Part Six Administrative Measures, Diplomatic Asylum

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A. The Limited Legal Authority for the Practice of Diplomatic Asylum

1 It has often been claimed that under certain conditions a State has a ‘right’ to grant asylum within its embassies abroad to fugitives and even that the individual fugitive has a ‘right’ to asylum if he has taken shelter in a foreign embassy. But the existence of such ‘rights’ is not generally accepted as a matter of customary international law. Within Latin America there exists an extensive network of treaties which for the States parties do create a right of granting diplomatic asylum. But it has not been shown that these treaties have created even a regional rule of customary international law and in other parts of the world there has been no disposition to accept the existence of any customary rule of international law or to regulate practices of diplomatic asylum in any formal treaty rules. What is widely accepted is a right of the State in whose embassy refuge has been taken (‘the sending State’) to grant asylum on a temporary basis as a matter of humanitarian protection. Such protection may be given either for the purpose of saving life or preventing injury where
there is immediate physical threat to the refugee or where the sending State determines that there is no prospect of his or her being given a fair trial on any charges by the authorities of the territorial State (‘the receiving State’). Diplomatic asylum has in practice been accorded on a wider basis on many occasions, but without the consistency in practice or the assertion of legal rights which might have created a customary rule of international law.¹

² Those who seek refuge within foreign embassies do not fall within the definition in the 1951 Convention of the term ‘refugee’ which applies under Art. 1 A, para. 2 to a person who ‘is outside his country of nationality and is unable or ... unwilling to avail himself of the protection of that country’. Fugitives within foreign embassies may be nationals of the receiving State (as well as nationals of the sending State or of any third State). But it is the receiving State in whose territory they are and to whose enforcement jurisdiction or ‘protection’ they are unwilling to return. Their situation is not that of the refugees contemplated by the 1951 Convention. Their physical position within the territory of the State which seeks to assert authority over them also conditions the limited rights of the sheltering embassy’s sending State. Given the primarily territorial nature of international jurisdiction, once the asylum seeker is in another State, that other State has, prima facie, the right to shelter him or her or to return him or her by way of deportation or extradition to the State which wants him or her. The rights of the State sheltering a fugitive within its embassy by contrast has no such prima facie right and by sheltering him or her relies on immunities of the embassy from (p. 1427) the enforcement jurisdiction of the receiving State which are accorded for quite different purposes. The same distinction between territorial and diplomatic asylum emerges also by implication from the Universal Declaration of Human Rights (UDHR) which provides in Art. 14 that everyone has the right to seek and enjoy asylum ‘in other countries’.²

B. Historical Development of the Practice of Diplomatic Asylum

³ The practice of sheltering fugitives in embassy premises grew up along with the practice among European States during the period of the renaissance of sending permanent rather than ad hoc ambassadors. It was soon accepted generally that the house of the ambassador—within which at this stage were all his ‘suite’, i.e. his ancillary staff from secretaries to domestic servants—was entitled to immunity from the enforcement jurisdiction of the receiving State so that it could not lawfully be entered by police or other law enforcement authorities. Grotius—often blamed as the originator of the misleading theory of exterritoriality—in fact stated that the idea that the ambassador should be regarded as remaining within the territory of the sending sovereign was a legal fiction, and that any right to grant asylum in embassy premises required the express consent of the receiving State.³ Sovereign rulers, however, took a more generous approach, and to the Emperor Charles V in particular is credited the statement: ‘May the houses of the ambassadors provide inviolable asylum, as did formerly the temples of the gods.’⁴ The practice did not, however, extend at that period to ambassadors suspected of treason, who on a few occasions were taken from embassy premises and expelled from the country by the receiving sovereign.

⁴ No writer on diplomatic law ever supported the theory that the premises of an embassy formed an enclave of foreign territory.⁵ But in a number of capitals—in particular Rome, Madrid, Venice, and Frankfurt-am-Main—a practice developed of prohibiting law enforcement action in respect of ordinary crimes within the premises of foreign embassies and even in the surrounding areas, as well as of exempting supplies of goods brought in nominally for the use of the ambassador and his suite. As a result of this practice, known as franchise du quartier, the embassies in those capitals became sanctuaries for local criminals.⁶ By the end of the 17th century however, as a result of public revulsion at such abuse of the inviolability of diplomatic premises and by the initiative of Pope Innocent XI in...
exact from a number of European sovereigns formal renunciation of the *franchise du quartier*, the practice fell into disuse and within Europe cases of diplomatic asylum became rare.

