Diplomatic asylum in contemporary international law

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1. INTRODUCTION

1. On 19 June 2012, Julian Assange sought refuge at the Ecuadorian embassy in London.[1] Assange was known as the founder of Wikileaks, a website known for publishing confidential and sensitive information. Many of the publications made available on Wikileaks concerned classified documents from the United States of America ("US") relating to the armed conflicts in Iraq and Afghanistan.[2] At the time of entering the Ecuadorian embassy, a European arrest warrant was issued for Assange due to sexual assault charges in Sweden.[3] Assange feared he would eventually be extradited to the US where, according to him, he would face ill-treatment due to the Wikileaks publications.[4] In August 2012, Assange was granted asylum by Ecuador on their diplomatic premises, a practice known as diplomatic asylum, leading to much controversy.

2. Ecuador is known to support diplomatic asylum,[5] and the Ecuadorian President stated that the decision to grant Assange diplomatic asylum is *"a sovereign decision protected by international law."*[6] The United Kingdom ("UK"), on the other hand, does not recognise diplomatic asylum in international law and generally rejects the practice.[7] Therefore, the UK refused

[1] Mohammed Abbas and Eduardo Garcia, 'Ecuador grants asylum to Assange, angering Britain' (Reuters, 17 August 2012) <www.reuters.com/article/us-wikileaks-assange-idUSBRE87F0KQ20120817> accessed on 4 May 2022.
[2] Alan Rusbridger, 'WikiLeaks: The Guardian's role in the biggest leak in the history of the world' (The Guardian, 28 January 2011) <www.theguardian.com/media/2011/jan/28/wikileaks-julian-assange-alan-rusbridger> accessed on 4 May 2022.
[3] Mohammed Abbas and Eduardo Garcia, 'Ecuador grants asylum to Assange, angering Britain' (Reuters, 17 August 2012) <www.reuters.com/article/us-wikileaks-assange-idUSBRE87F0KQ20120817> accessed on 4 May 2022.
[4] X, 'UK: Refusal by Supreme Court to grant Assange right to appeal is "a blow for justice"' (Amnesty International, 14 March 2022) <www.amnesty.org/en/latest/news/2022/03/uk-refusal-by-supreme-court-to-grant-assange-right-to-appeal-is-a-blow-for-justice> accessed on 4 May 2022.
5 UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [27].
6 Mohammed Abbas and Eduardo Garcia, 'Ecuador grants asylum to Assange, angering Britain' (Reuters, 17 August 2012) <www.reuters.com/article/us-wikileaks-assange-idUSBRE87F0KQ20120817> accessed on 4 May 2022.
[7] Foreign Secretary William Hague, 'Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange' (UK Foreign Secretary, 16 August 2012) <www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange> accessed on 8 March 2022.

to grant Assange safe passage out of the country.[8] Eventually, on 11 April 2019, Assange's stay at the Ecuadorian embassy ended when he was arrested by the British Metropolitan police after being invited to do so by the Ecuadorian ambassador.[9] In December 2021, the UK High Court permitted the extradition of Assange to the US, declaring the US assurances that he would not face severe treatment sufficient.[10]

3. The case of Assange is not an isolated case, there are multiple examples of States granting diplomatic asylum in the twentieth and twenty-first centuries. Only two months earlier in April, Chinese civil rights activist Chen Guangcheng sought protection in the US embassy in Beijing.[11] Guangcheng and his family were issued US visas and travelled to the US despite protests by the Chinese government.[12] The practice of diplomatic asylum has also not been absent from international jurisprudence. Indeed, the International Court of Justice ("ICJ") has been confronted with three contentious cases on diplomatic asylum.

4. Nevertheless, there has always been a degree of vagueness, inconsistency and controversy surrounding diplomatic asylum.[13] States have differentiating opinions regarding the legality of the practice and the international community cannot seem to agree on a binding legal instrument regulating diplomatic asylum.[14] This is due to the fact that diplomatic asylum interferes with the territorial sovereignty of the receiving State. Concludingly, a large majority of academic commentators argue that there is no right to grant diplomatic asylum under general public international law.

5. However, international law is subject to evolutions and, consequently, a study on the practice of diplomatic asylum is particularly valuable in order to assess whether diplomatic asylum has evolved into a more accepted practice. For example, while operating on the world stage, States need to increasingly take into consideration their obligations under international human rights law. While the traditional discussion of diplomatic asylum focused solely on States' reciprocal obligations, under current international law, it is no longer conceivable to disregard any human rights that an individual may assert against the granting State. Thus, human rights obligations can affect States' policy on diplomatic asylum and can strengthen the legitimacy of granting diplomatic asylum.

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[8] *Ibid.*

[9] Caroline Davies, Simon Murphy and Damien Gayle, 'Julian Assange faces US extradition after arrest at Ecuadorian embassy' (The Guardian, 12 April 2019) <www.theguardian.com/uk-news/2019/apr/11/julian-assange-arrested-at-ecuadorian-embassy-wikileaks> accessed on 16 April 2022.

[10] X, 'Julian Assange is dealt a legal blow as he fights extradition to the U.S.' (NPR, 14 March 2022) <www.npr.org/2022/03/14/1086495981/julian-assange-extradition> accessed on 4 May 2022.

[11] Jonathan Watts, 'Chen Guangcheng 'safe' in US embassy' (The Guardian, 27 April 2012) <www.theguardian.com/world/2012/apr/27/chen-guangcheng-safe-american-embassy> accessed on 6 May 2022.

[12] X, 'US expects dissident Chen Guangcheng to leave China soon' (BBC, 4 May 2012) <www.bbc.com/news/world-asia-17958429> accessed on 6 May 2022.

[13] René Värk, 'Diplomatic Asylum: Theory, Practice and the Case of Julian Assange' [2015] 11 Sisekaitseakadeemia Toimetised 240 ("Värk"), 241.

[14] Paul Behrens (ed), *Diplomatic Law in a New Millennium* (OUP 2017), 10.

6. This work will try to provide an answer to the question: "What is the legal status of diplomatic asylum in contemporary public international law, and how does the increasing importance of human rights law affect the traditional approach of international law to this practice?" The study will mainly be conducted through a literature review by analysing sources of general international law, as per Article 38(1) of the Statute of the ICJ[15], with specific attention to diplomatic law and international human rights law. In order to examine State practice and *opinio juris* concerning diplomatic asylum, news articles and government statements will also be consulted. These sources are predominantly in English, and on occasion sources in French will be consulted.

7. Although diplomatic asylum can be granted outside embassies, such as *inter alia* in consulates or on ships, the scope of this work is limited to the practice of diplomatic asylum in embassies. Additionally, only the right of States to grant diplomatic asylum will be examined, not the individual's right to demand such action by a State. The practice of international organisations concerning diplomatic asylum also falls outside the scope of this paper.

8. The first part of this workwill illustrate the institution of diplomatic asylum in international law (Chapter II). Specifically, the history (section a) and current international legal framework (section b) will be discussed. The Chapter ends with an examination of the jurisprudence concerning diplomatic asylum (section c). This section will contain case law from international, regional and national courts.

9. Chapter III and IV examine possible legal bases in international law that can be used to justify an act of diplomatic asylum. As the ICJ ruled that diplomatic asylum constitutes a derogation from the sovereignty of the receiving State, a legal basis must be provided at all times in order for diplomatic asylum to be legitimate. Two approaches in international law on this issue can be distinguished. On the one hand, there is the traditional approach in which the States and their obligations to each other are central. In Chapter III, this traditional view is explored by examining diplomatic law (section a), Latin American practice (section b) and the nature of diplomatic asylum in customary international law (section c).

10. On the other hand, a possibly innovative approach in which the individual plays a central role can be adopted. Key to this approach is the increasing importance of human rights in international law. Therefore, in Chapter IV, humanitarian considerations (section a) and human rights obligations (section b) will be studied.

2. THE INSTITUTION OF DIPLOMATIC ASYLUM IN INTERNATIONAL LAW

[15] Article 38(1) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153 ("Statute of the ICJ").

11. This Chapter will examine the current legal status of diplomatic asylum in public international law. It will do so by first analysing the history of diplomatic asylum, after which diplomatic asylum and its consequences will be examined in more detail, followed by jurisprudence concerning diplomatic asylum.

2.1. A BRIEF HISTORY OF THE PRACTICE OF DIPLOMATIC ASYLUM

12. Prior to the practice of diplomatic asylum as we know it now, it was customary in Greece to grant protection in religious temples to persons seeking refuge due to the sacred nature of those places.[16] The asylum was granted on the basis of a divine right and a fear of divine repercussions if those religious enclosures would be violated.[17] Therefore, the asylum was not based on any humanitarian considerations nor any moral or legal principles.[18]

13. With the emergence of Christian temples, individuals could seek refuge there based on two reasons.[19] Firstly, there was a respect for the priest who intervened on behalf of the persecuted person and, secondly, the sacred nature of the building meant that the building was inviolable.[20] Consequently, the practice of religious asylum became very widespread.[21]

14. However, due to the rise of sovereign States and the establishment of permanent diplomacy in Europe in the sixteenth century, the practice of religious asylum slowly diminished and diplomatic asylum became more prominent.[22] This was motivated due to the principle of inviolability of the ambassador's dwelling.[23] The ambassador's dwelling could be used to receive persons sought by the territorial State, consequently evading domestic jurisdiction.[24] The practice grew considerably as the inviolability of the ambassador's dwelling was extended to the surrounding areas, this was known as "*franchise du quartier*".[25]

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16 *The institution* of asylum and its recognition as a human right in the Inter-American system of protection, Advisory Opinion OC-25/18, IACtHR Series A No. 25 (30 May 2018) ("Asylum Advisory Opinion"), [72].

17 Asylum Advisory Opinion, [72]; Susanne Riveles, 'Diplomatic Asylum as a Human Right: The Case of the Durban Six' [1989] 11 Human Rights Quarterly 139 ("Riveles"), 143.

18 Asylum Advisory Opinion, [72].

19 Ibid., [73]; Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law' in Islam and Bhuiyan (eds), An Introduction to International Refugee Law (Brill Nijhoff 2013), 134.

20 Asylum Advisory Opinion, [73].

21 Laura Hughes-Gerber, Diplomatic Asylum: Exploring a Legal Basis for the Practice Under General International Law (Springer 2021) ("Hughes-Gerber"), 32.

22 Asylum Advisory Opinion, [75]; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 401.

23 Asylum Advisory Opinion, [75]; United Nations General Assembly ("UNGA"), 'Question of Diplomatic Asylum. Report of the Secretary-General' (1975) UN Doc. A/10139 (Part II) ("UNGA, Question of Diplomatic Asylum Part II"), [2].

24 Hughes-Gerber, 33.

25 Asylum Advisory Opinion, [76]; Eileen Denza, 'Diplomatic Asylum' in Zimmermann and others (eds), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (OUP 2011) ("Denza, Diplomatic asylum"), 1427.

