court in *Soering* nor the Commission in *WM v. Denmark* provided a catalogue of rights that would not need to be guaranteed by the requesting State.

185. *B and Others*, [2004] EWCA (Civ) 1344 [89].

186. *Id.* ¶ 95.

187. *Id.* ¶ 88.

188. The reason for this is that it is not the human rights violation per se which turns a crime into a crime against humanity—it is its wider context. The crime must have been committed as “part of a widespread or systematic attack directed against a civilian population” and the perpetrator must at least have been aware of the existence of such attack. Elements of Crime, *supra* note 134, art. 7(1)(a-k) (the last two elements of each alternative). Unlawful imprisonment can, under certain circumstances, qualify as a crime against humanity, whereas the unlawful deprivation of life through the state, in the absence of a contextual element, would be “merely” a human rights violation. ICCSt, *supra* note 134, art. (7)(1)(e). It should be noted that the Court of Appeal did not clearly state that such a violation could be the basis for diplomatic asylum—it referred to such deprivations only in the context of “lawless disorder.” See *B and Others*, [2004] EWCA (Civ) 1344 [88].

deprivation[s] of physical liberty” can form the basis for crimes against humanity,¹⁸⁹ bringing the alleged ground for diplomatic asylum very close to human rights violations whose inclusion the Court of Appeal had endeavored to avoid.

In this context, too, the court remains its own authority. Given the relatively novel understanding of crimes against humanity as a basis for asylum, it is difficult to dispel the impression that the judges were keen to climb on the bandwagon of international criminal justice. If that had been the intention, they did not manage to get entirely on board. It is a strange proposition that crimes against humanity, but not war crimes and genocide, should form a basis of asylum.

Nor does the judgment provide sufficient clarity for other violations of human rights: in areas where a “lesser level of threatened harm” (than that threatened through crimes against humanity) was concerned, the court contented itself with stating that the law was “ill-defined.”¹⁹⁰

The fact remains that none of the relevant provisions of the leading human rights instruments—neither Article 1 of the ECHR, nor Article 2 of the ICCPR, nor Article 1 of the ACHR—differentiates between various forms of jurisdiction or allows for the wholesale exclusion of certain human rights if particular forms of jurisdiction are involved. The basic premise remains that, once jurisdiction has been established, the whole range of human rights guaranteed under these instruments becomes applicable and imposes obligations on the contracting state.

Restrictions do exist. But the reason for their existence is that the obligation of the contracting state under human rights law is not the only interest in this field; the interests of the receiving state, to which reference has been made above, yet survive. If an assessment of the meeting of the divergent norms leads to the result that the interests of the receiving state weigh heavier in the scales, the rights that the mission seeks to protect may experience a limitation, and the evaluation may even lead to the result that, given the circumstances of the situation, a right to grant diplomatic asylum did not exist.

The identification of mechanisms that allow the performance of such an assessment will constitute the principal part of the following Section. It is based on the view that objective parameters for the evaluation of the lawfulness of the diplomatic decision do exist, and that a reflection of the positions taken by judicial authorities, sending and receiving states, and commentators in this field can yield more precise guidance on the matter. The result is the establishment of certain principles, which allow an understanding of the diplomatic decision in light of the values involved and the relevant threat to which they are exposed.

189. ICCSt, *supra* note 134, art. 7(1)(e).

190. *B and Others*, [2004] EWCA (Civ) 1344 [89].

III. BETWEEN AYES AND NAYS: WHERE THE RIGHT WAY LIES

The impact that divergent norms exercise on the grant of diplomatic asylum appears to have been recognized by courts and commentators only in the relatively recent past. But when the case of Al-Saadoon and Mufdhi reached the European Court of Human Rights (a case concerning the transfer of Iraqi prisoners from British custody to the Iraq High Tribunal, where they might have faced the death penalty), the court had opportunity to reflect, in an *obiter dictum*, on this aspect of diplomatic asylum. It reached the conclusion that there are certain obligations that the sending State owed to the receiving State—including the obligation not to interfere in the internal affairs of the latter—and that these obligations applied in cases in which refugees sought asylum in embassies.¹⁹¹ The court did continue to say that there may, however, “be other conflicting obligations, for example under the Convention [the European Convention on Human Rights].”¹⁹²

But it remains a rare phenomenon that this interplay between the norms is expressly addressed by observers of diplomatic asylum, and it tends to be the actual outcome of their considerations rather than their reasoning that allows for conclusions on the paths which they chose to resolve this meeting of norms.

The result of their deliberations can be the adoption of a confrontational mechanism, an approach that understands the coinciding of norms as a genuine conflict, whose resolution demands the subordination of one set of rules to another. But international law also recognizes methods that seek to avoid the assumption of a clash (and its potentially destructive consequences). There is evidence that both ways have, at some stage, been supported in literature and in practice.

A. Evaluating the meeting of the norms: a problem of methodology

A confrontational approach towards the meeting of norms forces a clear decision between the competing interests. In the eyes of the supporters of this approach, the relevant norms clash, and the clash is resolved by giving preference to one norm over the other. Riveles, for example, speaking about instances in which threats emanating from a system of apartheid meet with the interest of the receiving state in its ability to exercise territorial jurisdiction, advocates a solution along confrontational lines: in her view, it is the obligation to grant asylum in circumstances of that kind that survives.¹⁹³ It is an opinion that subordinates restrictive norms to permissive norms, but does so without inquiring whether the conditions of certain situations may allow for variations in the application of this rule.

The Court of Appeal in *Bakhtiari* went in the opposite direction. In that

191. Al-Saadoon v. United Kingdom, App. No. 61498/08, 51 Eur. H.R. Rep. 9, ¶ 140 (2010).

192. *Id.*

193. Riveles, *supra* note 18, at 158.

case, the court held that the European Convention on Human Rights could not call on states to grant consular asylum “if to do so would violate international law,”¹⁹⁴ and referred in particular to Article 55 of the Vienna Convention on Consular Relations.¹⁹⁵ The conclusion it reached was that granting asylum would have constituted an abuse of the inviolability of diplomatic premises: it would have “infringed the obligations of the United Kingdom under public international law.”¹⁹⁶ Here too, then, one legal system is subordinated to the other; but the reasons for this are far from clear. It is, after all, easy enough (and equally unsatisfactory) to reverse the reasoning and to demand that the VCCR must not be allowed to infringe Britain’s obligations under the ECHR.

It is true that confrontational mechanisms are, under certain circumstances, recognized in international law. Such mechanisms can be expressly enshrined in treaties,¹⁹⁷ but they may also occupy space in customary international law—such as the *lex specialis* rule (the rule that the more specific norm is to be given priority over the more general norm)¹⁹⁸ and the *lex posterior* rule¹⁹⁹ (the rule that the norm that arose later in time is to be given priority over the earlier norm).