5 While in the relatively ordered political circumstances of Europe during the 19th century the right to grant diplomatic asylum was rejected, this was not the case in Latin America where, in consequence of the frequency of revolutionary changes of government, together with tolerance of freedom of thought, the practice of granting diplomatic asylum in the wake of revolutions, together with safe passage for refugees out of the receiving State, (p. 1428) increased with general public approval. The practice was formalized in a series of conventions and agreed rules which specified the persons entitled to asylum and the procedures to be followed to resolve the situation. In 1889, for example, the Treaty on International Penal Law (Treaty of Montevideo) between Argentina, Bolivia, Paraguay, Peru, and Uruguay—mainly concerned with questions of international criminal law—provided in Art. 17 that asylum within legations should be respected in the case of those accused of political offences. The government of the receiving State must be notified and was entitled to demand that the refugee be sent out of the country as soon as possible under assurances of safe passage.

6 The Convention Fixing the Rules to Be Observed for the Granting of Asylum (Havana Convention) drawn up in 1928 by the Sixth International American Conference established as between the parties a right to accord diplomatic asylum to political offenders, while persons accused of ordinary crimes and deserters were expressly excluded. The right to grant asylum was, however, limited to urgent cases, the authorities of the receiving State must be notified and could demand expulsion of the refugee from the territory under safe conduct. While the Havana Convention did not specify whether the State granting diplomatic asylum or the receiving State had the right to qualify a charge as political, the Montevideo Convention on Political Asylum (Montevideo Convention) amended it in order to provide that it was the State granting asylum which had the right to qualify the offence. The United States, however, consistently denied any right to grant diplomatic asylum and signed the Havana Convention as a member of the Pan-American Union only with an express reservation making clear that it did not recognize the ‘so-called doctrine of asylum’. It never ratified either the Havana Convention or the Montevideo Convention. European States sometimes followed local custom in granting asylum within their diplomatic missions in Latin America, but they did this on a cautious and limited basis.

C. The Asylum Case

7 The Asylum case brought by Peru against Colombia in 1950 required the ICJ to analyse the concept of diplomatic asylum and to determine whether the treaties concluded among the States of Latin America and the widespread practice there of granting diplomatic asylum had given rise to a rule of customary international law. The proceedings resulted from an unsuccessful revolution in Peru and a decree of its president to bring the leaders to trial for military rebellion. A warrant was issued for the arrest of Haya de la Torre, and some weeks later he took refuge in the Colombian Embassy in Lima. The ambassador of Colombia notified the Peruvian government that it had granted diplomatic asylum to Haya de la Torre under the Havana Convention, had qualified his offence as political, and requested a safe conduct to enable him to leave Peru. Peru denied both that the grant of asylum was (p. 1429) justified under the Havana Convention and that Colombia had a unilateral right to qualify the offence as political.

8 The ICJ drew a clear distinction between territorial asylum, where the refugee is within the territory of the State of refuge and extradition is sought, and diplomatic asylum. It said:
In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.\(^{11}\)

The ICJ held that Peru, under the terms of the Havana Convention which was in force as between Peru and Colombia, had no implied right of unilateral qualification of the nature of the offence as being political. The Montevideo Convention had not been ratified by Peru and was clearly not a mere interpretation of the earlier Havana Convention, but created new obligations which could not be enforced as against Peru. Nor had Colombia shown the existence of a customary rule of law even on a regional basis. The treaties and practice among Latin American States showed so much uncertainty and contradiction as well as the influence of considerations of political expediency that it was not possible to detect ‘any constant and uniform usage, accepted as law’\(^{12}\) regarding unilateral entitlement of either State to qualify the offence. The grant of asylum had, moreover, not been justified under the Havana Convention since the element of urgency was absent when Haya de la Torre sought refuge in the Colombian embassy several weeks after the failure of the revolt. Nor was Peru under any obligation to grant a safe-conduct under the terms of the Havana Convention since it had not required that Haya de la Torre depart from its territory.

Since Peru was precluded from entering the Colombian embassy in order to arrest the refugee, these findings created an impasse which Colombia sought to resolve through a further application to the ICJ. Not for the first or last time, the ICJ held that it was not appropriate for it to direct how the parties to the dispute should comply with a judgment— in this case with the obligation to put an end to an irregular grant of asylum not covered by the terms of the Havana Convention. Colombia was under no obligation to surrender the fugitive and the parties should seek a solution on the basis of courtesy and good-neighbourliness.\(^{13}\) Ultimately an agreement was reached under which Haya de la Torre left Peru.

The Convention on Diplomatic Asylum was in part intended to respond to some of the ambiguities in earlier treaties shown up in the Asylum case. It made clear that the grant of asylum by a sending State within its embassy was a matter for its discretion, but that a State which permitted asylum was entitled unilaterally to determine whether the case was one of emergency and whether the charge was political. The Convention on Diplomatic Asylum was enforced against Cuba after the fall in 1959 of the Batista regime when some 800 political refugees sought asylum in embassies in Havana. The new government of Fidel Castro ultimately submitted to diplomatic pressure and issued safe-conducts.