15. Law and custom started providing a legal basis for diplomatic asylum.[26] For example, in 1554, a Venetian Statute stipulated that "he who has taken refuge in the house of a diplomat shall not be followed there, and his pursuers are to feign ignorance of his presence."[27] Additionally, Charles the Fifth stated "may the houses of ambassadors provide inviolable asylum, as did formerly the temples of the gods, and may no one be permitted to violate this asylum on any pretext whatever."[28]

16. In 1601, Pope Clement VIII provided the practice of diplomatic asylum a greater degree of legitimacy by delivering an arbitral award regarding a conflict between France and Spain.[29] Spanish soldiers stormed the French embassy in Madrid to seize several Frenchmen who had killed Spanish soldiers.[30] The Spanish authorities arrested the Frenchmen despite the ambassador's protests.[31] The Pope, appointed as an arbitrator in the dispute, found in favour of France and facilitated the handover of the arrested Frenchmen from Spain.[32]

17. The principle of diplomatic asylum became recognised by legal writers as well.[33] The legal basis for diplomatic asylum was grounded on the idea of extraterritoriality.[34] This theory denotes that the official premises of a diplomatic mission in the receiving State are considered part of the sending State's territory.[35] Grotius, considered one of the founding fathers of international law, referred to the principle of extraterritoriality to legitimise diplomatic asylum:

> *"I am fully persuaded, therefore, that nations have seen fit, in the case of the person of ambassadors, to make an exception to the universally accepted custom of regarding all foreigners who are present in the territory under the jurisdiction of a State as subject to the laws of the country. Hence, according to the law of nations, since an ambassador represents by some kind of fiction the actual person of his master, he is regarded, by a similar fiction, as being outside the territory of the Power to which he has been assigned to discharge his functions."*[36]

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26 UNGA, Question of Diplomatic Asylum Part II, [2].
27 Ibid., [2].
28 Egidio Reale, 'Le droit d'asile' [1938] 1 Recueil des cours de l'Academie de droit international 511, 513.
29 UNGA, Question of Diplomatic Asylum Part II, [2], [4]; Hughes-Gerber, 35.
30 UNGA, Question of Diplomatic Asylum Part II, [4].
31 Ibid.
32 Ibid.; Hughes-Gerber, 35.
33 UNGA, Question of Diplomatic Asylum Part II, [2].
34 Prakash Shah, 'Asylum, Diplomatic' (Max Planck Encyclopedias of Public International Law) (online edition) ("MPEPIL") (2007), [3]; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 402.
35 This theory has been rejected and can therefore no longer form a legal basis for diplomatic asylum. Anthea J. Jeffery, 'Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights' [1985] 1 South African Journal on Human Rights 10 ("Jeffery"), 13; Biswanath Sen, A Diplomat's Handbook of International Law and Practice (Nijhoff 1988), 357.
36 UNGA, Question of Diplomatic Asylum Part II, [2].

18. Diplomatic asylum was granted to common criminals,[37] but resistance remained when the individual in question had acted against the sovereign or the public welfare.[38] The same Venetian Statute of 1554 specified that it only applied when the offender had committed a common crime.[39] An incident in 1540, when magistrates of the Republic of Venice accused of high treason found refuge in a French embassy in the Republic, showcased this.[40] Venice maintained that asylum cannot be granted for the crime of treason and used threats to demand the surrender of the magistrates.[41] This demand was eventually met.[42]

19. Nevertheless, conflicts regarding the diplomatic mission's prerogatives led to a decline of diplomatic asylum in the seventeenth century.[43] This was largely due to the abuse of the *franchise du quartier*.[44] As the *franchise du quartier* implied that an entire quarter in a city became exempt from local jurisdiction, that quarter became a safe haven for criminals.[45] Consequently, it became harder for the local authorities to arrest these offenders as they needed the ambassador's permission to enter.[46] Accordingly, this made the practice harder to tolerate as it was considered a threat to a State's sovereignty.[47]

20. Therefore, at the end of the seventeenth century, the Spanish King determined that, from then on, the exclusion from Spanish jurisdiction would be restricted to the ambassador's dwellings only.[48] Likewise, Pope Innocent XI persuaded England, Poland, Austria, the Republic of Venice and Spain to agree to the abolition of the *franchise du quartier* in Rome.[49] France was harder to convince but, after the death of Pope Innocent XI, finally agreed.[50]

21. Still, incidents of diplomatic asylum in ambassador's dwellings remained in the eighteenth century. For example, in 1726, after being accused of breaking the trust of his position, Philip V of Spain's Minister for Finance and Foreign Affairs, the Duke of Ripperda, was granted asylum in the residence of the British ambassador in Madrid.[51] From the nineteenth century onwards, diplomatic

37 Asylum Advisory Opinion, [76]; Denza, Diplomatic asylum, 1427; Egidio Reale, 'Le droit d'asile' [1938] 1 Recueil des cours de l'Academie de droit international 511, 513.
38 UNGA, Question of Diplomatic Asylum Part II, [3]; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 401.
39 UNGA, Question of Diplomatic Asylum Part II, [3]; Egidio Reale, 'Le droit d'asile' [1938] 1 Recueil des cours de l'Academie de droit international 511, 513.
40 UNGA, Question of Diplomatic Asylum Part II, [3].
41 Ibid
42 Ibid.
43 Ibid., [5]; Hughes-Gerber, 35; Denza, Diplomatic asylum, 1427.
44 UNGA, Question of Diplomatic Asylum Part II, [5]; Hughes-Gerber, 35.
45 Ibid.
46 UNGA, Question of Diplomatic Asylum Part II, [5].
47 Ibid.
48 Ibid., [6].
49 UNGA, Question of Diplomatic Asylum Part II, [6]; Denza, Diplomatic asylum, 1427.
50 UNGA, Question of Diplomatic Asylum Part II, [6].
51 Ibid., [7]; C. Neale Ronning, Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations (Martinus Nijhoff 1965) ("Ronning"), 12.

asylum almost ceased to exist, except in political turbulences.[52] During the 1862 revolution in Greece, refuge was given in legations and consulates to persons in danger.[53] Similarly, during the revolution of 1910 in Portugal, asylum was given to supporters of the old regime in some legations.[54] Additionally, diplomatic asylum assumed a new characteristic. Formerly, diplomatic asylum was often granted to individuals accused or convicted of common crimes. Now, individuals accused or convicted of political offences were the recipients of diplomatic asylum.[55]

22. Despite the decline of the practice of diplomatic asylum in Europe, it evolved more in Latin America due to the emerging independence of Latin American States and the instability of their governments.[56] Diplomatic asylum became incorporated in Latin American legislation and multilateral and bilateral treaties regulating asylum for politically persecuted persons were adopted.[57]

23. In the twentieth and twenty-first centuries, incidents of diplomatic asylum remained.[58] Most striking, during the Spanish Civil War (1936 to 1939), asylum was granted to thousands by both Latin American and European diplomatic missions.[59]

2.2. THE CURRENT LEGAL STATUS OF DIPLOMATIC ASYLUM IN INTERNATIONAL LAW

24. In order to examine the status of diplomatic asylum in contemporary international law, it is essential to clarify the meaning and legal consequences of diplomatic asylum. Due to the lack of codification on diplomatic asylum, this must be examined based on patterns and consensus found in academic commentary and decisions stemming from case law.

2.2.1. What is diplomatic asylum?

25. For the purposes of determining what diplomatic asylum is, the meaning of "asylum" must be established first. There is no universally recognised definition of asylum in international law.[60] The institution of asylum generally entails protection granted by a State on its territory or in another place under its control

52 UNGA, Question of Diplomatic Asylum Part II, [10]; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 402.
53 UNGA, Question of Diplomatic Asylum Part II, [10].
54 Ibid.
55 John Basset Moore, A Digest of International Law Vol. II (Washington Government Printing Office, 1906), 773.
56 Asylum Advisory Opinion, [77]; Jeffery, 14.
57 Asylum Advisory Opinion, [77], [78]; Denza, Diplomatic asylum, 1428. See infra Chapter III.b.
58 See infra Chapter III.c.ii.1.
59 Antonio Manuel Moral Roncal, 'An Analysis of Foreign Diplomatic Aid to the Catholic Clergy during the Spanish Civil War (1936–1939)' [2013] 4(1) Religions ("Roncal"), 101.
60 Asylum Advisory Opinion, [64]-[65]; John Basset Moore, A Digest of International Law Vol. II (Washington Government Printing Office, 1906), 755.

to a person who seeks it.[61] This meaning provides that asylum can be accorded within a State's territory, as well as outside a State's territory. The former is referred to as "territorial asylum", the latter as "extraterritorial asylum" or "diplomatic asylum".[62]

26. It is also important to note that an asylum seeker differs from a refugee. Both terms are closely linked, yet distinct. An asylum seeker entails a broader group of people, covering all persons seeking asylum.[63] Whereas a refugee is an individual who satisfies all criteria laid down in Article 1(A)(2) of the Refugee Convention and is not subject to one of its exclusion provisions.[64] Under this definition, a person is a refugee if they have a:

> *"Well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*[65]

27. Now that the meaning of various terms has been illustrated, it is possible to examine the meaning of diplomatic asylum in more detail. Diplomatic asylum in a broad sense is the practice of "asylum granted by a State outside its territory, particularly in its diplomatic missions, in its consulates, on board its ships in the territorial waters of another State, and also on board its aircraft and of its military or para-military installations in foreign territory."[66] Indeed, a State extends its sovereign rights to grant asylum within the territory of another State. The State in whose territory diplomatic asylum is sought is known as the receiving State, the State in whose diplomatic premises asylum is granted is called the sending State. International organisations cannot grant diplomatic asylum.[67]

28. As established above, this form of asylum differs from territorial asylum which entails an exercise of the sovereign right of a State to grant asylum within

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[61] Article 1 L'Institut de Droit international, 'L'asile en droit international public (à l'exclusion de l'asile neutre), Session de Bath', (1950); Atle Grahl-Madsen, The Status of Refugees in International Law Vol. II (A.W. Sijthoff's Uitgeversmaatschappij 1972) ("Grahl-Madsen"), 3; Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law' in Islam and Bhuiyan (eds), An Introduction to International Refugee Law (Brill Nijhoff 2013), 133; Hughes-Gerber, 19.

[62] Grahl-Madsen, 5.

[63] Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law' in Islam and Bhuiyan (eds), An Introduction to International Refugee Law (Brill Nijhoff 2013), 133.

[64] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Advisory Opinion) [2007] UNHCR ("UNHCR Advisory Opinion"), [6].

[65] Article 1(A)(2) Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ("Refugee Convention").

[66] UNGA, Question of Diplomatic Asylum Part II, [1].