But their applicability to the meeting of the rule of non-interference with norms deriving from human rights or *erga omnes* interests is not without problems. The reason for that is that confrontational methods of this kind often presuppose not only a hierarchy but also a link between the relevant norms. *Lex posterior* and *lex specialis* in particular are only feasible mechanisms if the rules under consideration concern the same subject area.²⁰⁰ That is precisely not the case here; the meeting of diplomatic duties with the permissive norms outlined above rather provides an illustration for the common problem of the existence of special and separate intersecting regimes.²⁰¹

Nor is it apparent that the applicability of other confrontational mechanisms has been advocated. It is in particular worth observing that neither courts nor academic commentators tend to base their preference for one of the competing interests in this context on the existence of a norm

194. *B and Others*, [2004] EWCA (Civ) 1344 [84].

195. *Id.* ¶ 88.

196. *Id.* ¶ 96.

197. The classic example is Art. 103 of the U.N. Charter, which settles potential conflicts between obligations of Member States under the Charter and their obligations under other international agreements, in favor of the former. U.N. Charter, *supra* note 103, art. 103.

198. Rep. of the Int’l Law Comm’n, Study Grp., *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, at 8, ¶ (5), 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.702 [hereinafter Study Group on Fragmentation].

199. *Id.* at 17, ¶ 24.

200. *Id.* at 8, ¶ 5 and 17, ¶ 24.

201. See Michael J. Matheson, *The Fifty-Eighth Session of the International Law Commission*, 101 AM. J. INT’L L. 407, 428 (2007).

with *jus cogens* character. One of the reasons may be that it has always been difficult to identify norms that belong to this exclusive circle,²⁰² and even if the prohibition of a certain human rights violation has been identified as carrying *jus cogens* character, it does not follow that ancillary rules—such as the extension of jurisdiction to secure the underlying rights in another State—share this status. States as well as international courts and tribunals have shown themselves hesitant to expand the *jus cogens* concept beyond the core obligations themselves.²⁰³ That and the devastating effects of peremptory rules²⁰⁴ have contributed to the ongoing problem of defining the boundaries of the concept, and courts have been reluctant to assess a meeting of norms on the basis of *jus cogens* alone.²⁰⁵

The fact remains that both the ban on diplomatic interference (and of the misuse of mission premises) and the divergent norms they encounter, represent important strands of international law. The duties of diplomatic agents were established in an effort to protect the sovereignty of the receiving state; *erga omnes* rights and human rights obligations on the other hand are direct emanations of common interests of the international community and the rights of individuals. Given the importance that these fields of international law enjoy, there is no apparent reason why they should not demand equal validity.

The approach adopted by the ICJ in the *Asylum Case* follows a more

202. At least support by "a very large majority" of States has to be established. *See* 1 UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS 472, UN Doc. A/Conf.39/11 (1968). There is some evidence that the prohibition of torture belongs to it, as does the ban on slavery, genocide, and the unlawful use of force. *See* Study Group on Fragmentation, *supra* note 198, at 21, ¶ 33 (on the prohibition of torture); *State Responsibility Articles*, *supra* note 108, at 85, art. 26, commentary ¶ 5 (on torture and slavery); *Domingues v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, doc. 5 rev. ¶ 49 (2002) (on slavery and genocide); *Armed Activities on the Territory of the Congo (Armed Activities Case)* (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 I.C.J. ¶ 64 (Feb. 3) (on genocide); *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n 247, art. 50, commentary ¶ 1, UN Doc. A/CN.4/SER.A/1966/Add.1 (discussing the prohibition against the unlawful use of force). In the *Nicaragua Case*, the I.C.J. referred to these and other materials on the *jus cogens* nature of the prohibition of the unlawful use of force, without rejecting the view. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Case)* (Nicar. v U.S.), 1986 I.C.J. 14, 100-01, ¶ 190 (June 27).

203. In the field of torture for instance, the question may arise whether the *jus cogens* character of the core prohibition of torture would also cover the ancillary right to prosecute offenders and thus elevate that rule to a higher status than conflicting rules of immunity pertaining to State officials. The Pinochet case in the United Kingdom illustrates two opposing views on this subject. *Compare* *R v Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L.) 278 (Lord Millet), *with id.* at 242 (Lord Hope). *See also* *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 101-02, ¶¶ 61, 66.

204. *See* Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

205. Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 71 (2009); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 305 (2006) (with particular reference to the I.C.J.).

discerning line than that advanced by supporters of the confrontational school. The court appreciated that there may be situations in which the “derogation from territorial sovereignty” that diplomatic asylum constituted, might be justified, but it demanded that the legal basis for this be established in each instance.²⁰⁶ A differentiating approach is also chosen by those states that refer to the shape that the protected interest received through the conditions of a particular scenario. Austria for instance, in her response to General Assembly Resolution 3321 (XXIX) of 1974, found that the granting of diplomatic asylum, while constituting a “grave interference with the sovereignty of the receiving country” was justifiable if a person was in “immediate, serious danger,”²⁰⁷ and the Canadian Department of External Affairs similarly accepted a right to asylum if the individual faced “a serious and imminent risk of violence.”²⁰⁸ From this perspective, it is not the relevant human right on its own, but its particular form in a specific situation, that triggers a right to resort to diplomatic decisions of this kind.

These statements are indications that a more exacting assessment of diplomatic asylum requires a mechanism that is capable of comparing the relevant interests and which can allocate a weight corresponding to the position they occupy in the circumstances of the individual case. And it is not only the legal interests whose evaluation is required. The same considerations may apply to the measures involved in an effort to protect that interest. A decision to grant asylum might, after all, not be the most appropriate method to pursue that aim, even if the situation involves an immediate risk to a legally recognized right. Other measures might exist and might even possess a greater degree of efficiency.

A mechanism that understands these aspects cannot be derived from hierarchical rules. But a reflection of the general principles of international law allows the identification of methods whose specific purpose it is to provide mediation in situations of this kind. These are conciliatory approaches (chief among them, the principle of proportionality) that evaluate the co-existence of divergent interests in a way that promotes harmonization rather than subordination. The applicability of these considerations and of the tests arising from proportionality in particular will form the substantial part of the next Section.