(p. 1430) D. Asylum on Humanitarian Grounds

While under customary international law any general right of a State to grant diplomatic asylum to fugitives is denied, it has long been accepted that refuge in embassies may be accorded in the face of an immediate threat to the refugee. The threat may be of immediate death or injury at the hands of a mob or of a failure by the receiving State to provide guarantees of fair trial. In either case it is irrelevant whether the potential charge is political or not. The ICJ in the Asylum case acknowledged both kinds of justification. As to the first they said that: ‘Asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population.’\(^{14}\) As to the second they acknowledged the possibility of exceptional grant of asylum ‘if the administration of justice were corrupted by measures clearly prompted by political aims’.\(^{15}\) Except on a short-term basis, however, as the ICJ pointed out, the grant of
asylum—particularly on the latter of these two exceptional bases—risks being seen as intervention in the affairs of the receiving State.

12 UK practice acknowledged the permissibility of granting asylum in these exceptional cases in its instructions to its diplomats abroad. The British Foreign Secretary, in 1896, advised his Minister in Haiti in these terms:

... the practice of harbouring political refugees is an objectionable one and should be resorted to only from motives of humanity in cases of instant or imminent personal peril. In such cases the refugee should not be allowed to communicate with his partisans from the shelter of His Majesty’s Legation and should be removed the moment he is no longer exposed to summary treatment at the hands of his pursuers.

The instructions accepted that protection must sometimes be accorded to British subjects. British refugees accused of an offence against local laws should be given up but only to the competent authorities and on guarantees of proper treatment and a fair trial.16

13 The practice of providing temporary humanitarian protection within embassies in the face of violent disorder outside was also endorsed in a resolution of the Institut de Droit International in 1950.17 This permitted the grant of diplomatic asylum when the life, physical safety, or liberty of an individual was threatened by the local authorities or when those authorities were powerless to provide appropriate protection against violence.

14 Occasions where diplomatic asylum has been granted by a number of embassies on humanitarian grounds include the civil war in Chile in 1891, the uprising in Hungary in 1956, and following the fall of the government of President Allende in Chile in 1973 and its replacement by the regime of General Pinochet. In 1975, 800 refugees in the French embassy in Phnom Penh, Cambodia, were expelled under dangerous conditions after the Communist regime took control, and the French mission was itself withdrawn as soon as the last refugees departed.18 Although the nature of any offence is in theory irrelevant, in practice those seeking refuge usually do so for political reasons.19 It is, however, difficult to define the circumstances in which grant of asylum on humanitarian grounds is justified as a matter of law, particularly since the State offering shelter is often reluctant to be precise as to its legal justification for doing so.20 In Tehran in 1979, the Canadian embassy not only gave refuge to a number of US diplomats who had not been inside the US embassy when it was seized by Iranian students but assisted their covert departure from Iran by issuing Canadian passports and forged Iranian departure visas.21

15 Even the United States, which has consistently denied any general right of a State to grant diplomatic asylum within its mission premises, has on a number of occasions extended protection on humanitarian grounds in its missions in countries where the political requirement to protect fugitives from likely failure of local justice has outweighed the requirements of non-intervention in the internal affairs of the receiving State. It gave shelter to Cardinal Mindszenty within its embassy in Budapest following the Hungarian uprising of 1956 for 15 years—though the length of his stay was due to the Cardinal’s own reluctance to quit his country even under assurances of safe-conduct abroad until given express instructions to leave by the Pope.22 Following the massacre by Chinese troops in Tianenmen Square in 1989 of peaceful protesters in Tianenmen Square, the United States gave asylum in its embassy in Beijing for a year to a prominent Chinese dissident and his wife who ultimately left under safe-conduct.23 But a more restrictive approach has prevailed since the attacks by Al Qaeda on US embassies in Kenya and in Tanzania in 1998 and in New York and Washington in 2001 have led to greater anxiety over unauthorized intrusions into US diplomatic missions abroad and a high degree of security, making incursions very difficult. North Koreans seeking shelter in US missions in China in the hope of safe passage to South Korea have not been welcomed, and the Assistant Secretary of State for the Bureau of
Population, Refugees and Migration in justifying their rejection stated categorically that 'The U.S. does not grant “diplomatic asylum” which the United States does not recognize as a rule of international law.'

E. The Vienna Convention on Diplomatic Relations

I. Preparatory Work

16 The question of diplomatic asylum was placed on the agenda of the ILC among its initial list of suitable topics for study. In 1948 there was some discussion of whether it should be covered in the drafting of the Declaration of the Rights and Duties of States. In the absence of any serious study of practice and in the face of divided views among members, it was decided to omit it altogether.