[67] As indicated by Section 9(b) Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations (adopted 26 June 1947, entered into force 21 October 1947) 147 UNTS 11.

its own territory.[68] Therefore, diplomatic asylum and territorial asylum call for a different set of rules. Diplomatic asylum must also be differentiated from political asylum. Political asylum refers to a sovereign State granting territorial asylum to an individual who is sought for political reasons by the authorities of their State of nationality or of the State in which they reside at the time of being granted political asylum.[69]

29. Additionally, although diplomatic asylum can be viewed as a form of diplomatic protection, they are still two different concepts. According to Article 1 of the Draft Articles on Diplomatic Protection, *"diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."*[70] Diplomatic protection is generally exercised by the State of nationality, while diplomatic asylum mostly consists of cases where a State grants asylum to a non-national.[71]

30. States may grant diplomatic asylum for various reasons, such as humanitarian or political motivations.[72] Ultimately, in cases of diplomatic asylum, a balance between the receiving and sending States' rights needs to be achieved.[73]

2.2.2. Codification attempts

31. There is, currently, no universal convention in international law governing diplomatic asylum.[74] Besides in Latin America,[75] global attempts to codify the concept of diplomatic asylum have been unsuccessful.[76] Thus, the UK was

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[68] UNGA, Question of Diplomatic Asylum Part II, [1]; Prakash Shah, 'Asylum, Diplomatic' MPEPIL (2007), [1].
[69] Hughes-Gerber, 25.
[70] International Law Commission ("ILC"), 'Draft Articles on Diplomatic Protection with commentaries' (2006), Article 1.
[71] Asylum Advisory Opinion, [67]; Hughes-Gerber, 24.
[72] Angela M. Rossitto, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis' [1987] 13(1) Brooklyn Journal of International Law 111 ("Rossitto"), 113; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 400.
[73] Felice Morgenstern, 'Extra-Territorial Asylum' [1948] 25 British Yearbook of International Law 236, 236.
[74] Asylum (Colombia v. Peru) (Judgement) [1950] ICJ Rep 266 ("Asylum (Colombia v. Peru)"), 274; Prakash Shah, 'Asylum, Diplomatic' MPEPIL (2007), [1]; Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law (4th edn, OUP 2021) ("Goodwin-Gill and McAdam, The Refugee in International Law (4th edn)"), 324; Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law' in Islam and Bhuiyan (eds), An Introduction to International Refugee Law (Brill Nijhoff 2013), 138-139.
[75] See infra Chapter III.b. for an extensive analysis of the Latin American treaty framework on diplomatic asylum.
[76] Maarten den Heijer, Europe and Extraterritorial Asylum (Bloomsbury Publishing 2012) ("den Heijer"), 109; Värk, 248.

entirely correct to claim that it was not bound by any legal instrument requiring it to recognise diplomatic asylum in the Assange case.[77]

32. The issue of diplomatic asylum has been put on the agenda of the United Nations ("UN") General Assembly and the International Law Commission ("ILC") several times, nevertheless, States are reluctant to adopt a positivist approach on diplomatic asylum.[78]

33. In 1974, Australia requested the inclusion of the topic of diplomatic asylum on the agenda of the twenty-ninth session of the UN General Assembly.[79] This request was granted, and, on 14 December 1974, after consideration by the Sixth Committee, the UN General Assembly adopted Resolution 3321 (XXIX).[80] This Resolution invited the Member States to express their views on diplomatic asylum, and requested the Secretary-General to prepare a report analysing diplomatic asylum.[81]

34. In 1975, the Secretary-General delivered the report consisting of two parts. The first part contained the views expressed by Member States concerning diplomatic asylum, the second part addressed relevant legal issues concerning diplomatic asylum. Part I of the report established that only seven of the twenty-five States who submitted their views were in favour of drawing up an international convention on the topic.

35. The report noted that most delegations, such as Israel, the Soviet Union and Hungary, rendered international practice insufficiently developed in order to draft a convention on the existing rules in international law.[82] Japan, Germany and France noted that it was 'unrealistic and imprudent' to attempt to create universal rules on an institution which was contained to only Latin America.[83] Other States further pointed out that a set of rigid rules on diplomatic asylum would limit the flexibility States currently enjoy when granting diplomatic asylum.[84] Consequently, the UN General Assembly decided *"to continue*

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[77] Foreign Secretary William Hague, 'Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange' (UK Foreign Secretary, 16 August 2012) <www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange> accessed on 8 March 2022.

[78] Asylum Advisory Opinion, [116]; den Heijer, 109; Värk, 248.

[79] UNGA, 'Question of Diplomatic Asylum. Report of the Secretary-General' (1975) UN Doc. A/10139 (Part I) ("UNGA, Question of Diplomatic Asylum Part I"), 3.

[80] UNGA Res 3321 (XXIX) (14 December 1974) UN Doc. A/RES/3321; UNGA, Question of Diplomatic Asylum Part I, 3.

[81] UNGA, Question of Diplomatic Asylum Part I, 3.

[82] UNGA, Question of Diplomatic Asylum Part II, [242]-[243].

[83] Ibid., [242].

[84] See UNGA, Question of Diplomatic Asylum Part I, 23, 15. For example, France stated "France is among the States which consider that the formulation of rigid rules on this subject might run counter to the humanitarian concerns (...)". Belgium further considered that it "is not convinced that it would be useful to draw up a legal instrument on principles governing the practice of diplomatic asylum. Such an instrument might minimize or have too repressive an effect on the humanitarian motivation and the personal interpretation of certain factors."

studying this matter at a future session of the General Assembly" by its Resolution 3497 (XXX)[85] but this has not (yet) been followed up.[86]

36. The ILC briefly addressed the question of diplomatic asylum while working on the draft articles relating to diplomatic intercourse and immunities, later the Vienna Convention on Diplomatic Asylum, but did not include a right to grant diplomatic asylum.[87]

37. There were also efforts by non-governmental organisations, such as the Institute of International Law[88] and the International Law Association[89], to develop and codify international law on diplomatic asylum, but these did not lead to significant results.[90]

2.2.3. Legal consequences

38. International law does not recognise a general right to grant diplomatic asylum as the practice is considered to constitute a derogation from the sovereignty of the receiving State.[91] It withdraws the individual from the jurisdiction of the receiving State and constitutes a possible intervention in the internal affairs of said State.[92] Therefore, in the 1950 *Asylum* case, the ICJ held that a legal basis is required in each particular case in order to recognise diplomatic asylum.[93] This legal basis can be provided through treaties or established custom.[94]

39. Conversely, the ICJ stated that territorial asylum is the *"normal exercise of the territorial sovereignty"* as *"the refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State."*[95]

40. The principle of diplomatic asylum is consequently at odds with the diplomatic duty of non-interference. Intervention in the internal affairs of the receiving State by the diplomats of the sending State is prohibited by Article 41(1) of the Vienna Convention on Diplomatic Relations ("VCDR").[96] At the

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[85] UNGA Res 3497 (XXX) (15 December 1975) UN Doc. A/RES/3497.
[86] den Heijer, 109; Värk, 248.
[87] UNGA, Question of Diplomatic Asylum Part II, [172]. See infra Chapter III.a. for more information.
[88] The Institute of International Law adopted a resolution 'Asylum in public international law (excluding neutral asylum)' in 1950.
[89] The International Law Association adopted a draft Convention on Diplomatic Asylum in 1972.
[90] Värk, 249.
[91] Asylum (Colombia v. Peru), 274, 275; Värk, 244; Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [1].
[92] Asylum (Colombia v. Peru), 275.
[93] Asylum (Colombia v. Peru), 275.
[94] Robert Jennings and Arthur Watts, *Oppenheim's international law* (9th edn, Addison Wesley Longman Inc 1996) ("Jennings and Watts, *Oppenheim's international law*"), 1083; Grahl-Madsen, 46.
[95] Asylum (Colombia v. Peru), 274.
[96] Article 41(1) Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 ("VCDR").

same time, it has been put forth that acquiescence or approval of the receiving State to the grant of diplomatic asylum makes the act legal.[97] Furthermore, practice and legal doctrine have upheld that, in exceptional circumstances, a State can refuse to hand over asylum seekers without violating their international law duties if doing so was necessary to prevent a serious injury.[98] This approach is rooted in the idea that the sending State must balance their respect for the receiving State's sovereignty and their obligations under human rights law.[99]

41. Additionally, there is no obligation under international law for the head of a mission to prevent a person from entering and taking sanctuary within the premises of the mission.[100] Indeed, in the *Asylum* case, the ICJ judged that an ambassador was not at fault for granting asylum.[101]

42. In the successive case of the *Asylum* case, the *Haya de la Torre* case[102], the ICJ decided that a State granting irregular asylum is not obligated to surrender the diplomatic asylee to the local authorities.[103] Even if the asylum must cease, there is no obligation to do this by surrendering the individual to the receiving State.[104]

43. It should also be noted that most States agree that diplomatic asylum is not possible for common criminals.[105] Accordingly, diplomatic asylum is mostly reserved for individuals accused or convicted of political crimes.[106] However, there is no consensus on what entails a political crime.[107] The ICJ held in the *Asylum* judgement that the sending State can provisionally determine the nature of the offence but this is subject to contestation by the receiving State.[108]

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[97] Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 409; Grahl-Madsen, 46; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Nijhoff 1988), 348; Kate Ogg, 'Protection closer to home? A legal case for claiming asylum at embassies and consulates' [2014] 33(4) Refugee Survey Quarterly 81 ("Ogg"), 104; Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 362.

[98] *R (B & Others) v SSFCA* [2004] EWCA Civ 1344 ("R (B & Others)"), [89]; Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 362; Riveles, 158.

[99] Felice Morgenstern, 'Extra-Territorial Asylum' [1948] 25 British Yearbook of International Law 236, 236. See *infra* Chapter IV.

[100] Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Nijhoff 1988), 360; Jennings and Watts, *Oppenheim's international law*, 1083.

[101] Asylum (Colombia v. Peru), 287.

[102] *Haya de la Torre (Colombia v. Peru)* (Judgement) [1951] ICJ Rep 71 ("Haya de la Torre (Colombia v. Peru)").

[103] Haya de la Torre (Colombia v. Peru), 81.

[104] *Ibid.,* 82.

[105] Asylum (Colombia v. Peru) (Dissenting opinion Judge Alvarez), 291; United Nations, 'Codification of the International Law Relating to Diplomatic Intercourse and Immunities Memorandum prepared by the Secretariat' (1956) UN Doc. A/CN.4/98, [300]; Värk, 245; UNGA, Question of Diplomatic Asylum Part II, [236]; UNGA, Question of Diplomatic Asylum Part I, 13, 24; Peter Porcino, 'Toward Codification of Diplomatic Asylum' [1976] 8 New York University journal of international law and politics 435 ("Porcino"), 437.

[106] Jeffery, 14; Värk, 245.

[107] Porcino, 452; Jeffery, 21.

[108] Asylum (Colombia v. Peru), 274.

44. Furthermore, diplomatic asylum often occurs in combination with the practice of safe conduct.[109] Safe conduct ensures that the individual seeking protection in an embassy can leave the receiving State by virtue of protection guarantees afforded by the government of the receiving State.[110] The decision to grant safe conduct depends on the circumstances in each particular case. Nevertheless, safe conduct is often the ultimate goal of diplomatic asylum and can turn the practice into territorial asylum.[111]

45. Finally, even if States would have the right to grant diplomatic asylum, this would not necessarily entail a right for an individual to request such asylum.[112]

2.3. RELEVANT JURISPRUDENCE CONCERNING DIPLOMATIC ASYLUM

46. This section discusses three prominent legal cases relating to diplomatic asylum. Interestingly, these cases originate from an international court, a regional court and a domestic court.