B. Avoiding the conflict, protecting the interests: The way forward

It is today possible to speak of a tendency within the international community—and among international courts and institutions—to prefer conciliatory to confrontational methods, where the assessment of a meeting of norms is concerned.²⁰⁹ In that regard, the conclusions of the ILC Study Group on Fragmentation are illuminating: The group found that “[c]onflicts

206. Asylum Case (Colom./Peru), 1950 I.C.J. 266, 275 (Nov. 20).

207. Sec-Gen Report (1), *supra* note 29, ¶ 6.

208. Green, *supra* note 21, at 143.

209. See Milanovic, *supra* note 205, at 71.

between rules of international law should be resolved in accordance with the principle of harmonization.”²¹⁰ Yet a reference to “conflicts” in this context may be not entirely adequate: harmonization, after all, is based on the perspective that a conflict in the true sense of the word can be avoided.²¹¹

And conciliatory methods have sound foundations in international law. The ILC considers harmonization a “generally accepted principle” that applies where several norms have an impact on the same subject matter and demands that the resulting assessment gives rise “to a single set of compatible obligations.”²¹² But it is also possible to understand it as a technique of interpretation that takes into account the contents of both rules²¹³ and thus avoids the assumption of a normative conflict.²¹⁴

As such, it derives support from the practice of international courts²¹⁵ and from academic writings.²¹⁶ But the view that the interpretation of a norm must take into account other rules of international law, which have relevance for the instant situation, is also embraced by article 31(3)(c) of the VCLT.²¹⁷ The underlying rationale appears to be that a conciliatory approach is possible as long as one way can be found for a state and its agents to comply with the conditions that the two rules impose.²¹⁸ As a result, one rule will typically condition the meaning of the other.

An equally strong case can be made for the applicability of proportionality as one of the emanations of a conciliatory approach. Proportionality has been well established as one of the general principles to which article 38(1)(c) of the ICJ Statute makes reference.²¹⁹ It fills the gaps

210. Study Group on Fragmentation, *supra* note 198, at 25.

211. See Milanovic, *supra* note 205, at 73.

212. Study Group on Fragmentation, *supra* note 198, at 8, ¶ 4.

213. See *id.*

214. See Milanovic, *supra* note 205, at 98 (regarding the presumption against norm conflict in international law).

215. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 41 (Nov. 6). See Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, ¶ 55 (referencing Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) ¶ 43 (1995)). See also Milanovic, *supra* note 205, at 128 (with further references).

216. See Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L., 401, 427-28 (1953). See also SEYED A. SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES 25, 34 (2003) (suggesting a similar non-confrontational method which he termed the “reconciliation of norms”). In his view, a differentiation between “interpretation” and “reconciliation” has to be made. *Id.* But the method of finding a way that reconciles apparently conflicting rules appears to be the adoption of an understanding which allows co-existence—this, however, is a task of interpretation.

217. See Vassilis P. Tzevelekos, *The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration*, 31 MICH. J. INT’L L. 621, 624, 631, 644 (2010) (with further references).

218. Cf. SADAT-AKHAVI, *supra* note 216, at 34 (advancing a similar approach).

219. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 716 (2008); Riccardo P. Mazzeschi, Book Review, 13 EUR. J. INT’L L. 1031, 1035 (2002) (reviewing ENZO CANNIZZARO, IL PRINCIPIO DELLA

of the law²²⁰ and provides a default position, which applies unless states have specifically opted for a deviating regulation. Its presence has been recognized in fields as diverse as trade law and the use of force, human rights law and the law of the sea, but also in those instances of diplomatic law where the rule of non-interference meets with norms, which permit the diplomatic conduct in question.²²¹

It is more difficult to establish with certainty the constituent elements of proportionality. Literature²²² and the courts²²³ suggest various tests as to the aspects of the assessment that proportionality requires; but on the basis of their common features, it is possible to identify three necessary stages that are included in the evaluation: the identification of the relevant interests that have an impact on the particular case, the identification of the relevant measures that are involved, and the performance of a comparative analysis.

Where the situation of diplomatic asylum is concerned, this paper has already discussed the relevant interests when it referred to the permissive and restrictive norms that reflect values that benefit the sending and receiving states respectively. But proportionality also requires an assessment that takes into account the parameters of the particular situation in which rights and obligations are claimed. That includes a reflection on future developments, which are foreseeable in the individual case (such as the impact that denial of asylum may have on a people whose right to self-determination will be indirectly affected).

The relevant measure must show some form of connection to its aim;²²⁴ at the very least, the means employed must, in general, be capable of achieving it. If therefore the declared aim of the grant of diplomatic asylum is assistance towards the realization of self-determination, while the measure in fact protects only the rights of an individual that have no link to that

PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE [THE PRINCIPLE OF PROPORTIONALITY IN INTERNATIONAL LAW] (2000)).

220. See Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L. J. 371, 404 (2007).

221. See Paul Behrens, *Diplomatic Interference and Competing Interests in International Law*, 82 BRIT. Y.B. INT'L L. 179, 226-27 (2011) (regarding the general applicability of proportionality in these fields).

222. See Han Xiuli, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 CHINESE J. INT'L L. 635, 636 (2007); Andenas & Zleptnig, *supra* note 220, at 382, 388.

223. See *Bartik v. Russia*, App. No. 55565/00, Eur. Ct. H.R. (2006), ¶ 46 available at <http://echr.ketse.com/doc/55565.00-en-20061221/view/>; *Mathews v. Ministry of Def.*, [2002] EWHC (QB) 13 [35] (Eng.); *R v. Sec'y of State for the Home Dep't*, [2003] EWCA (Civ.) 364 [32] (Eng.).

224. See *Mathews*, [2002] EWHC (QB) 13 (requiring a "rational connection" to the objective), *Bartik*, App. No. 55565/00, Eur. Ct. H.R. (2006) (noting the measure must be "appropriate" to fulfill the function). See also Case C-240/95, *Criminal Proceedings against Rémy Schmit*, 1996 E.C.R. I-03179, ¶ 24. See also Xiuli, *supra* note 222, at 636 (referring to the "suitability" of the measure for the purpose). There does not seem to be much difference in the practical application of these parameters. See Andenas & Zleptnig, *supra* note 220, at 388 (referencing the *Rémy Schmit* case).

interest, it would be difficult to demonstrate that the necessary connection between measure and aim had been present.

Of the three stages of the examination of proportionality, the last—the comparative analysis—is by far the most complex one. There are two approaches to this examination that make frequent appearances in case law and literature: the test of the “least restrictive means” and that of the “cost-benefit analysis.”

The test of the least restrictive means inquires whether, in a given situation, alternative measures had been available that would have achieved the same objective, but imposed less of a burden on the affected interest.²²⁵

The significance of this test for the assessment of diplomatic asylum is apparent from the opinions of courts dealing with that matter, but also from the views of members of the international community. Australia noted in her submission pursuant to General Assembly Resolution 3321 (XXIX) that diplomatic asylum had to be the “only resort open to the fugitive.”²²⁶ In a similar vein, the Court of Appeal in the *Bakhtiari* case explored the available alternatives to the grant of asylum that existed in the specific case. It referred to the fact that a hearing on the Bakhtiaris’ refugee status was pending in the courts of Australia at the same time at which they requested asylum in the consulate²²⁷ and pointed out that the receiving state was a country which “observe[d] the rule of law.”²²⁸ The judges also found it “significant” that the High Court of Australia had commented on Australian criminal, civil, and administrative law as providing “avenues of redress to aliens who alleged that they had suffered mistreatment while in detention.”²²⁹

But these arguments highlight one of the dangers that exist if the test of the least restrictive means were understood in this sense. Means that are less intrusive can often be found, and in the case of diplomatic asylum the contention will frequently be raised that the diplomatic mission could have refrained from acting altogether and could have left the matter to the local authorities.