17 It might have appeared that the obvious context for pursuit of internationally agreed rules on diplomatic asylum would be the work of the ILC on diplomatic privileges and immunities. But when the Sixth Committee of the GA drew up the mandate for the ILC’s work on diplomatic privileges and immunities, it made clear that the subject of diplomatic asylum was not to be included, and no study or proposals on it were made by the Special Rapporteur, Sandström. During the 1957 proceedings of the ILC on diplomatic privileges (p. 1432) and immunities, the British member, Sir Gerald Fitzmaurice, proposed the addition of text to the provision on premises of the mission, which later became Art. 22 of the Vienna Convention on Diplomatic Relations (VCDR). This read:

> Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under local law, not being charges preferred on political grounds.

An alternative formulation by Sir Gerald omitted the humanitarian exception, and required the surrender of the fugitive on demand by the local authorities, except where charges were preferred on political grounds. The French member, Francois, objected that the ILC would be acting ultra vires in considering diplomatic asylum when it was not within its terms of reference and had not been studied by the Special Rapporteur, and he was supported by other members. The matter was therefore put aside on the understanding that failure by an ambassador to comply with the applicable rules on asylum could not be a justification for entry by the authorities of the receiving State. The omission of any provision on diplomatic asylum was endorsed by governments and neither in comments on the draft articles of the ILC, in Sixth Committee discussion, or at the Vienna Conference were there proposals that express provision should be included in the VCDR.

II. Inviolability of the Premises of the Mission

18 The VCDR, however, constitutes modern international law in regard to diplomatic relations, privileges, and immunities, and three of its provisions are central to any analysis of the modern law on diplomatic asylum. First, Art. 22 VCDR provides:

1) The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

There are no exceptions permitted for cases of ‘emergency’. It has been argued by some, including the present writer, that entry by the authorities of the receiving State may be permissible in the face of an overriding duty to protect human life, but this possible exception has no application to the case of one or several fugitives within an embassy who are seeking to protect their own lives rather than to endanger those outside.27

III. Duties of Diplomats

19 Secondly, Art. 41, para.1 VCDR provides:

Without prejudice to their privileges and immunities, it is the duty of all persons enjoying 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.

(p. 1433) Art. 41, para. 3 VCDR requires that:

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 agreement in force between the sending and the receiving State.28

Ambassadors and diplomats are not—unless express provision is made—exempt from the application of territorial laws but only immune as a general rule from the enforcement of those laws. They are therefore under a duty to surrender a fugitive to local law enforcement authorities when presented with a lawful basis for the request, unless they can themselves claim legal authority for refusing to comply. The express reference to special agreements in Art. 41, para. 3 VCDR was intended to cover the regional treaties within Latin America to which reference has been made above. In States within Latin America the local laws and regulations, reflecting these treaties, will also permit the grant of diplomatic asylum—at least to political fugitives—on a more generous basis, so that a grant of asylum would in many cases not contravene Art. 41, para.1 VCDR. It is, moreover, clear from the preparatory work relating to the VCDR that a breach of the duties imposed on diplomats by Art. 41 does not ever justify a response in the form of infringement of the inviolability of mission premises. This was emphasized by the ICJ in the Tehran Hostages case,29 where it was stated that the VCDR forms a self-contained regime with remedies—such as a declaration of persona non grata or a total breach of diplomatic relations—which may be used by way of response to any violation of the duties under the convention.

IV. Role of Customary International Law Where There is No Express Provision in the VCDR

20 Thirdly, the VCDR, in its Preamble, provides that ‘the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention’.30 Diplomatic asylum is not expressly regulated by the terms of the VCDR, and the reference back to customary rules therefore opens the way to the grant of asylum within mission premises for a limited period in the face of threat to human life, physical safety, or liberty.

V. Non-Interference in Affairs of the Receiving State
The duty of non-interference in the internal affairs of the receiving State under Art. 41, para. 1 VCDR is of most relevance where it might be sought to offer asylum to a fugitive on the ground that, if surrendered, he would be unlikely to receive proper treatment or a fair trial. Probably for this reason, instances of diplomatic asylum being continued on the ground of possible unfair treatment of the fugitive appear in modern times to be limited. Unless asylum can be justified on the basis of physical threat to life or safety during public disturbance, it is probably better to surrender a refugee to a lawful request from the local authorities while requiring assurances of proper treatment and, in particular, consular access. The emphasis in modern times on the international protection of human rights has led to greater latitude for diplomats in such matters as observing and commenting on human rights performance by authorities in the receiving State where this may be necessary for the proper performance of diplomatic functions, and it is generally accepted that such monitoring and appraisal is not in itself an interference in the internal affairs of the receiving State. Such activities are, however, quite different from deliberately withholding a fugitive from the normal operation of local laws on the ground that they may be unsatisfactory by reference to international standards of human rights.