2.3.1. The 1950 Asylum judgement by the International Court of Justice

47. The ICJ had a chance to decide upon the matter of diplomatic asylum in the *Asylum* case of 1950. This judgement led to a series of two other cases brought before the Court.[113] In these cases, the Court primarily focused on the practice and legal rules of diplomatic asylum in Latin America, however, it also made several findings applicable to diplomatic asylum in general.

a. Summary of the facts

48. A military rebellion broke out in Peru on 3 October 1948, which was stifled on the same day.[114] The next day, the Peruvian President issued a decree charging the American People's Revolutionary Alliance, a political party, with organising and directing the rebellion.[115] Víctor Raúl Haya de la Torre, leader of the American People's Revolutionary Alliance, and other members of the party were held responsible and were charged with the crime of military rebellion.[116]

49. On 3 January 1949, Colombia granted diplomatic asylum to Haya de la Torre in its embassy in Lima, Peru.[117] Colombia recognised Haya de la Torre as

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[109] Porcino, 454; Riveles, 152, 159; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 404.
[110] James Kraska, 'Safe Conduct and Safe Passage' *MPEPIL* (2009), [1]; Porcino, 454.
[111] Porcino, 438; Riveles, 159.
[112] Ogg, 83; Hughes-Gerber, 18; Porcino, 438.
113 Request for interpretation of the Judgement of November 20th, 1950, in the asylum case (Colombia v. Peru) (Judgement) [1950] ICJ Rep 395 and Haya de la Torre (Colombia v. Peru).
114 Asylum (Colombia v. Peru), 272.
115 Ibid.
116 Ibid.
117 Ibid., 273.

a political offender and, according to the provisions of the 1928 Havana Convention on Asylum[118] ("Havana Convention"), the Colombian ambassador informed the Peruvian Minister for Foreign Affairs and Public Worship of the afforded asylum to Haya de la Torre in its embassy and requested the Minister to guarantee safe conduct so that Haya de la Torre could leave Peru.[119]

50. However, the Peruvian government refused to grant safe conduct and argued that it was under no obligation to accept the unilateral qualification of the offence by Colombia.[120] Negotiations between the two States failed, resulting in the dispute being brought before the ICJ.[121]

51. The Colombian government asked the Court to adjudge and declare that Colombia was competent to qualify the offence for the purpose of the asylum and that the receiving State, *in casu* Peru, needed to give the necessary guarantees so that Haya de la Torre could leave the country.[122] Peru initiated a counter-claim, asking the Court to adjudge and declare that the grant of diplomatic asylum by Colombia to Haya de la Torre constitutes a violation of the 1928 Havana Convention.[123]

b. Judgement

52. In its judgement, the Court addressed the two Colombian submissions separately. Regarding the first submission on Colombia's ability to qualify the offence, the Court held that Colombia cannot unilaterally and definitively decide on the qualification of the offence.[124] Indeed, the sending State can make a provisional qualification of the alleged offence committed by the individual as to determine whether the conditions for asylum are fulfilled, though, the receiving State retains the right to contest this qualification.[125]

53. Colombia's argument that it can make a binding decision on Peru concerning the qualification was based on legal rules originating from agreements and custom.[126] Firstly, Colombia relied on Articles 18 and 4 of the 1911 Bolivarian Agreement on Extradition.[127] Article 18 of the Bolivarian Agreement stipulates:

> *"Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law."*

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118 Havana Convention on Asylum (adopted 20 February 1928, entered into force 21 May 1929) 132 LNTS 323 ("Havana Convention").
119 Asylum (Colombia v. Peru), 273.
120 UNGA, Question of Diplomatic Asylum Part II, [91].
121 Ibid.; Riveles, 149.
122 Asylum (Colombia v. Peru), 269, 271.
123 Ibid., 270-271.
124 *Ibid.*, 278.
125 *Ibid.*, 274.
126 *Ibid.*
127 *Ibid.*, 274-277.

54. However, the Court stressed that the principles of international law do not recognise any rule of unilateral and definitive qualification by the State granting diplomatic asylum.[128] The other argument presented by Article 4 of the Bolivarian Agreement concerns extradition of a criminal refugee, which, according to the Court, showed confusion between territorial asylum (extradition) and extraterritorial asylum:

> *"In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.*
>
> *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."*[129]

55. To substantiate its arguments further, the Colombian government also referred to the 1928 Havana Convention which addresses diplomatic asylum but does not address the qualification of an offence by the State granting asylum.[130] Nevertheless, Colombia argued that this competence is implied and inherent to the institution of asylum.[131] However, the Court judged that this is not the case, declaring:

> *"A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum."*[132]

56. Furthermore, Colombia argued that regional custom on the matter existed in Latin America.[133] On this point, the Court held that it fell upon the Party relying on the custom to prove that there is constant and uniform regional usage of the rule in question.[134] Neither the conventions invoked by Colombia, nor the large number of cases of diplomatic asylum it had cited established the existence

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[128] *Ibid.*, 274.
[129] Asylum (Colombia v. Peru), 274-275.
[130] *Ibid.*, 275.
[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*, 276.
[134] *Ibid.*

of such a custom.[135] Upon the assessment of the treaties and practice invoked by Colombia, the Court concluded that these show so much uncertainty and contradiction, that it is not possible to determine constant and uniform usage, which is accepted as law, with regard to the alleged rule of unilateral qualification of the offence.[136]

57. *Vis-à-vis* Colombia's second submission concerning the necessary guarantees for Haya de la Torre to leave the country, the Court decided that a State who has received a request of safe conduct is not legally bound to consent to it.[137]

58. With regard to Peru's counter-claim, Peru claimed that Colombia violated two different provisions of the Havana Convention: Article 1(1), which provides that States cannot grant diplomatic asylum to persons accused or condemned of common crimes[138], and Article 2(2), which requires an element of urgency to justify diplomatic asylum[139].[140] The Court quickly dismissed Peru's first objection, relating to Article 1(1) Havana Convention, as Peru failed to establish that the crime of military rebellion is a common crime.[141]

59. As to the second objection pertaining to a possible violation of Article 2(2) Havana Convention, the Court agreed that there was no imminent danger on 3 January 1949 when the Colombian ambassador granted diplomatic asylum to Haya de la Torre.[142]

60. The Court assessed what kind of danger can function as a basis for asylum and concluded that asylum cannot be used to obstruct the operation of justice.[143] Indeed, the protection afforded by asylum cannot be understood as a shield against the regular application of the law or the jurisdiction of tribunals.[144] The protection provided by the diplomatic agent in this sense would allow him to hinder the application of the receiving State's laws, even though it is his duty no to do so.[145] Only if arbitrary action is substituted for the rule of law in the guise of justice can there be an exception to this norm.[146] This would be the case if the administration of justice was tainted by actions that were clearly motivated by political goals.[147] *In casu*, it was not established that the situation in Peru implied the abolition of judicial guarantees.[148]

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[135] *Ibid.*, 277.
[136] *Ibid.*
[137] *Ibid.*, 278-279; UNGA, Question of Diplomatic Asylum Part II, [101].
[138] Article 1(1) Havana Convention; Asylum (Colombia v. Peru), 281.
[139] Article 2(2) Havana Convention; Asylum (Colombia v. Peru), 282.
[140] Asylum (Colombia v. Peru), 281.
[141] *Ibid.*, 282.
[142] *Ibid.*, 283, 287.
[143] *Ibid.*, 284.
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*

61. For this reason, the Court found that the grant of diplomatic asylum by Colombia violated Article 2(2) of the Havana Convention as on the day that Haya de la Torre was granted diplomatic asylum, there existed no danger constituting a case of urgency pursuant to Article 2(2) of the Havana Convention.[149] Importantly, this finding did not imply that the Colombian ambassador was at fault for granting diplomatic asylum to Haya de la Torre.[150]

c. The subsequent 1951 *Haya de la Torre* case

62. After Colombia and Peru could not come to an agreement on the manner in which effect should be given to the *Asylum* case[151], Colombia instituted new proceedings on 13 December 1950.[152] Colombia asked the ICJ to determine how effect was to be given to the Court's judgement in the *Asylum* case, and whether Colombia had to surrender Haya de la Torre to the Peruvian authorities.[153]

63. The Court found that the Havana Convention fails to give a clear answer on the issue of the termination of asylum[154] and arrived to the conclusion that:

> *"the asylum must cease, but (...) the Government of Colombia is under no obligation to bring this about by surrendering the refugee to the Peruvian authorities. There is no contradiction between these two findings, since surrender is not the only way of terminating asylum."*[155]

64. According to the Court, it is not part of its judicial function to determine how the asylum must cease.[156] The Parties can base this decision on considerations of practicability or political expediency.[157]

65. Eventually on 23 March 1954, Colombia and Peru reached an agreement and Haya de la Torre was allowed to leave the Colombian embassy in Lima on 6 April 1954.[158] Haya de la Torre went to Mexico and was granted political asylum there.[159]

2.3.2. The 2018 Advisory Opinion by the Inter-American Court of Human Rights

66. On 18 August 2016, Ecuador submitted an application with the Inter-American Court of Human Rights ("IACtHR") for an advisory opinion

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[149] *Ibid.*, 287; UNGA, Question of Diplomatic Asylum Part II, [106].
[150] Asylum (Colombia v. Peru), 287.
[151] And, additionally, to Colombia's request for an interpretation of the *Asylum* judgement of 20 November 1950 which the ICJ rejected. *Request for interpretation of the Judgement of November 20th, 1950, in the asylum case (Colombia v. Peru)* (Judgement) [1950] ICJ Rep 395, 404.
[152] Haya de la Torre (Colombia v. Peru), 72.
[153] Riveles, 149.
[154] Haya de la Torre (Colombia v. Peru), 80.
[155] *Ibid.*, 82.
[156] *Ibid.*, 79.
[157] *Ibid.*
[158] Grahl-Madsen, 68.
[159] *Ibid.*; Riveles, 150.

concerning "the institution of asylum in its various forms and the legality of its recognition as a human right of all persons in accordance with the principle of equality and non-discrimination".[160]

67. Ecuador first outlined its considerations that gave rise to the request. Based on these considerations, Ecuador sought to clarify the nature and scope of the institution of asylum, including diplomatic asylum, and submitted seven questions thereto.[161]

68. Ecuador noted, among others, that:

> *"the institution of diplomatic asylum (...) was transformed into a human right following its enshrinement in various human rights instruments such as the American Convention on Human Rights (Article 22(7)[162]), and the American Declaration of the Rights and Duties of Man (Article XXVII[163]). [This is] an institution that has been specifically codified by regional treaties (...). (...)*
>
> *Ecuador considers that, when a State grants asylum or refuge, it places the protected person under its jurisdiction, either by granting him asylum in application of Article 22(7) of the American Convention on Human Rights, or by according him refugee status under the 1951 Geneva Convention.*
>
> *(...)*
>
> *[Accordingly, for Ecuador] all forms of asylum are, of necessity, universally valid, and this condition is the inevitable consequence of the universality of the legal principle of non-refoulement, the absolute nature of which covers asylum granted under a universal [1951] convention, but also asylum provided under a regional agreement or the domestic law of a State."*[164]

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[160] Asylum Advisory Opinion, [1].