There is, however, a corrective mechanism that imposes a cap on calls for less intrusive means, which finds wide support in international law,²³⁰ and whose existence is necessary if the test is not to be deprived of all significance for the principle of proportionality. According to this understanding, alternative measures must be at least of equal efficiency to

225. *R v. Goldstein*, [1983] A.C. 151 (H.L.) (appeal taken from Court of Appeal) Lord Diplock in that case appeared to consider this test to lie at the very core of the principle of proportionality (“You must not use a steam hammer to crack a nut, if a nutcracker would do.”). *Id.* at 155.

226. Sec-Gen Report (1), *supra* note 29, ¶ 6.

227. *R v. Secretary of State (B & Others)*, [2004] EWCA (Civ) 1344, [94], [2005] Q.B. 643 (appeal taken from Q.B.).

228. *Id.* ¶ 95.

229. *Id.*

230. Behrens, *supra* note 221, at 235.

achieve the objective that the adopted measure pursues. In the *Bakhtiari* case for instance, the observations made by the Court of Appeal would have been more persuasive if the court had not also found that Australian law does not “include a right to challenge a failure to secure the enjoyment of human rights,” and if it had not pointed out that neither the ICCPR, nor the ICESCR nor the Convention on the Rights of the Child or the Convention Relative to the Status of Refugees and its amending Protocol had been transformed into Australian domestic law.²³¹ If it had indeed been the judges’ view that human rights violations could not be challenged in the courts of Australia, it would have been hardly consistent to derive an argument against diplomatic asylum from the fact that judicial redress had, after all, been available to the applicants.

The answer to the question whether less intrusive but equally effective alternatives existed, will inevitably be shaped by the internal structure of the receiving state and both its willingness and ability to secure the rights that the grant of diplomatic asylum seeks to protect. It is the nature of the relevant interest that allows conclusions on the efficiency of the receiving state in this context: if the interest is based on the right to self-determination, a state which possesses strong mechanisms for the protection of minority rights will find it easier to support the claim that appropriate alternatives to asylum exist than would a state that does not. If the interest is based on conventional obligations of the sending state to secure human rights, the receiving state would have to possess means of guaranteeing the fulfilment of human rights violations through its own authorities, if it wishes to claim that “effective alternatives” had been in place.

That does not mean that only a very specific form of government is capable of securing the interests that diplomatic asylum seeks to protect. A more decisive factor is the question whether past experiences in this field suggest that the receiving state is able and willing to work towards the protection of these interests.

When, in 1956, Cardinal Mindszenty sought asylum in the U.S. embassy in Budapest, he did so a few days after the Hungarian uprising of that year and at a time when Soviet troops were about to crush the revolution. Shortly before his appearance at the embassy, Mindszenty had, in a radio speech, underlined the concepts of “national independence and democracy;”²³² and it would be fair to say that the cardinal had come to be considered one of the representatives of those Hungarian movements that desired a change from communist rule and thus embodied the people’s struggle to determine their own political fate.

If the interest that the American embassy sought to protect is thus understood as assistance towards the Hungarian people’s right to self-

231. *B and Others*, [2004] EWCA (Civ) 1344, [90].

232. *International Conference and Exhibition on Cardinal József Mindszenty*, WEBSITE OF THE PRIME MINISTER’S OFFICE, HUNGARY (Sept. 21, 2012, 3:49 PM), <http://www.kormany.hu/en/prime-minister-s-office/news/international-conference-and-exhibition-on-cardinal-jozsef-mindszenty>.

determination, the opinion that there were alternatives, and that Mindszenty could have been referred to the authorities of the receiving state or to the occupying power, would appear somewhat quixotic. But there was more to the case: experiences made in comparable incidents underlined the fact that effective alternatives to the granting of asylum were difficult to find.

Imre Nagy, the reformist Prime Minister who was in office during the uprising, had likewise taken refuge in diplomatic premises—together with colleagues of his administration, he had sought asylum in the Yugoslav embassy in Budapest.²³³ The new Hungarian government promised Nagy safe conduct if he wished to leave the country, yet when he did emerge from the embassy, he was arrested (and later executed).²³⁴ At least at that stage, it must have been clear that recourse to the authorities of the receiving state offered a viable alternative neither to an asylum seeker nor to the people whose right to self-determination was affected.

The grant of diplomatic asylum can also be the only effective alternative if the receiving state is, in principle, willing and able to protect the legitimate interest but is unable to do so in the specific circumstances of the relevant situation. It is at that stage that the scenario of a threat of “mob violence,” which has been invoked by several commentators on diplomatic asylum,²³⁵ gains particular significance—not in the shape of an automatic right to asylum that would apply in any situation of this kind,²³⁶ but as a factor that has an impact on the evaluation of the diplomatic measure. If general disorder has engulfed the area around mission premises, it is entirely possible that diplomatic agents are able to offer a faster, and thus more effective, defense than agents of the receiving state. It is situations of this kind that underline the fact that the granting of asylum may sometimes be the best available method of securing rights that are recognized under international law.²³⁷

Emphasis has, on occasion, been placed on the allegedly low level of involvement of the sending state in situations in which diplomatic asylum has been granted. According to Porcino, asylum represents only a “passive infringement,”²³⁸ no more than “a limited incursion” into rights of the receiving state; the sending state “does not enter the territory of the sovereign state uninvited [...] there is no application of force or aggression against the territorial state.”²³⁹ These are considerations that matter for the

233. Bola A. Akinterinwa, *Nigeria, Cote D'Ivoire Tango over Asylum-seekers*, AFRICA NEWS, (Oct. 8, 2000).

234. *Id.*; Riveles, *supra* note 18, at 157.

235. *B and Others*, [2004] EWCA (Civ) 1344, [88]; Fruchtermann, *supra* note 57. *See also, Ex-Duvalier Police Chief Granted Asylum in Brazil*, *supra* note 86; Beaulieu, *supra* note 86.

236. *See supra* text accompanying note 86.

237. *Cf.* Jeffery, *supra* note 33, at 22.