This approach is supported by the recent decision of the UK Court of Appeal in the case of R. (on the application of ‘B’ and others) v. Secretary of State for the Foreign and Commonwealth Office. The case concerned two young boys of Afghan origin who were applying for asylum in Australia, escaped from the Woomera Detention Centre where they were held, and took refuge in the British consulate in Melbourne. There they applied for asylum and humanitarian protection from the government of the United Kingdom. Considerable publicity accompanied their arrival, and the Australian authorities made clear that they would seek return of the boys to their own care. After contacts with London, the boys were told by UK officials that they could not remain in the British consulate and that their asylum request should be considered by Australia as the country of first arrival, after which they left voluntarily. The boys then claimed that UK consular officials were in breach of their duties under the UK Human Rights Act by failing to protect them through asylum from return to a jurisdiction under which they would suffer both inhuman and degrading treatment, contrary to Art. 3 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), and indefinite and arbitrary detention contrary to Art. 5 of that Convention. The court accepted that the Human Rights Act was capable of applying to actions of diplomatic and consular officials in Melbourne who were under the jurisdiction and control of the United Kingdom, as the ECHR had been interpreted by the ECmHR and ECtHR. But the ECHR did not require States parties to afford asylum on consular premises if such an action would violate international law. The court considered authorities on the international law on diplomatic asylum and concluded that it could be legally justified to protect the fugitive from a threat of violence or a crime against humanity. But this had not been the situation in this case, where the applicants had escaped from lawful detention under Australian law, and they held:

On the face of it international law entitled the Australian authorities to demand their return. We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act 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.

The evidence did not show that this threshold had been reached, but rather that Australia was a country which observed the rule of law and where the authorities would not knowingly expose children to inhuman and degrading treatment. For diplomatic or consular officers to have given diplomatic asylum would have been an abuse of the inviolability of
premises and would have infringed the obligations of the United Kingdom under international law.

**(p. 1435) F. Counter‐Measures for Unjustified Grant of Asylum**

23 It is clear from the preparatory work relating to the VCDR that a breach of the duties imposed on diplomats by Art. 41 VCDR does not ever justify a response in the form of infringement of the inviolability of mission premises. This was emphasized by the ICJ in the *Tehran Hostages case*, where it was stated that the VCDR forms a self‐contained regime with remedies—such as a declaration of *persona non grata* or a total breach of diplomatic relations—which may be used by way of response to any violation of the duties under the VCDR.33

24 There are only a very few instances where a receiving State, on determining that the shelter of a fugitive from justice is unjustified, has responded by entering diplomatic premises in order to arrest or seize him. In a few cases of hot pursuit it has been claimed by way of excuse that the police were unaware of the status of the premises.34 In 1976, however; Uruguayan police entered the embassy of Venezuela to arrest a fugitive dissident, and Venezuela subsequently broke diplomatic relations by way of protest.35 In 1989, the United States invaded Panama for the purpose of seizing General Noriega, then acting as Head of State of Panama though not recognized as such by the United States. The occupying troops first entered the residence of the Nicaraguan ambassador in the belief that Noriega had taken refuge there. A Security Council Resolution condemning this action as a breach of diplomatic inviolability would have been adopted but for a US veto, and Nicaragua also expelled most of the US diplomats accredited to it. Finding that Noriega was in fact sheltering within the legation of the Holy See, US troops laid siege to the legation and bombarded the premises with deafening rock music and overflying military helicopters, despite the protests of the Apostolic Nuncio that this disturbance of the peace of the mission violated Art. 22 VCDR. Ultimately General Noriega emerged, was arrested by waiting soldiers and removed for trial on drug trafficking charges in Florida.36 These cases do not, however, offer any conceivable legal justification for the entry or harassment of diplomatic premises in response to a grant of diplomatic asylum even if regarded as unlawful by the receiving State and confirm the correctness of the legal position set out by the ICJ in the *Tehran Hostages case*, as described in the previous paragraph.

**G. Later Study within the UN**

25 In 1974, an initiative by Australia seeking to formulate a worldwide international agreement on diplomatic asylum did lead to the comprehensive study of the subject which had been lacking when the VCDR and the Vienna Convention on Consular Relations (VCCR) were drawn up. In response to the request by the GA,37 the Secretary-General compiled a Report on the Question of Diplomatic Asylum, which contains comprehensive (p. 1436) analysis of the historical development of the practice of diplomatic asylum, the rules and treaties concluded among Latin American States, the judgments of the ICJ, and the work of other international bodies.38 Discussion in the Sixth (Legal) Committee of the GA, however, had shown that attitudes—with the single exception of Australia, which believed that the practices in Latin America could be extended elsewhere—had not changed. Latin American States argued that the principles underlying their own regional treaties and the practice there had been beneficial and could be enlarged so as to have universal application. The United Kingdom, France, Spain, India, and the United States, however, all maintained that there was no international law permitting the grant of diplomatic asylum except on a temporary basis for humanitarian reasons, and displayed no enthusiasm for creating any
such system by further international agreement. There was therefore no further work
carried out on the topic.