[161] For a full list of the questions, see Asylum Advisory Opinion, [3]. The relevant question on diplomatic asylum stated: "Is it admissible that a State refuse asylum to a person who requests this protection in one of its diplomatic missions alleging that granting it would be misusing the premises occupied by the Embassy, or that granting it in this way would be extending diplomatic immunity unduly to a person who does not have diplomatic status, and what should be the legal consequences of these arguments on the human rights and fundamental freedoms of the person concerned, taking into account that he could be a victim of political persecution or acts of discrimination?"

[162] Article 22(7) American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ("ACHR") stipulates "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."

[163] Article XXVII American Declaration of the Rights and Duties of Man (2 May 1948) OEA/Ser.L./V.II.23, doc 21, rev 6 ("American Declaration") provides "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."

[164] Asylum Advisory Opinion, [2].

69. The request of Ecuador for an advisory opinion should be construed within the context of Ecuador granting diplomatic asylum to Julian Assange in its embassy in London, UK. The request uses general terms but refence to the UK is clear.[165]

70. In the advisory opinion, the Court first addressed the question of the right to asylum and its scope as a human right in the inter-American system, and whether this encompasses diplomatic asylum, followed by State obligations associated with diplomatic asylum.[166]

71. On diplomatic asylum, the Court recognised that it differs from territorial asylum and that, due to its nature[167], it must

> *"be compatible with other areas of international law, such as diplomatic relations and the principle of non-intervention in the internal affairs of the receiving State. In this regard, if there are no special agreements between States on the grounds of diplomatic asylum, and this is granted by the accrediting State, with the opposition of the receiving State, a dispute could arise."*[168]

72. Indeed, the rules governed by the VCDR need to be taken into account when granting diplomatic asylum.[169] However, when a diplomatic agent grants protection in its embassy to an individual suffering from imminent danger to life, security, liberty and/or integrity or persecution, this does not necessarily entail that the diplomatic premises are used in a manner incompatible with Article 41(3) VCDR as this Article incorporates other rules derived from general international law or other agreements.[170]

73. Furthermore, the Court was asked to determine whether Articles 22(7) of the American Convention on Human Rights ("ACHR") and XXVII of the American Declaration of the Rights and Duties of Man ("American Declaration") cover diplomatic asylum.[171] It came to the conclusion that the will of the drafting States was to exclude the concept of diplomatic asylum, indicating that this concept should be governed by Latin American conventions.[172] The intention not to include diplomatic asylum can be explained by the fact that the drafting States regarded diplomatic asylum as a State prerogative, giving States

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[165] Andreina De Leo and Juan Ruiz Ramos, 'Comparing the Inter-American Court opinion on diplomatic asylum applications with MN and Others v Belgium before the ECtHR' (EU Immigration and Asylum Law and Policy, 13 May 2020) <https://eumigrationlawblog.eu/comparing-the-inter-american-court-opinion-on-diplomatic-asylum-applications-with-m-n-and-others-v-belgium-before-the-ecthr> accessed on 11 April 2022.
[166] Asylum Advisory Opinion, [60], [69].
[167] Asylum Advisory Opinion, [109].
[168] *Ibid.*, [104].
[169] *Ibid.*, [105].
[170] *Ibid.*, [107].
[171] *Ibid.*, [144].
[172] *Ibid.*, [153]. See *infra* Chapter III.b for a detailed analysis of Latin American conventions on diplomatic asylum.

the discretionary power to grant or refuse it.[173] Consequently, Ecuador's belief that diplomatic asylum is enshrined in Articles 22(7) ACHR and XXVII of the American Declaration was rejected by the Court.[174]

74. After the foregoing, the Court assessed the legal framework on diplomatic asylum. It recognised that no consensus exists in public international law on the right to receive diplomatic asylum.[175] However, diplomatic asylum is considered *"a humanitarian practice for the purpose of protecting fundamental human rights (...), which has been granted for the purpose of saving lives or preventing damage to rights in the face of an imminent threat."*[176] Additionally, on the assessment of the existence of a regional custom pertaining to diplomatic asylum, the Court ruled that the requirements necessary for a rule of regional customary law were not satisfied.[177] Thus, diplomatic asylum must be governed by multilateral or bilateral agreements or domestic legislation on diplomatic asylum.[178]

75. After extensively reviewing the institution of (diplomatic) asylum in the inter-American system, the Court went on to assess the incumbent obligations upon States regarding individuals who apply for asylum in their diplomatic missions. To do this, the IACtHR first analysed the scope of human rights obligations in legations. This is a matter of jurisdiction. The Court concluded that States have jurisdiction over individuals when they are exercising control, authority or responsibility over a person.[179] Thus, a State's obligations arising from the ACHR are triggered when a personal link of jurisdiction with the individual in question is established through actions of diplomatic agents.[180]

76. To this extent, the principle of *non-refoulement* is enforceable against a State who is exercising authority or effective control over an individual.[181] This principle of *non-refoulement*, found in Article 22(8) ACHR, prohibits returning an individual to another country where they risk serious harm.[182] As the obligations pursuant to the ACHR are not limited to a State's territory, the scope of protection against *refoulement* also applies extraterritorially, obligating a State not to return an individual seeking protection in its embassy.[183] However, the Court notes, the fact that the individual cannot be returned does not imply that a State must grant diplomatic asylum, the State can also take other measures.[184]

77. Concludingly, the IACtHR's approach provides a substantial degree of protection for individuals seeking protection in embassies. Although diplomatic

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[173] Asylum Advisory Opinion, [154].
[174] *Ibid.*, [156].
[175] *Ibid.*, [155].
[176] *Ibid.*
[177] Asylum Advisory Opinion, [157]-[162].
[178] *Ibid.*, [163].
[179] *Ibid.*, [171].
[180] *Ibid.*, [177].
[181] *Ibid.*, [192].
[182] *Ibid.*, [185]. See *infra* Chapter IV.b.i for an analysis of the scope of *non-refoulement*.
[183] Asylum Advisory Opinion, [188].
[184] *Ibid.*, [198].

asylum is not protected by Articles 22(7) ACHR and XXVII of the American Declaration, States cannot return the individual to another State if there is a real risk to the life, integrity, liberty or security of the individual. Moreover, the IACtHR's approach puts forth the intersection of human rights protection with diplomatic and general international law.[185] Nevertheless, the advisory opinion is limited to the Organization of American States ("OAS").

2.3.3. The 2003 Bakhtiari Judgement by the Court of Appeal of England and Wales

78. Similarly to what was said in the Asylum Advisory Opinion of the IACtHR, although dating from 2004, this English case deals with the question whether a sending State has human rights obligations in the receiving State. It raises the question whether and in what circumstances human rights obligations require diplomatic agents to afford diplomatic asylum to fugitives whose fundamental human rights are under threat.[186]

a. Summary of the facts

79. Two brothers, Alamdar and Muntazer Bakhtiari, arrived in Australia in 2001 seeking asylum and were subsequently detained in the Woomera Detention Centre in South Australia.[187] The two boys described their experiences at the Detention Centre as traumatic. Both brothers had engaged in acts of self-harm and had been exposed to tear gas and water cannons.[188] Incidents also include being pushed into razor wire or hit by staff and being eyewitnesses to acts of self-harm and attempted suicide by other detainees.[189] They eventually escaped from Woomera Detention Centre around 29 June 2002 and on 18 July 2002, the brothers entered the British consulate in Melbourne requesting asylum and humanitarian protection.[190]

80. At the British consulate, the vice-consul brought the two brothers into his office while he sought guidance from his superiors.[191] Eventually, they were informed that there were no grounds to consider an asylum request other than in the country of first asylum and the brothers were told that they could not remain in the consulate.[192] The brothers left voluntarily and were taken into custody by the Australian authorities.[193]

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[185] Ralph Wilde, 'Diplomatic asylum and extraterritorial non-refoulement' in Mark and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021) ("Wilde"), 206.
[186] R (B & Others), [1].
[187] *Ibid.*, [5].
[188] *Ibid.*, [11]-[12].
[189] *Ibid.*
[190] *Ibid.*, [7], [8].
[191] *Ibid.*, [10], [13].
[192] *Ibid.*, [17].
[193] *Ibid.*

81. The brothers initiated proceedings before the Court of Appeal of England and Wales to seek judicial review of the decision to deny them asylum and expel them from the consular premises. They contended that they were under a real threat of a violation of Articles 3 and 5 of the European Convention on Human Rights[194] ("ECHR") and by refusing to let the applicants stay in the consulate, the consular officials were in breach of the ECHR and the 1998 UK Human Rights Act.[195]

82. The Court of Appeal of England and Wales concluded that the application raised three issues: (1) do the actions of UK diplomatic and consular officials abroad fall within the jurisdiction of the UK within the meaning of Article 1 ECHR; (2) does the UK Human Rights Act apply to the actions of the UK diplomatic and consular officials abroad; and (3) do the actions of the UK diplomatic and consular officials violate the ECHR and the Human Rights Act?[196]

b. Judgement

83. On the first issue, the Court first analysed the extraterritorial application of the ECHR through the jurisprudence of the European Court of Human Rights ("ECtHR").[197] With regard to diplomatic and consular activities, the Court had to determine whether the actions of the consular officers put the brothers subject to the extraterritorial jurisdiction of the UK for the purpose of Article 1 ECHR.[198] After an assessment of the facts *in casu*, the Court was content to assume that while in the consulate the brothers were sufficiently within the authority of the consular staff so as to be under the UK's jurisdiction.[199] This finding was not based on the mere presence of the brothers in the consulate, the decisive factor was the temporary shelter given to the brothers in the consulate and that they were assured of their safety.[200]

84. The Court drew similarities with the 1992 *W.M. v. Denmark* case[201].[202] Likewise, this case dealt with the issue of jurisdiction and whether there had been a breach of the ECHR.[203] The European Commission of Human Rights determined in that case that giving the applicant shelter and conducting negotiations on their behalf is sufficient to establish authority over the individual in order for the extraterritorial jurisdiction of Denmark to be triggered.[204]

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[194] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ("ECHR"). Article 3 provides freedom from inhuman or degrading treatment and Article 5 entails the right to liberty and security.
[195] R (B & Others), [22].
[196] R (B & Others), [25].
[197] *Ibid.*, [30]-[59].
[198] *Ibid.*, [60]-[64].
[199] *Ibid.*, [66].
[200] *Ibid.*
[201] *W.M. v. Denmark* App. No. 17392/90 (ECtHR, 14 October 1992) ("W.M. v. Denmark"),.
[202] R (B & Others), [64].
[203] The Commission eventually declared the applicant's claim inadmissible.
[204] R (B & Others), [64].