238. Peter Porcino, *Toward Codification of Diplomatic Asylum*, 8 N.Y.U. J. INT'L L. & POL. 435, 446 (1975–1976).

239. *Id.*

evaluation of the diplomatic measure but also for the second test that the comparative analysis of proportionality requires: that of the so-called “cost-benefit analysis”²⁴⁰ (also called “proportionality *stricto sensu*” or “true proportionality”).²⁴¹ It is a test that calls for a relationship of proportionality between the advantage gained (or expected to be gained) and the negative effects that the measure generates.

Cost-benefit analysis is an approach that can again rely on acceptance in various fields of international law,²⁴² but there is some doubt as to what precisely the sides of the equation should contain. Case law and literature sometimes refer to the competing interests themselves.²⁴³ But in this generalized form, the analysis would re-introduce the concept of a hierarchical relationship between norms and, with it, the challenges that accompany this approach.²⁴⁴

What a comparison of costs and benefits really needs to involve, is an analysis that considers the way in which the measures in question have shaped the affected interests. What is being compared is, on the one hand, the negative impact that the measure has on the affected interest and, on the other, the benefit that the decision-maker hopes to achieve by adopting the measure.²⁴⁵

The question whether, given this analysis, the benefits outweigh the negative impact, cannot be approached through the application of a precise mathematical formula.²⁴⁶ But what the examination must include, are factors

240. See Andenas & Zleptnig, *supra* note 220, at 388.

241. Xiuli, *supra* note 222, at 637.

242. See Behrens, *supra* note 221, at 237.

243. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 392, ¶ 1389 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY] (speaking of a “balance between military necessity, on the one hand, and the requirements of humanity, on the other”). See also Case C-169/91, *Stoke-on-Trent City Council & Norwich City Council v. B & Q P.L.C.; Rochdale Borough Council v. Anders; Reading Borough Council v. Payless DIY Ltd. et al.*, 1992 E.C.R. I-6635, ¶ 15 (weighing the “national interest in attaining [a legitimate] aim against the Community interest in ensuring the free movement of goods”).

244. See *supra*, Part III.A.

245. See Andenas & Zleptnig, *supra* note 220, at 390-91 (arguing that the “effects of a measure” must not be “disproportionate or excessive in relation to the interests affected”). There is some indication that cost-benefit analysis, where it is adopted in international law, contains a reflection on the impact that the relevant measure had on the affected interests. See Case C-331/88, *The Queen v. Minister for Agric., Fisheries & Food ex parte Fedesa*, 1990 E.C.R. I-4023, 4063, ¶ 13; The ECHR habitually involves the measure concerned in its proportionality analysis when it emphasizes that the “interference” must be “proportionate to the legitimate aim.” *Maslov v. Austria*, App. No. 683/03, 47 Eur. H.R. Rep. 20, ¶ 68 (2008); *Chassagnou v. France*, 1999-III Eur. Ct. H.R. 21, ¶ 112; *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶ 53 (1981); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), ¶ 49 (1976). For a similar approach adopted by the Human Rights Committee, see *Human Rights Comm., C. v. Australia*, Communication 900/1999, ¶ 4.28, 76th Sess., Oct. 14–Nov. 1, 2002, U.N. Doc. A/58/40, (Oct. 28, 2002).

246. See *State Responsibility Articles*, *supra* note 108, at 135, art. 51, commentary, ¶ 5; Decision of the Arbitrator, *United States – Tax Treatment for Foreign Sales Corporations*,

which have an impact on the interests in the particular situation, including the gravity of the danger to which the protected interest is exposed, existing urgency that calls for the granting of diplomatic asylum, and the irreversibility of the damage that is caused if shelter were not provided. The combined weight of aspects like these may indeed tip the scales in favor of the measure adopted by the diplomatic agent.

And yet, Porcino's understanding of the grant of asylum as a "passive infringement" constitutes a generalization. The fact remains that a positive act on the side of the sending state exists—in the shape of the decision to afford shelter in the first place.²⁴⁷ Porcino does not deny that, yet he stresses that this decision is made "only upon the initiative of the refugee."²⁴⁸ In most cases, that will be a valid observation.²⁴⁹ But it should not lead to the conclusion that the grant of asylum therefore cannot carry considerable weight.

A recent case of diplomatic asylum—an incident in 2009 involving the former president of Honduras, Manuel Zelaya—illustrates the problem.²⁵⁰ Zelaya was removed from office by the military in June 2009, following an order by the Honduran Supreme Court to detain him. He then went into exile in Costa Rica, where he attacked his ouster as a "coup d'état." In September of that year, Zelaya managed to return to Honduras, where he found refuge in the Brazilian embassy in Tegucigalpa.²⁵¹

The Zelaya incident was one of very few instances in which a state requested the ICJ to provide an evaluation of an alleged situation of diplomatic interference.²⁵² Honduras' claim referred, *inter alia*, to propaganda activities for which, in her view, the diplomatic premises had

WT/DS108/ARB, ¶ 5.18 (Aug. 30, 2002) (relating to Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1867 U.N.T.S. 14, n. 9 [hereinafter SCM Agreement]). *But see* ICRC COMMENTARY, *supra* note 243, at 396, ¶ 1395 (expressing the view, in the field of international humanitarian law, that the concept of military necessity "can never justify a degree of violence which exceeds the level which is *strictly necessary* to ensure the success of a particular operation in a particular case") (emphasis added).

247. *See supra*, text accompanying note 176.

248. Porcino, *supra* note 238, at 446.

249. There was however some discussion in the 2008 case of Anwar Ibrahim as to whether diplomatic asylum in this instance had been based on a request by the refugee or an invitation by the Turkish Ambassador. *See* Jonathan Eyal, *Pushing the Limits of Diplomatic Immunity*, STRAITS TIMES (Singapore), July 5, 2008.

250. *See also supra*, note 43.

251. *Honduras President Arrested in Military Coup*, THE GUARDIAN (June 28, 2009, 11:41 AM), <http://www.theguardian.com/world/2009/jun/28/hondouras-coup-president-zelaya>; Rory Carroll, *Manuel Zelaya Refuses to Leave Honduras As Asylum Seeker*, THE GUARDIAN, (Dec. 10, 2009, 12:30 PM) <http://www.theguardian.com/world/2009/dec/10/manuel-zelaya-hondouras-asylum-mexico>; *Honduras Crisis: Role of the Supreme Court*, BBC ONLINE, <http://news.bbc.co.uk/1/hi/world/americas/8345457.stm> (last updated Nov. 6, 2009, 1:04 PM).