H. Collective Refuge

26 A distinction has often been drawn by writers between diplomatic asylum offered to one
or a few fugitives and collective refuge. The cases of collective refuge do appear to show a
somewhat more generous attitude to shelter, but they are so few in number and so
politically charged that it is difficult to determine whether different legal principles are
being applied. Collective shelter may be traced to the custom which formerly existed in
Persia, allowing fugitives to take ‘bast’ or shelter within the premises of a foreign legation
as a means of asserting grievances. The classic instance of this is recounted by Satow,
whose account is derived from that of the British Minister in Tehran.39 The Minister was
informed by a eunuch from the royal Palace that the Shah’s wives had taken exception to
his decision to marry a girl who was sister to one of his wives and the daughter of a
gardener. By way of protest they sought sanctuary, or bast, in the British legation. The
Minister made preparations for the reception of 300 refugees, purchasing sheep and bread
and pitching tents on the lawn—but before the mass invasion arrived the Shah capitulated,
and the ladies sent their grateful thanks.

27 Other cases of mass refuge within diplomatic missions occurred in Europe and in Latin
America during the 20th century. During the Spanish Civil War thousands of fugitives took
sanctuary within embassies in Madrid and the matter was discussed by the Council of the
League of Nations, where Chile asked for evacuation of the fugitives under the supervision
of the ICRC. Following denial of any right to diplomatic asylum by the victorious General
Franco, most embassies accepted his demands, but the embassy of Chile continued to hold
one thousand, and the last of them left only with assurances of safe-conduct out of Spain.40
Mass shelter in foreign embassies also took place in Chile after the fall of President Allende

28 Most dramatic in terms of the impact on world history were the mass invasions of West
German embassies in August 1989. East Germans were recognized by West Germany as
having German citizenship and thus the right to be admitted to West Germany, and there (p.
1437) had been earlier cases in which fugitives from the Communist regimes in East Europe
succeeded in gaining entry into West German missions there and were taken to West
Germany under safe-conduct.41 The mass occupations of August 1989 were made possible
because of abolition of visa restrictions between East Germany, on the one hand, and
CzechoSlovakia and Poland, on the other. West German missions at first tried to stem the
inflow of East Germans into their embassies in Prague and Warsaw, and negotiated safe
transit only for refugees already on diplomatic premises. But when those refugees departed
across the border from CzechoSlovakia to Austria or in sealed trains from Warsaw to West
Germany, they were immediately replaced by others. It became obvious that it was
impossible to maintain the tight restrictions on emigration from East Germany to the West,
and with the dropping of those restrictions the events which led to the destruction of the
Berlin Wall and the liberation from Communist rule of East Europe followed almost as a
chain reaction.42

29 The German precedent of 1989 has been followed on a few occasions by dissidents from
oppressive regimes. In 1990 there were mass invasions of foreign embassy premises in
Albania by hundreds of protesters who refused to leave, in spite of difficulties in supplying
food and medicine, until granted safe passage to leave Albania, and again the events set in
motion the decline and fall of the Communist government there.43 Similar tactics were used
by North Korean defectors in Beijing in 2002—on this occasion the fugitives succeeded in being taken to South Korea but there were no wider repercussions.\textsuperscript{44}

\textbf{I. Wider Applications of the Principles of Diplomatic Asylum}

\textbf{30} There have been a few cases where fugitives have sought refuge within other premises entitled to inviolability, such as consular premises, premises of international organizations, and visiting warships. The principles applied do not appear to differ from the rules applied to asylum within diplomatic missions. At the Vienna Conference which drew up the VCCR, the United Kingdom proposed the addition to the draft article on inviolability of the consular premises (which became Art. 31) of the words: ‘Consular premises shall not be used to afford asylum from fugitives from justice.’\textsuperscript{45} This narrow proposal would have left untouched the possibility of a grant of asylum to protect from physical danger and perhaps also for ‘political’ fugitives. It was, however, rejected on the grounds that no provision for asylum had been made in the VCDR—so that express exclusion in the VCCR might give rise to the \textit{a contrario} argument that a right to grant asylum existed under the VCDR.\textsuperscript{46} It also remained the case that further study of the subject under UN auspices was envisaged. The VCCR is therefore silent on the question of asylum.