85. The second issue referred to the possible extraterritorial application of the UK Human Rights Act. Thereto, the Court held that "the Human Rights Act was capable of applying to the actions of the diplomatic and consular officials in Melbourne."[205] As this is a matter of UK law, and with the context of this work in mind, the Court's analysis on this issue will not be further discussed.

86. Lastly, the Court had to decide whether the consular officials' actions violated the ECHR and the Human Rights Act. It was clear that there was no direct violation of the ECHR by the officials. Rather, the issue at stake was whether by not allowing the applicants to stay in the consulate and by forcing them to leave, the officials exposed the applicants to a risk that the Australian authorities would treat them contrary to the rights provided by the ECHR.[206]

87. To that extent, the Court points out that it would be hard to accept that the ECHR requires States to give protection to fugitives within consular premises if this would violate international law.[207] Therefore, an assessment of diplomatic asylum within international law was required. The Court concluded:

> *"The duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving State requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction (...). Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum.*
>
> *It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum. This is an area where the law is ill-defined. (...)"*[208]

88. The facts of the case do not evidence that the perceived threat to the physical safety of the applicants, when they sought refuge in the Melbourne consulate,

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[205] *Ibid.*, [79].
[206] R (B & Others), [80].
[207] *Ibid.*, [84].
[208] *Ibid.*, [88]-[89].

was so immediate and severe that the officials could have refused to return them to the Australian authorities.[209] According to the Court, Australia is regarded as a country that upholds the rule of law, and diplomats would not expect the Australian authorities to deliberately implement or condone a regime that subjected children to inhuman and degrading treatment.[210] Furtermore, the threat of indefinite detention does not in itself suffice the justify diplomatic asylum.[211] Indeed,

> *"The applicants were not subject to the type and degree of threat that, under international law, would have justified granting them diplomatic asylum. To have given the applicants refuge from the demands of the Australian authorities for their return would have been an abuse of the privileged inviolability accorded to diplomatic premises. It would have infringed the obligations of the United Kingdom under public international law."*[212]

89. To conclude, no violation of the ECHR was established and the appeal was dismissed.[213] The Bakhtiari family was eventually deported from Australia.[214]

90. This judgement supports the idea that once jurisdiction under a human rights instrument is established, the human rights obligations pursuant to that instrument are applicable on the State. Therefore, this could provide a legal basis for diplomatic asylum. It should be noted however that the Court did not provide any authority on its conclusion that international law permits granting diplomatic asylum when the receiving State intends to subject the individual to "treatment so harsh as to constitute a crime against humanity", nor the conclusion that indefinite detention cannot provide a legal basis for diplomatic asylum.[215] The judgement also fails to provide clarity on what entails 'a lesser level of threatened harm', and was satisfied with asserting that the law is 'ill-defined'.

3. THE TRADITIONAL INTERNATIONAL LAW PERSPECTIVE ON DIPLOMATIC ASYLUM

91. As discussed above, the ICJ held in the *Asylum* case that diplomatic asylum can only be recognised if a legal basis is established in each particular case.[216] This legal basis can be afforded by treaty or established custom.[217] This Chapter

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[209] *Ibid.*, [93]-[94].
[210] R (B & Others), [95].
[211] *Ibid.*
[212] *Ibid.*, [96].
[213] *Ibid.*, [97].
[214] X, 'The Bakhtiari family saga' (The Sydney Morning Herald, 30 December 2004) <www.smh.com.au/politics/federal/the-bakhtiari-family-saga-20041230-gdkekr.html> accessed on 29 April 2022.
[215] Paul Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach' [2014] 35(2) Michigan Journal of International Law 319 ("Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach'"), 347.
[216] Asylum (Colombia v. Peru), 275. See *supra* Chapter II.c.i.
[217] Jennings and Watts, *Oppenheim's international law*, 1083.

will examine what kind of possible legal bases, found in international law, can be provided for diplomatic asylum. It tackles this issue from a traditional point of view, namely the obligations States owe to each other, or in other words, an interstate approach. Particularly, the Vienna Convention on Diplomatic Relations, the Latin American conventions on diplomatic asylum and the possibility that diplomatic asylum is customary law will be discussed.

3.1. VIENNA CONVENTION ON DIPLOMATIC RELATIONS

92. Cases of diplomatic asylum often lead to a standoff between the receiving State relying on its territorial sovereignty and the duty of diplomatic officials not to interfere with the internal affairs of the receiving State in order to end the protection provided by diplomatic asylum, and the sending State relying on, inter alia, the inviolability of its diplomatic premises in order to continue affording protection to the individual in question.

93. The VCDR does not contain any treaty provisions relating to diplomatic asylum.[218] Nevertheless, it contains two provisions, Articles 22 and 41 VCDR, that affect the practice. In the following sections, these provisions will be discussed in addition to the VCDR's travaux préparatoires.

3.1.1. Travaux préparatoires

94. During the preparatory works of the VCDR, the ILC discussed diplomatic asylum, however, the Sixth Committee of the UN General Assembly made clear that the ILC's mandate does not cover diplomatic asylum.[219]

95. Sir Gerald Fitzmaurice, a member of the ILC, proposed to include the following paragraph to draft Article 12[220]:

> *"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 the local law, not being charges preferred on political grounds."*[221]

96. The suggested alternative text stated:

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[218] Paul Behrens, *Diplomatic interference and the law* (Hart Publishing 2016) ("Behrens, *Diplomatic interference and the law*"), 237; Jeffery, 18.
[219] United Nations, 'Codification of the International Law Relating to Diplomatic Intercourse and Immunities Memorandum prepared by the Secretariat' (1956) UN Doc. A/CN.4/98, [300]; United Nations, 'Yearbook of the International Law Commission Volume I' (1957) UN Doc. A/CN.4/SER.A/1957, 54, [41]; Värk, 251.
[220] This Article later became Article 22 VCDR.
[221] United Nations, 'Yearbook of the International Law Commission Volume I' (1957) UN Doc. A/CN.4/SER.A/1957, 54, [33].

> *"Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds."*[222]

97. The paragraph was rejected as the majority of the Commission believed that the issue of diplomatic asylum posed to be too complex, warranting a preliminary study, and that the ILC would be acting outside its mandate.[223] The members of the Commission were aware that this would cause a gap in their work.[224] They concluded that, regardless of the legality of the asylum, the diplomatic premises were considered as inviolable thus the receiving State was in any way prohibited to enter the premises in order to end the diplomatic asylum.[225]

3.1.2. Article 22 VCDR

98. Article 22 VCDR deals with the inviolability of the diplomatic mission and stipulates:

> *"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."*[226]

99. This Article protects the premises of the mission from the intrusion of the authorities of the receiving State without the consent of the sending State.[227] No exception to this rule is provided. It applies even when the premises are used in a non-compatible way with the VCDR, therefore, this rule is considered absolute.[228]

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[222] *Ibid.*
[223] *Ibid.*, 54-55, [41], [42]; Denza, *Diplomatic asylum*, 1431.
[224] United Nations, 'Yearbook of the International Law Commission Volume I' (1957) UN Doc. A/CN.4/SER.A/1957, 55-56, [45], [53], [59].
[225] *Ibid.*, 55-57.
[226] Article 22 VCDR.
[227] Hughes-Gerber, 93; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019), 388.
[228] Asylum Advisory Opinion, [106]; Denza, *Diplomatic asylum*, 1432; Värk, 252.

100. A literal interpretation of Article 22 VCDR clearly does not provide a legal basis for diplomatic asylum. Other interpretations of the Article also fail to provide a legal basis. A teleological interpretation[229] is not successful as the preamble of the VCDR indicates that the treaty wants to *"ensure the efficient performance of the functions of diplomatic missions"* and promote the friendly relations between States.[230] Diplomatic asylum would not contribute to the efficient functioning of the mission as it estranges the friendly relations between the receiving and sending States.[231]

101. A historical interpretation may facilitate the practice of diplomatic asylum as there has been a longstanding history of diplomatic asylum cases.[232] However, Article 32 of the Vienna Convention on the Law of Treaties ("VCLT") indicates that recourse to supplementary means of interpretation is only permissible when the other aforementioned means of interpretation leave the meaning ambiguous or lead towards a manifestly absurd result.[233] As this is not the case, a historical interpretation cannot be accepted and, consequently, no legal basis in Article 22 VCDR for diplomatic asylum can be found.

102. Yet, Article 22 VCDR does facilitate the practice of diplomatic asylum as the receiving State cannot take effective action to end it.[234] Due to the absolute nature of the inviolability of the mission premises, the receiving State cannot enter the embassy to end the protection afforded by diplomatic asylum when it is granted with no legal basis.[235]

3.1.3. Article 41 VCDR

103. According to Article 41 VCDR:

> "*1. 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.*
>
> *2. (...)*
>
> *3. 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*

[229] Interpretation based on the object and purpose of the treaty.
[230] Preamble VCDR; *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (institution of proceedings) [2018] ICJ, [36].
[231] Hughes-Gerber, 99.
[232] See *supra* Chapter II.a.
[233] Article 32 Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ("VCLT").
[234] United Nations, 'Yearbook of the International Law Commission Volume I' (1957) UN Doc. A/CN.4/SER.A/1957, 56.
[235] United Nations, 'Yearbook of the International Law Commission Volume I' (1957) UN Doc. A/CN.4/SER.A/1957, 56; Asylum Advisory Opinion, [106]; Jean d'Aspremont, 'Premises of Diplomatic Missions' *MPEPIL* (2009), [25].

any special agreements in force between the sending and the receiving State."[236]

104. Under paragraph 1 of Article 41 VCDR, diplomats of the sending State are obligated to comply with the laws of the receiving State and not to interfere in the domestic affairs of that State. The ICJ has already judged that diplomatic asylum constitutes an interference in the internal matters of the receiving State,[237] therefore, Article 41(1) VCDR cannot provide a legal basis for diplomatic asylum. Additionally, if the local laws of the receiving State preclude diplomatic asylum, the granting of it would be in violation of Article 41(1) VCDR.

105. Paragraph 3 of Article 41 VCDR stipulates that the mission premises cannot be used in a manner incompatible with the functions of the mission.[238] This is to prevent any abuses of the inviolability of the mission premises.[239] There is no provision in the VCDR that prohibits the mission premises from being used specifically for diplomatic asylum, but it is doubtful whether diplomatic asylum is considered a function of the mission as determined by the VCDR.[240]

106. The functions of the mission are regulated by Article 3 VCDR which provides a non-exhaustive list of five functions,[241] namely representation, protection of the sending State's interests and its nationals (within the limits permitted by international law), negotiation, observation and promotion of friendly relations.[242] It is difficult to ascertain that diplomatic asylum represents any of these functions.[243] Arguably, granting diplomatic asylum can be understood as meeting the second function of protection but as established earlier, most cases of diplomatic asylum concern a sending State protecting a foreign national instead of its own nationals.[244] Furthermore, in light of the differing attitudes of States on diplomatic asylum, it would be short-sighted to accept diplomatic asylum as a function of the diplomatic mission in general international law.