252. *See* Application Instituting Proceedings by the Republic of Honduras Against the Federative Republic of Brazil (*Honduras Application*) (Hond. v. Braz.) (Oct. 28, 2009), available at <http://www.icj-cij.org/docket/files/147/15935.pdf>.

been utilized since Zelaya's arrival in the embassy.²⁵³ At the time, it was reported that hundreds of Zelaya's followers had surrounded the embassy, where the former President addressed them with slogans such as "Restitution, Fatherland or Death!"²⁵⁴ The government of Honduras expressed the fear that Zelaya's conduct threatened the "peace and internal public order of Honduras."²⁵⁵ It considered the situation serious enough to declare a curfew and to use police and military forces to disband the crowd in front of the embassy.²⁵⁶

Incidents of this kind emphasize the serious consequences that can emanate from the diplomatic decision to allow private individuals the use of embassy premises—consequences, which, in volatile situations, may include public disorder and even armed strife within the receiving state. Such impact is likely to be grave and may well be irreversible. And yet, if Porcino's considerations are applied, the conduct of the embassy itself, throughout the entire development of the situation, could only be described as a "merely passive" infringement of the sovereignty of the receiving state.

It is, beyond that, difficult to align Porcino's view with the prevailing perspective on state responsibility—even if the principal significance of the diplomatic conduct in an incident like that involving Manuel Zelaya, were to be seen in a diplomatic omission rather than a positive act. The fact, after all, must be taken into account that the international community attaches as much significance to positive acts by a state as to omissions.²⁵⁷ It is in that regard of relevance that the International Law Commission, in its consideration of elements of internationally wrongful acts, noted that, in principle, "no difference . . . exists between the two."²⁵⁸

In the event, there never was an ICJ judgment in the *Zelaya* case. Following elections in Honduras in 2010 and the assumption of office by a new president, the state decided to withdraw its application, and the case was removed from the court's list.²⁵⁹ Had it been decided, the prevailing norms on diplomatic asylum in Latin America would inevitably have formed part of the basis of the court's findings.²⁶⁰

253. *Id.* ¶ 5.

254. José De Cordoba, *Crisis in Honduras: What Was Really Behind the Removal of President Manuel Zelaya, and Is he Likely to Be Reinstated?*, INSIDE COSTA RICA (Oct. 10, 2009), http://insidecostarica.com/special_reports/2009/2009-10/honduras_zelaya.htm.

255. *Honduras Application*, ¶ 5.

256. De Cordoba, *supra* note 254.

257. *See State Responsibility Articles*, *supra* note 108, at 34, art. 2.

258. *Id.*, commentary, ¶ 4.

259. Certain Questions Concerning Diplomatic Relations (Hond. v Braz.), 2010 I.C.J. 303, 304 (May 12); Elisabeth Malkin, *Honduras Swears in New President, as Ousted One Leaves*, N.Y. TIMES, Jan. 28, 2010 at A7, available at <http://www.nytimes.com/2010/01/27/world/americas/28honduras.html?ref=josemanuelzelaya>.

260. On the Latin American practice, *see supra* Part II.A.1. Not all of the instruments mentioned above would have been applicable: Honduras for instance, had not ratified the Caracas Convention (but was party to the Montevideo Convention on Political Asylum). Brazil is party to both treaties.

But the incident demonstrates that there are situations in which the decision to grant asylum is a measure that has a foreseeable and grave impact on affairs of the receiving state. That does not mean that, even in these situations, a comparison of available measures and a weighing up of cost and benefit cannot lead to a result favorable to the sending state. In the *Zelaya* case, the fact bears observing that the ouster of the President was the removal of a democratically elected head of state—an act that raised questions about its impact on the Honduran people’s right to determine their own political fate and that subsequently met with condemnation by the United Nations and the Organization of American States.²⁶¹

It is the hallmark of cost-benefit analysis that it offers a consideration of the impact of the diplomatic measure both with regard to the protected interests and with regard to the effects it generates in the receiving state. If the granting of asylum constitutes a significant contribution to the protection of a right whose exercise would otherwise be imperiled, it is possible that even a powerful impact on the order in the receiving state might be justified.

In many cases of diplomatic asylum, it is likely that the benefits of the measure may indeed outweigh its negative impact in the receiving state. The reason for that is not the “passive role” that the sending state plays in granting asylum, but the fact that asylum is often adopted as a temporary measure only and usually extended to a very limited circle of persons. On the other hand, the interests that the diplomatic mission seeks to protect often constitute recognized rights that have come under considerable threat.

An incident arising in June 2008 provides an illustration for this. In that month, the former Malaysian Deputy Prime Minister, Anwar Ibrahim, sought asylum in the Turkish embassy in Kuala Lumpur. Ibrahim had been accused by the Malaysian authorities of homosexual conduct (which Malaysia criminalized), but there were reasons to suspect a political background to the case: Ibrahim was the leader of the Pakatan Rakyat opposition at a time when the government had on several occasions attempted to stifle opposition movements and rallies.²⁶² The diplomatic measure of granting asylum therefore aided not only the individual refugee, but assisted the interests that he represented: the right of a people striving for the realization of self-determination. The provision of asylum on the other hand, was temporary in nature, and it does not appear that it occasioned irreversible or even sustained damage to the criminal justice system of the receiving state.

It is true that there may be a tendency to overstate the beneficial influence of the granting of diplomatic asylum; it appears, in particular, naïve to claim that diplomatic asylum may (by itself) have the potential of

261. See G.A. Draft Res. U.N. Doc. A/63/L.74 (June 29, 2009), *as orally revised in* GAOR, 93d plen. mtg at 11-12, U.N. Doc. A/63/PV.93, 11-12 (June 30, 2009); Organization of American States, *Resolution on the Political Crisis in Honduras*, OAS Assembly Res. AG/Res. 1 (XXXVII-E/09) rev. 1 (July 2, 2009).

262. HUMAN RIGHTS WATCH, *Malaysia*, in *WORLD REPORT 2009* 266, 266, *available at* http://www.hrw.org/sites/default/files/reports/wr2009_web_1.pdf.

persuading the territorial state to “mend its ways.”²⁶³ A more tangible benefit lies in the fact that it draws the attention of the international community to a particular situation and can thus, in the long term, create sufficient pressure to effect a change of the relevant conditions.

In cases in which the protected interest is based on the sending state’s obligations under human rights law, cost-benefit analysis can lead to a distinction between the human rights that are affected. But this is not a distinction along the hierarchical lines that judicial authorities have sometimes suggested.²⁶⁴ The important issue is not whether the protected interests belonged to an exclusive circle of rights—any right to which the conventional obligation refers, can be relevant. The decisive question is whether the damage that such a right would experience in the absence of the diplomatic measure would be serious and irreversible.

It is true that this will often see the rights to life and freedom from torture in a privileged position, since their violation furnishes an obvious case for grave and irreparable damage. But that does not mean that the protection of other rights can never lead to an assessment in which the benefit of their protection would outweigh the costs of the measure.