\textbf{31} Article 31 VCCR accords in some respects a lower degree of inviolability to consular premises than is accorded to premises of a diplomatic mission under Art. 22 VCDR. In particular, there is a right of entry for the authorities of the receiving State in case of ‘disaster requiring prompt protective action’. In nearly all cases where fugitives have sought asylum within consular premises they have been surrendered to the law enforcement authorities (p. 1438) on request or left of their own accord on being refused shelter, as in the case of \textit{R. (on the application of ‘B’ and others) v. Secretary of State for the Foreign and Commonwealth Office}, which is described above.\textsuperscript{47} On a very few occasions, local police have entered consular premises in order to remove fugitives seeking asylum. In 2002, \textit{e.g.}, Chinese police entered the premises of the Japanese Consulate General in Shenyang in order to remove a family of five North Koreans seeking refuge and transport to South Korea, but claimed that they did so with the consent of the Japanese consular officers.\textsuperscript{48}

\textbf{32} In 1984, the United Kingdom on humanitarian grounds offered temporary shelter in the British consulate in Durban, South Africa, to six opponents of apartheid. After three weeks, three of them left voluntarily and were arrested. After one of the remaining fugitives gave a press interview, using a radio transmitter smuggled in, the UK authorities asked for assurance that they would not engage in political activities during their shelter and in the absence of such assurances refused permission for further visitors. A month later the remaining three left voluntarily and two of them were immediately arrested by the authorities on charges of treason. The United Kingdom expressly denied any right to grant asylum, and South Africa—though it never infringed the inviolability of the premises—retaliated politically in several other ways against the failure to expel the fugitives or permit entry by local police to arrest them.\textsuperscript{49}

\textbf{33} Seeking refuge within the premises of an international organization does not appear to have been a frequent practice in spite of the inviolability which such organizations enjoy in most cases. Section 9 of the Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations\textsuperscript{50} expressly provides that the UN is required to prevent the headquarters district from becoming a refuge for fugitives from justice.

\textbf{34} There were a number of cases during the 19th century where asylum to political refugees was granted on visiting warships, which are also regarded as inviolable under customary international law. A limited right to grant asylum to political refugees on warships was acknowledged in the Hague Regulations drawn up by the Institut de Droit International concerning the legal regime of ships and their crews in foreign ports.\textsuperscript{51}
Although any general right to grant asylum was denied by States—in particular by the United States during the American Civil War—it was normally possible for any dispute to be swiftly resolved by the departure of the ship with the fugitive on board. Many fugitives from the Spanish Civil War escaped from Spain on foreign warships. In 1971, a Lithuanian seaman who had jumped from a visiting Soviet trawler onto an adjacent US warship, in US waters, was refused asylum and was violently recaptured by Soviet authorities with the acquiescence of US naval and government officers. This was, however, a case of territorial asylum-seeking, and there was widespread condemnation in the United States of the conduct of their own authorities in permitting the surrender of the fugitive.

(p. 1439) J. Evaluation and Prospects for Change

35 It is clear from the various attempts during the preparation of the VCDR and the VCCR and again—supported this time by comprehensive research—in the 1970s, that States are content with the existing international law and practice on diplomatic asylum. Although it might appear that there is a sharp difference between Latin America and elsewhere, this reflects political sympathy towards refuge in diplomatic missions and more extensive practice in Latin American countries rather than any substantial difference in the legal rules applied. As the ICJ pointed out, there is so much variation in the terms of the many treaties on the subject and such uneven participation in those treaties that no customary rule can be shown to exist. The treaties moreover are hedged with so many restrictions—in particular as to the requirement for a situation of urgency to be shown in order to justify asylum within an embassy—that application of their terms as between the parties would often produce a result no more favourable for the fugitive than reliance on the humanitarian principles applied elsewhere.

36 States are not willing to contemplate the use of their foreign diplomatic missions as general places of refuge. Such a practice would undermine the rule that immunities are granted for the performance of specified functions and that inviolable premises must be used only for those functions and in compliance with local laws. The threats to foreign embassies from terrorists and from political demonstrators are already so acute as to have led to the closure of many vulnerable missions by the United States, the United Kingdom, and France in particular, and to protective cordons around remaining missions which constitute serious obstacles to the proper performance of some of their functions involving open contact with the people in the receiving State. A more open door towards political dissidents would be seen in the countries where fugitives are most likely to seek asylum as interference in local affairs. There are indeed ways in which States are now more likely to run the risk of accusations of intervention in the interests of upholding international standards of human rights, but a more generous approach towards diplomatic asylum is not among them.