It is, for instance, too simple to state, as the Court of Appeal did in *Bakhtiari*, that the threat of indefinite detention could not justify or demand the grant of asylum under human rights conventions.²⁶⁵ What is required is a more detailed investigation of the harm threatened to the asylum seeker and its comparison to the impact of the diplomatic measure. In the particular instance of the Bakhtiaris, it would be difficult to ignore medical evidence relating to the grave effects that indefinite detention has on detainees in general,²⁶⁶ and on children in particular.²⁶⁷ It is clearly not possible to consider the restrictions on the asylum seeker’s right to liberty and security

263. For a different view on the effects of asylum, see Jeffery, *supra* note 33, at 21 (noting the ‘salutory outcome’ that the grant of diplomatic asylum may generate in the longer term).

264. See *supra* text accompanying note 185 and note 196.

265. *R v. Secretary of State (B & Others)*, [2004] EWCA (Civ) 1344, [95], [2005] Q.B. 643 (appeal taken from Q.B.). The court’s finding is particularly unfortunate in view of its earlier observation that threatened harm on a “lesser level” than crimes against humanity may “justify the assertion of an entitlement under international law to grant diplomatic asylum,” and that this was an “ill-defined” area of the law. *Id.* ¶ 89.

266. In a recent report, Physicians for Human Rights referred inter alia to “severe and chronic anxiety and dread,” “pathological levels of stress that have damaging effects on the core physiologic [sic] functions of the immune and cardiovascular system,” “depression and suicide,” “[p]ost-traumatic stress disorder” and “enduring personality changes.” CARA M CHEYETTE, PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE US 2 (Scott Allen ed., 2011).

267. INTERNATIONAL DETENTION COALITION, *Impact of Detention on Children, in CAPTURED CHILDHOOD* 48 (David Corlett et al eds., 2012), available at <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf> [hereinafter CAPTURED CHILDHOOD]. In the Bakhtiari case, the HRC did reach the conclusion that a violation of Art. 9(1) ICCPR (the right to liberty and security of person) had come into existence. Bakhtiari 2003, *supra* note 142, ¶ 9.3.

as divorced from the impact these restrictions have on other rights. That includes the right to family life,²⁶⁸ but also the right to physical and moral integrity.²⁶⁹ In the *Bakhtiari* case, a youth worker dealing with the situation noted in early 2002 that she had seen, over the period of one year, a “continual decline in the children’s well-being, particularly related to their socialization and psychological state.”²⁷⁰ When the Human Rights Committee dealt with the case in 2003, it referred to the “traumatic experiences” of the Bakhtiari family in “long-term immigration detention” (which, in its view, violated the right to liberty and security of person).²⁷¹

Damage caused by indefinite detention can have lasting effect and may be irreversible.²⁷² Under certain circumstances, detention of children may amount to inhuman treatment.²⁷³ A finding of this kind was reached by the ECtHR in the 2007 *Mubilanzila* case, which concerned the detention of a five-year-old girl in a Belgian Transit Centre as an illegal immigrant.²⁷⁴ While the young age of the applicant formed part of the court’s considerations, conditions at the Centre were described in significantly friendlier terms than those at Woomera.²⁷⁵ What the court did take into

268. The Human Rights and Equal Opportunities Commission of Australia noted that “the longer . . . families are in detention, the further the capacity of parents to care for their children is compromised.” HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION (AUSTL.), *A LAST RESORT?: NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION* 376 (Sev Odowski ed., 2004). The International Detention Coalition pointed out that “[t]he longer a family spends in detention, the more likely it is to break down,” a finding which highlights the risk of irreversible harm if timely remedial measures are not taken. CAPTURED CHILDHOOD, *supra* note 267, at 49.

269. On this right, *see supra* note 102. Where children are concerned, the fact must be taken into account that indefinite detention prevents them from pursuing their natural development in the formative years of their lives. A 2009 study on children in a British immigration centre reported sleep difficulties, somatic problems, symptoms of depression, and anxiety as common problems among the children observed. Ann Lorek, *The Mental and Physical Health Difficulties of Children Held Within a British Immigration Detention Center: A Pilot Study*, 33 CHILD ABUSE & NEGLECT 573, 581-85 (2009). In extreme cases, children in detention have shown serious symptoms of “psychological distress, including mutism, stereotypic behaviours, and refusal to eat and drink.” CAPTURED CHILDHOOD, *supra* note 267, at 49.

270. *Id.* at 52.

271. *Bakhtiari* 2003, *supra* note 142, ¶ 9.6.

272. A 2011 report by Physicians for Human Rights draws the conclusion that “physical, social and emotional problems continue to plague individuals long after their release from some form [of] indefinite detention.” CHEYETTE, *supra* note 266, at 17. A study carried out on former Australian immigration detainees found that several of them “had changed irrevocably as [people].” Guy J. Coffey et al., *The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum*, 70 SOC. SCI. & MED. 2070, 2076 (2010).

273. *See* ECHR, *supra* note 102, art. 3.

274. *Mayeka & Mitunga v. Belgium*, 2006-XI Eur. Ct. H.R. 18-19, ¶¶ 58, 59.

275. The court referred to statements detailing that the child had been able to play with other children, had been looked after by women who were themselves mothers and had been comforted when showing signs of distress. *Id.* ¶ 37. She had also been in daily telephone contact with her mother or uncle and the court found that “staff and residents at the centre did

account was the fact that the child was not accompanied by her parents, had been detained in the same conditions as adult asylum seekers, that measures had not been taken to guarantee proper counselling and educational assistance, and that the detention had lasted for two months.²⁷⁶

Diplomatic agents might not always have full knowledge of all features of the situation in which the asylum seekers would find themselves in the absence of diplomatic action. But in the *Bakhtiari* case, the relevant aspects were known at the time.²⁷⁷ Under these circumstances, the consular officers had the opportunity, and, given the human rights obligations of the sending state, the duty, to perform an appropriate assessment of the threat facing the children. Aspects that should have played a role in an evaluation of this kind were the conditions at the detention facility, the particularly vulnerable position of the asylum seekers (based in part on their age and their past traumatic experiences) and the length of their stay at Woomera—which, by the time of their escape, had been close to one and a half years.

In situations in which the potential negative impact on the refugee is as well defined as that, it is difficult to see how the benefit of securing their human rights could be outweighed by the costs of withdrawing them from a system that showed little inclination of welcoming them in the first place. An assessment under the principle of proportionality cannot reach any other result but that the diplomatic (or consular) officials were entitled to grant asylum and, in the circumstances of the case, required to protect the human rights that had come under threat.

CONCLUSION

The grant of asylum on mission premises constitutes one of the most significant and controversial areas in which charges of diplomatic interference have been raised. Unlike many other fields that may be considered in this context—such as certain lobbying activities, criticism of the administration of the receiving state and even the making of threats—the impact of the decision to afford asylum is felt immediately and is usually accompanied by an inordinate amount of publicity.

It is true, of course, that it is usually not the diplomats themselves who take the first step in situations of this kind, and once a refugee turns up on their doorstep, claiming to be in considerable danger, they will often not have the luxury of leisurely deliberation before reaching their decision. And yet, the grant of asylum involves serious repercussions, both on the political

their best for her.” *Id.* ¶ 52.

276. *Id.* ¶ 50.

277. The Court of Appeal noted that “[b]y 2001 the conditions in which immigrants, and especially children, were detained in Woomera [...] were giving rise to well publicized concern.” *R v. Secretary of State (B & Others)*, [2004] EWCA (Civ) 1344, [6], [2005] Q.B. 643 (appeal taken from Q.B.). Moreover, the consular officials also received detailed information about the treatment which the Bakhtiaris had received at Woomera, when the boys arrived at the consulate. *Id.* ¶¶ 11–12.

and the legal plane, and it is hardly advisable to base a choice of this gravity on instinct alone. Even in states known for their oppressive methods, asylum is not always a justifiable path, and even in states whose liberal systems are widely appreciated, asylum is not always excluded under international law. It is suggested that the following principal considerations must be taken into account in any situation of this kind.

First of all, no diplomatic mission can afford to ignore the impact of an act by which the embassy assumes jurisdiction over the refugee. There is no evidence that the international community forces a sending state to assume jurisdiction if its premises are overrun by asylum seekers,²⁷⁸ but once a voluntary act of assumption has been performed, the situation changes. And such an act can be seemingly innocuous: in the *Bakhtiari* case, moving the refugees from the reception area to the office area sufficed.²⁷⁹

Quite apart from the political tensions that such an act will almost invariably involve, the act also triggers the applicability of certain duties under human rights conventions, if the sending state is party to them. It bears observing that neither the Court of Appeal in the *Bakhtiari* case, nor the European Commission of Human Rights in *WM v Denmark* denied the existence of such duties; what kindled controversy, was their extent. But the emergence of such duties means that the sending state now partakes, to a certain degree, in the responsibility to secure the rights of the asylum seeker. If these rights are not credibly guaranteed by the territorial state, it may no longer be possible to hand over the refugees to the authorities of the latter.

On a practical level, this means that the mission now has to find ways to negotiate a settlement of the situation of asylum with the receiving state. If a settlement satisfying the rights of the asylum seeker cannot be reached, the mission may have to endure all the difficulties that an unresolved situation of this kind involves. That might include surveillance by authorities of the receiving state—in the case of Mindszenty for instance, security police reportedly continued to take pictures of the cardinal on his walks through the courtyard even fourteen years after his asylum had begun²⁸⁰ and other impediments to the proper fulfilment of its functions.²⁸¹

Secondly, mission premises are still the territory of the receiving state. Its sovereignty, while limited, is not removed, and the concomitant rights

278. On the contrary, a diplomatic mission faced with a situation of this kind can seek the assistance of the receiving state in removing the refugees. Under Art. 22(2) VCDR, the receiving state has a “special duty” to take “all appropriate steps to protect the premises of the mission against any intrusion”. See VCDR, *supra* note 13, arts. 22(2), 25.

279. See *supra* text accompanying note 175.

280. Last, *supra* note 21. In the case of Assange, police guards remained outside the Ecuadorian embassy months after he had been granted asylum. Decca Aitkenhead, *Julian Assange: The Fugitive*, THE GUARDIAN (Dec. 7, 2012, 5:58 PM), <http://www.guardian.co.uk/media/2012/dec/07/julian-assange-fugitive-interview>.

281. That is not to say that such methods, as far as the receiving state has responsibility for them, should invariably be considered lawful. The receiving state is under a continuing duty to “accord full facilities for the performance of the functions of the mission.” VCDR, *supra* note 13, art. 25.

are recognized by the international community. They are usually recognized by the sending state too, and with good reason: inroads into sovereignty are not always to the benefit of the state that makes them. Given the reciprocal nature of diplomatic relations, such precedents can be expected to be used against the sending state itself.

If the rights of the territorial state are thus a necessary starting point for the evaluation of diplomatic asylum, it is also fair to say that even impartial observers often find it difficult to look beyond that basic premise. The reason for that is that, outside regional arrangements, diplomatic asylum remains a poorly codified area of international law. In the absence of generally applicable treaty law on the subject, the codified norms showing the closest proximity to diplomatic asylum appear to be the VCDR ban on interference and the Convention's prohibition on the misuse of mission premises.

These are considerations that underline the importance of minimizing, where possible, the impact of the grant of asylum on legitimate interests of the receiving state. They militate in favor of a limitation of diplomatic asylum both in view of its temporal and its personal dimension, so that refuge will not be afforded beyond the necessary period of time or to a greater circle of persons than those who genuinely require shelter. But in its impact assessment, the mission will also have to take into account the conduct that it allows asylum seekers to adopt while they are guests on their premises, as well as the message that even the initial decision to grant asylum sends out, especially if such decision can be construed as support for the political agenda of the refugee.

Thirdly, it is essential that diplomatic missions are aware of the wider legal context in which the decision to grant asylum is situated. It is only an understanding of the normative context that allows the identification of legitimate interests on the side of the sending state that may have considerable impact on the assessment of the diplomatic decision.

That presupposes an awareness of rights and obligations that apply to that state. But it also requires an understanding of the factual situation—including an appreciation of the nature of the harm threatening the refugee and the probable consequences if asylum is not afforded.

On the basis of this assessment, the mission will be able to obtain an understanding of the rights that correspond to the interests that the refugee intends to protect and with that, of the possibility that these rights correspond to norms, which support the position of the sending state. Thus, threats to the existence of certain human rights can invoke a direct right of the sending state to provide help for their protection, if the rights in question have attained *erga omnes* character. In other cases, the sending state will be able—and even obliged—to act to safeguard rights, pursuant to its own conventional commitments. In other situations again, asylum seekers who represent a people whose right to self-determination has been threatened, may trigger a right of the sending state to assist in the realization of that interest.

The fact remains that, despite the establishment of various systems for the protection of human rights, the mechanism for their defense in the actual case must often appear inadequate to the bearers of these rights. Effective protection will, even today, frequently require the assistance of other states.

However, that puts diplomatic agents around the world in a special position, and one that differs increasingly from that envisaged by the traditional functions of the diplomatic office. As agents of their states, diplomats today play, unavoidably, an active role in rendering assistance toward the realization of human rights.

To peoples and individuals whose rights have come under attack, the diplomatic mission of a state that respects these interests fulfills a protective, but also highly symbolic role. In a situation of oppression, when all legitimate venues of relief within the territorial state have been barred, diplomatic missions are the only effective guarantors of the rights under threat. They are more than the representations of individual states; they are, often enough, the only remnants of the voice of the international community.