37 Refuge granted on humanitarian grounds will continue to be permitted and practised—but given security measures protecting embassies from casual entry and a less than generous attitude in many countries towards asylum seekers, it is likely to remain exceptional and politically charged. The extraordinary invasions of West German embassies in Poland, Czechoslovakia, and Hungary in 1989 were possible because of West German acceptance of East Germans as citizens with full rights of integration should they arrive in West Germany and also because the Communist authorities in those countries were losing confidence and the readiness to use brutal methods to prevent the incursions. In spite of later attempts to replicate the success of these tactics, this highly exceptional combination of circumstances has never recurred.
It is highly unlikely that States would collectively be ready to tie their hands in advance by defining the circumstances in which diplomatic asylum might be granted on humanitarian grounds. Some precision could perhaps be given to the requirement of immediate threat to the life, physical safety, or liberty of the fugitive. But the cases which cause difficulty are those where shelter is prolonged because of the likelihood that if the fugitive is surrendered to the local authorities, minimum standards of humane treatment or of fair trial will be disregarded. In these cases the sending State must balance the risk, on the one hand, of damage to its relations with the receiving State if it is seen to be challenging local standards or intervening in local affairs with its humanitarian concern, on the other, for the survival and welfare of the fugitive. Such decisions are unlikely to be helped by prescriptive rules set out in advance and cannot be divorced from political considerations deriving from the history of the fugitive and the current relations between the sending and receiving States. They are in short not justiciable. Usually where there is no prospect of negotiating a safe conduct it will be preferable to surrender the fugitive against guarantees of proper treatment and fair trial and in particular a promise of consular access to check that the guarantees are being observed. Sometimes, however, the sending State will take the political risk of continued protection—clandestine if possible as in the conduct of the Canadian embassy in Tehran in 1989. In the near future there will probably be fewer fugitives claiming sanctuary from within foreign embassies and there will certainly be no international attempt to codify the conditions under which it may be lawfully granted.

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Footnotes:

1 Jennings/Watts, Oppenheim's, pp. 1082–1086 (paras. 495–496).
2 GA Resolution 217 (III) of 10 December 1948. Proposals to extend the right of asylum to include diplomatic asylum were discussed and rejected during the drafting of the Declaration. Cf. Goodwin-Gill/McAdam, Refugee, pp. 251–252 and 356–357, fn. 12; Hathaway, Rights, p. 173.
3 Grotius, De Iure, II.xviii.iv.4; II.xviii.viii.2.
4 Quoted in Reale, RCADI 63 (1938-I), pp. 469, 513.
5 Cf. e.g. de Vattel, Le droit des gens, Book r, Ch. VIII, para. 117 who says explicitly that exterritoriality of the ambassador and his embassy is merely a way of expressing his independence and the rights necessary for the success of his mission, a fiction which cannot detract from the rights of the receiving sovereign.
6 Adair, Exterritoriality, Ch. XI; Young (later Denza), BYIL 40 (1964), pp. 141, 155–157.
7 At this period only the oldest established States exchanged ambassadors, while others sent heads of mission of lower rank such as legates or chargés d'affaires en titre.
12 Ibid., p. 277.
15 Ibid., p. 284.
16 Despatch from Earl Grey, 30 May 1913, British Digest of International Law 7, p. 922.
18 Rousseau, RGDIP 79 (1975), pp. 1091, 1107-1108.
19 Salmon, Manuel, p. 234 (para. 339); Rousseau, RGDIP 79 (1975), pp. 1091, 1107-1108.
20 Jennings/Watts, Oppenheim’s, p. 1084 (para. 495), fn. 10: ‘The humanitarian basis for asylum defies definition in advance: it has affinities with humanitarian intervention.’
21 Green recounting these events in CanYIL 19 (1981), pp. 132, 144-147, suggests that Canadian actions were justified on the basis that they upheld the rights of the US diplomats as stated by the ICJ in United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports (1980), pp. 3-47.
22 For the account of the US Ambassador at the time cf. Puhan, Cardinal, passim.
23 Jennings/Watts, Oppenheim’s, p. 1084 (para. 495), fn. 11.
26 Ibid., pp. 54-57.
27 Denza, Law, pp. 140-145, 149-150.
28 Ibid., pp. 460-468.
30 Denza, Law, p.15.
32 ‘B’ and others, supra, fn. 31, para. 89.
34 E.g. cf. Denza, Law, p. 147.

37 GA Res. 3321 (XXIX) of 9 October 1975.


40 Salmon, Manuel, para. 340.

41 Cf. e.g. Rousseau, RGDIP 88 (1984), p. 895.


43 The Times, 6 July 1990.


47 Supra, MN 22.

48 Lee/Quigley, Law, p. 366.


51 IDI, IDI Annuaire (1898), pp. 221, 227.


53 An inquiry was held by the House of Representatives Sub-Committee on State Department Organization and Foreign Operations, cf. Rousseau, RGDIP 75 (1971), pp. 134, 139–144.

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