107. However, Article 41(3) VCDR also incorporates rules originating from general international law or special agreements between the sending and receiving States.[245] Thus, if diplomatic asylum is to be regarded as an additional

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[236] Article 41 VCDR.
[237] Asylum (Colombia v. Peru), 274, 275.
[238] United Nations, 'Yearbook of the International Law Commission Volume II' (1958) UN Doc. A/CN.4/SER.A/1958/Add.l, 104.
[239] Hughes-Gerber, 98.
[240] UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [23]; Rossitto, 116.
[241] UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [7]. It was specifically stated that: "those that argued that diplomatic asylum was not in accordance with the functions of diplomatic missions as defined in article 3 of the Vienna Convention overlooked the fact that article 3 had been purposely left open-ended, so as, *inter alia*, to avoid any prejudice to the position of those States which accepted the right of diplomatic asylum."
[242] Article 3 VCDR.
[243] Behrens, *Diplomatic interference and the law*, 240.
[244] See *supra* Chapter II.b.
[245] Asylum Advisory Opinion, [107].

function to those listed in Article 3 VCDR, it needs to fulfil all requirements of a norm of general international law or be found in a special agreement.[246] The Latin American conventions on asylum[247], humanitarian considerations[248] or the principle of *non-refoulement*[249], as will be specified later, can possibly be used as rules or agreements where the function would be derived from.[250] Still, if the diplomatic asylum does not find a legal basis in general international law or special agreements, there is a breach of Article 41(3) VCDR.[251] In that case, diplomatic asylum is considered as incompatible with the functions of the mission.

108. It must be noted that some scholars argue that only the protection offered by the sending State to the individual seeking protection in the embassy from prosecution from the local authorities constitutes a violation of Article 41 VCDR.[252] Grahl-Madsen explains:

> "*It is not their presence on the premises but the protection of such persons from prosecution by the territorial authorities which is the crucial point. If the territorial authorities do not press any charges against the person in question, they may hardly object to his being sheltered in the embassy or to granting him safe conduct out of the country.*"[253]

109. Thus, if the territorial authorities of the receiving State do not object to the grant of diplomatic asylum, the protection afforded by diplomatic asylum can be construed as legal.[254] Conversely, when the territorial authorities demand the surrender of the individual, and diplomatic asylum is not regarded as a function of the embassy, the grant of diplomatic asylum is in violation of Article 41 VCDR.[255]

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[246] Behrens, *Diplomatic interference and the law*, 240.
[247] See *infra* Chapter III.b.
[248] See *infra* Chapter IV.a.
[249] See *infra* Chapter IV.b.
[250] Asylum Advisory Opinion, [107]. This was also noted by the ILC in its commentary on Article 41(3) VCDR: "among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises." See United Nations, 'Yearbook of the International Law Commission Volume II' (1958) UN Doc. A/CN.4/SER.A/1958/Add.1, 104.
[251] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) ("Denza, *commentary VCDR*"), 384.
[252] Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [8]; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Nijhoff 1988), 358; den Heijer, 110; Grahl-Madsen, 46, 77; Ogg, 104; Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 362.
[253] Grahl-Madsen, 46.
[254] den Heijer, 110.
[255] *Ibid.*; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Nijhoff 1988), 348; Ogg, 104.

3.1.4. Conclusion

110. Diplomatic asylum is considered an abuse of the inviolability of diplomatic premises.[256] Nevertheless, due to the absolute nature of Article 22 VCDR, the authorities of the receiving State cannot enter the diplomatic premises in order to end the protection afforded by diplomatic asylum. Therefore, Article 22 VCDR facilitates diplomatic asylum, even when it has no legal basis. Likewise, Article 41 VCDR does not provide a legal basis for diplomatic asylum. Diplomatic asylum is generally considered a violation of Article 41 VCDR, although arguments have been raised by academic commentators that this is only the case when the receiving State wants to exercise its jurisdiction over the individual in question and the sending State refuses to surrender them. Nevertheless, in case of an unlawful breach of this Article 41 VCDR, there is no sanction mechanism.[257]

111. In the commentary to the VCDR, the ILC states that failure to fulfil the duty laid down in Article 41 VCDR does not absolve Article 22 VCDR.[258] As a result, the unenforceable nature of Article 41 VCDR, in combination with Article 22 VCDR, enables the practice of diplomatic asylum without any legal basis. The lack of an enforcement mechanism prevents the receiving State from taking effective action and makes the receiving State resort to other remedies such as ending the diplomatic relations[259] or declaring agents of the mission *persona non grata*[260].[261]

112. To solve this issue, an amendment to the VCDR on diplomatic asylum can be introduced. This could promote friendly relations and decrease the risk of conflict between the concerned States, as well as provide more legal certainty on the obligations of the receiving and sending States. Another option would be to interpret the VCDR to allow for the possibility of diplomatic asylum. In that way, the VCDR need not be altered. However, it would be difficult to do so as the rules in the VCDR regarding diplomatic asylum are clear enough not to warrant an alternative interpretation.[262] Furthermore, this could create uncertainties again.

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[256] Wilde, 202.

[257] Mitchell S. Ross, "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities" [2011] 4(1) American University International Law Review 173, 182; Leslie Shirin Farhangi, "Insuring against Abuse of Diplomatic Immunity" [1986] 38(6) Stanford Law Review 1517, 1522.

[258] United Nations, 'Yearbook of the International Law Commission Volume II' (1958) UN Doc. A/CN.4/SER.A/1958/Add.l, 104.

[259] Article 45 VCDR. Although it must be noted that this might also not be effective as Article 45(a) VCDR provides that the receiving State must still "respect and protect the premises of the mission" after severance of diplomatic relations.

[260] Article 9 VCDR.

[261] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (Judgement) [1980] ICJ Rep 3, [85]; Denza, *Commentary VCDR*, 385; Felice Morgenstern, 'Extra-Territorial Asylum' [1948] 25 British Yearbook of International Law 236, 239.

[262] See in particular Article 22 VCDR as discussed above.

113. Concludingly, the VCDR does not contain a legal basis for diplomatic asylum, but, on the other hand, it does not explicitly preclude diplomatic asylum. Consequently, there exists a legal lacuna as diplomatic law considers diplomatic asylum to be unacceptable, but this very same regime also facilitates the controversial practice by preventing the receiving State from taking effective measures to put an end to it. However, it would be unacceptable to deduce a right to grant diplomatic asylum from this just because the receiving State has no immediate remedy to end the practice.[263]

3.2. LATIN AMERICAN TREATY-BASED SYSTEM OF PROTECTION

114. Regional treaty law can provide a regional legal basis for diplomatic asylum. In this respect, Latin American practice is most relevant as it is the only region[264] in the world that has a treaty law regime governing diplomatic asylum.[265]

115. In the Latin American States, there exists a long-standing tradition of territorial and extraterritorial asylum.[266] The reason for this is explained in Colombia's written arguments submitted to the ICJ in the *Asylum* case:

> "*The American institution of asylum, with the special characteristics which it assumes on the continent, is, in short, the result of two coexisting phenomena deriving from law and politics respectively and in evidence throughout the history of this group of States: on the one hand, the power of democratic principles, respect for the individual and for freedom of thought; on the other hand, the unusual frequency of revolutions and armed struggles which, after each internal conflict, have often endangered the safety and life of persons on the losing side.*"[267]

[263] Felice Morgenstern, 'Extra-Territorial Asylum' [1948] 25 British Yearbook of International Law 236, 239.
[264] Latin America is an unofficial designation. For the purposes of this work, Latin America includes not just the South American continent, but also States in Central and North America that have been influenced by the Spanish, Portuguese or French language. Thus, in this work, the following States are considered as Latin American States: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.
[265] Hughes-Gerber, 101.
[266] Riveles, 145; Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn), 324.
[267] *Asylum (Colombia v. Peru)* (Memorial submitted by the Government of the Republic of Colombia) 10 January 1950, 25, [21]. Translation provided by UNGA, Question of Diplomatic Asylum Part II, [11].

116. This "Latin American tradition of asylum"[268] not only stems from the numerous instances of Latin American States granting diplomatic asylum but is also supported by conventions and treaties adopted in Latin America.[269]

3.2.1. Relevant principles on diplomatic asylum

117. Before examining relevant Latin American treaty law pertaining to diplomatic asylum, some principles relevant to the subject will be recalled. These principles were formulated by diplomatic representatives of Latin American States and are the foundations of later treaty law.[270]

a. The 1865 Rules of Lima

118. The 1865 Rules of Lima transpired out of a diplomatic incident in May 1865 in which the Peruvian General Canesco, after being charged with conspiracy, received diplomatic asylum in the US embassy in Peru for four months.[271] The diplomatic corps accredited to the Peruvian government came together and formulated the following principles:

> *"(1) that apart from inhibitions in their instructions or in conventional stipulations, there were limits to the privilege of asylum which the prudence of diplomatic agents ought to counsel;*
>
> *(2) that the diplomatic corps adopted the instructions given by Brazil to its minister, according to which asylum was to be conceded with the greatest reserve, and only for such time as was necessary in order that the fugitive should secure his safety in another manner - an end which it was the duty of the diplomatic agent to do all in his power to accomplish."*[272]

119. It was also agreed that these Rules should only apply to political offences.[273] These principles already establish some key characteristics of later treaty law, namely that asylum should only be granted for political offences in exceptional circumstances and only for the time necessary. However, the Peruvian

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[268] *The Pacheco Tineo Family v. Plurinational State of Bolivia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 272 (25 November 2013), [137] ("The adoption of a series of treaties related to territorial and diplomatic asylum and non-extradition on political grounds led to what has usually been defined as "the Latin American asylum tradition".").
[269] Asylum Advisory Opinion, [78]; Asylum (Colombia v. Peru) (Dissenting opinion Judge Alvarez), 292.
[270] UNGA, Question of Diplomatic Asylum Part II, [26].
[271] L. Clinton Nolan, 'Limitations Upon the Right of Diplomatic Asylum in Peru, 1867' [1934] 97(3) World Affairs 176, 176.
[272] UNGA, Question of Diplomatic Asylum Part II, [27].
[273] John Basset Moore, *A Digest of International Law Vol. II* (Washington Government Printing Office, 1906), 836.

government did not approve these Rules as they deemed the Rules insufficient to deal with the difficulty of the situation.[274]

b. The 1898 Rules of La Paz

120. The Rules of La Paz were drawn up in December 1898 by the heads of the legations of the US, France and Brazil in Bolivia.[275] They agreed on the following:

> "*Every person asking asylum must be received first in the outer or waiting room of the legation, and there state his name, official capacity, if any, residence, and reasons for demanding refuge; also if his life is threatened by mob violence or is in active danger from any attack.*
>
> *If, according to the joint rules laid down by the committee composed of the Brazilian, American, and French ministers, he shall be adjudged eligible for protection, he must subscribe to the following rules in writing:*
>
> *First. To agree that the authorities shall be at once notified of his place of refuge.*
>
> *Second. To hold no communication with any outside person, and to receive no visitors except by permission of the authority quoted above.*
>
> *Third. To agree not to leave the legation without permission of the resident minister.*
>
> *Fourth. To hold himself as virtually the prisoner-guest of the minister in whose legation he is.*
>
> *Fifth. To agree to peaceably yield himself to the proper authorities when so demanded by them and requested by his host.*
>
> *Sixth. To quietly depart when so requested by the minister, should the authorities not demand his person after a reasonable time has elapsed.*"[276]

121. An assessment of these rules indicates similarities with the modern practice of diplomatic asylum in Latin America as the Rules of La Paz also reference humanitarian considerations[277], the requirement of urgency and the obligations an individual needs to respect.[278]

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[274] UNGA, Question of Diplomatic Asylum Part II, [28]; John Basset Moore, *A Digest of International Law Vol. II* (Washington Government Printing Office, 1906), 836.
[275] UNGA, Question of Diplomatic Asylum Part II, [29]; John Basset Moore, *A Digest of International Law Vol. II* (Washington Government Printing Office, 1906), 784.
[276] UNGA, Question of Diplomatic Asylum Part II, [29]; John Basset Moore, *A Digest of International Law Vol. II* (Washington Government Printing Office, 1906), 784.
[277] See reference to "if his life is threatened by mob violence or is in active danger from any attack".
[278] Hughes-Gerber, 105.

c. The 1922 Rules of Asunción

122. The diplomatic missions to the UK, the US, France, Germany, Spain, Argentina, Brazil, Cuba, Peru, Uruguay and Bolivia adopted the Rules of Asunción in 1922.[279] Remarkably, this shows that in 1922 Western European States adopted a similar position as the Latin American States. The Rules in question stipulate:

> "*Any person who, invoking reasons of a political character, seeks asylum in the residence of a foreign legation, shall set forth the facts which have led him to ask for this asylum; and the chief of the legation shall be the one to judge such facts.*
>
> *Once asylum is granted, the person to whom it is granted shall promise, in writing, upon his word of honour:*
>
> *1. To refrain from all participation in political questions.*
>
> *2. To receive no visits without prior consent of the foreign representative, who will reserve the right to be present in the conversations.*
>
> *3. To maintain no written communications without prior censure of the chief of the legation.*
>
> *4. Not to leave the legation without the consent and authorization of the head of the same; failure to keep this promise will mean the loss of the right to renewed refuge within the legation.*
>
> *5. To submit to the decisions of the head of the mission, concerning the termination of the asylum or leaving the country, with the guarantees which he may deem proper.*
>
> *These principles shall be observed provided they are not contradicted by instructions received by each head of mission.*"[280]

123. Similarly to the Rules of La Paz, the Rules of Asunción focus on obligations the individual needs to respect. They highlight the importance for the asylee not to engage in political activity, as well as providing penalties when the individual leaves the legation without authorisation.[281]

3.2.2. Treaties

124. The following section discusses, in a chronological way, Latin American treaties possibly providing a legal basis for diplomatic asylum.

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[279] UNGA, Question of Diplomatic Asylum Part II, [30].
[280] UNGA, Question of Diplomatic Asylum Part II, [30].
[281] *Ibid.*, [31].

a. The Treaty on International Penal Law

125. The Treaty on International Penal Law[282] was adopted on 23 January 1889 by Argentina, Bolivia, Paraguay, Peru and Uruguay after two incidents of diplomatic asylum.[283] Article 17 of the Treaty deals specifically with diplomatic asylum and reads as follows:

> "*Such persons as may be charged with non-political offences and seek refuge in a legation, shall be surrendered to the local authorities by the head of the said legation, at the request of the Ministry of Foreign Relations, or of his own motion.*
>
> *Said asylum shall be respected with regard to political offenders, but the head of the legation shall be bound to give immediate notice to the government of the State to which he is accredited; and the said government shall have the power to demand that the offender be sent away from the national territory in the shortest possible time.*
>
> *The head of the legation shall, in his turn, have the right to require proper guarantees for the exit of the refugee without any injury to the inviolability of his person.*
>
> *The same rule shall be applicable to the refugees on board a man-of-war anchored in the territorial waters of the State.*"[284]

126. Article 17 reaffirmed and established some key characteristics of the Latin American practice pertaining to diplomatic asylum, such as a notice requirement, the duration being limited to the time necessary, the practice being reserved for only political offences and guarantees of safe conduct.[285] These features are still present in present Latin American State practice and treaty law.[286] Nevertheless, the value of this Treaty is limited due to the small number of State parties.

b. The Havana Convention on Asylum

127. On 20 February 1928, the Sixth International Conference of American States adopted the Havana Convention on Asylum with the objective of

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[282] Treaty on International Penal Law (adopted 23 January 1889) OAS Official Records, OEA/Ser.X/1. Treaty Series 34.
[283] Asylum Advisory Opinion, [81]. The incidents concerned a Peruvian General receiving asylum in the US embassy in 1865 and several Peruvian individuals receiving asylum with the *chargé d'affairs* of France in Peru.
[284] Article 17 Treaty on International Penal Law.
[285] UNGA, Question of Diplomatic Asylum Part II, [35]; Hughes-Gerber, 107.
[286] See *infra* Chapter III.b.ii, sections 2 to 5.

regulating diplomatic asylum.[287] The Convention entered into force on May 21st 1929 and has sixteen State parties[288].

128. The Havana Convention provides that persons accused or convicted of common crimes cannot be afforded diplomatic asylum and shall be surrendered upon request of the authorities of the receiving State.[289] Persons convicted of political offences can benefit from diplomatic asylum "to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted"[290].

129. Article 2 of the Convention sets certain conditions for diplomatic asylum granted to political offenders. Firstly, it can only be granted in urgent cases and for the time strictly necessary to ensure the asylee's safety.[291] Secondly, the diplomatic agent granting asylum shall immediately report to the Minister of Foreign Relations of the territorial State or the State wherein the offence was committed.[292] Thirdly, the receiving State can request the removal of the asylee from the national territory and the granting State can ask for the necessary guarantees for the safe departure of the asylee.[293] Fourthly, individuals are not permitted to be landed in any part of the national territory or any location too close to it.[294] Fifthly, individuals are not permitted to do acts contrary to the public peace while receiving diplomatic asylum.[295] Finally, States are not obliged to cover the costs spent by those who receive asylum.[296] Besides the final clause, these conditions are similar to the earlier principles discussed.[297]

130. Noteworthy, Article 2 also refers to the humanitarian motivations for asylum, implying that States not recognising the right of diplomatic asylum can still tolerate the practice based on humanitarian considerations.[298]

131. The Havana Convention fails to provide a definition of common and political crimes and does not specify which State can qualify the crime.[299] This played a key role in the 1950 Colombian-Peruvian *Asylum* case as Colombia claimed that the State granting diplomatic asylum is competent to unilaterally

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[287] Asylum Advisory Opinion, [83].
[288] Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay. Five States (Argentina, Bolivia, Chile, the US and Venezuela) signed the Convention but failed to ratify it. See Ronning, 222.
[289] Article 1 Havana Convention.
[290] Article 2 Havana Convention.
[291] Article 2(2) Havana Convention.
[292] Article 2(3) Havana Convention.
[293] Article 2(4) Havana Convention.
[294] Article 2(5) Havana Convention.
[295] Article 2(6) Havana Convention.
[296] Article 2(7) Havana Convention.
[297] See *supra* Chapter III.b.i. Like the founding principles, the Havana Convention establishes similar characteristics of an urgency requirement, a political offence requirement, a notification requirement and the requirement that the practice is limited to the time necessary.
[298] Hughes-Gerber, 110. See also *infra* Chapter IV.a.
[299] Asylum Advisory Opinion, [83].

qualify the nature of the offence for the purpose of the asylum.[300] The ICJ decided that this right cannot be derived from the Havana Convention.[301]

132. Another lacuna of the Havana Convention is that it does not elaborate on the method of termination of the asylum when asylum is granted contrary to Article 2 of the Convention.[302] This gave rise to the 1951 *Haya de la Torre* case wherein the ICJ declared that "the silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency."[303]

c. The Convention on Political Asylum

133. Following the Havana Convention, on 26 December 1933, the Convention on Political Asylum[304] was adopted in Montevideo.[305] Interestingly, while the US was a signatory to the Havana Convention, it stated with regard to this Convention that it "does not recognize or subscribe to, as part of international law, the doctrine of [political] asylum".[306] This indicates a shift in attitude towards diplomatic asylum in only five years.

134. The purpose of this Convention was to define the terms used in the Havana Convention.[307] Article 1 of this Convention modified Article 1 of the Havana Convention and reaffirmed that common criminals are excluded from benefiting from diplomatic asylum.[308]

135. Further, Article 2 of the Convention determines that the State granting asylum is responsible for qualifying the crime as either political or common in nature.[309] Accordingly, to substantiate its argument, the Colombian government referred to this provision during the proceedings in the *Asylum* case.[310] However, as Peru had not yet ratified the Convention, it could not be invoked against the State.[311]

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[300] Asylum (Colombia v. Peru), 273, 274. See *supra* Chapter II.c.i.
[301] Asylum (Colombia v. Peru), 275.
[302] Haya de la Torre (Colombia v. Peru), 80; UNGA, Question of Diplomatic Asylum Part II, [55].
[303] Haya de la Torre (Colombia v. Peru), 81.
[304] Convention on Political Asylum (adopted on 26 December 1933, entered into force 28 March 1935) OAS Treaty Series No. 34.
[305] The Convention has sixteen State parties: Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay. See Ronning, 223.
[306] Asylum Advisory Opinion, [161]; Department of International Law, 'A-37: Convention On Political Asylum' (OAS) <www.oas.org/juridico/english/Sigs/a-37.html> accessed on 16 April 2022.
[307] Preamble Convention on Political Asylum.
[308] Article 1 Convention on Political Asylum; Asylum Advisory Opinion, [84].
[309] Article 2 Convention on Political Asylum; Asylum Advisory Opinion, [84].
[310] Asylum (Colombia v. Peru), 276.
[311] *Ibid.*

136. Finally, it is also worth noting that the Havana Convention only indicated diplomatic asylum as respected through humanitarian toleration,[312] while Article 3 of the Montevideo Convention refers to diplomatic asylum "as an institution of humanitarian character".[313]

d. The Treaty on Asylum and Political Refuge

137. Six years later, on 4 August 1939, the Treaty on Asylum and Political Refuge[314] was adopted in Montevideo. The Treaty deals with both territorial and extraterritorial asylum and aims to provide more detailed rules in response to new situations that had arisen due to the Spanish Civil War.[315]

138. It reiterates some previously regulated matters of diplomatic asylum, such as the notification requirement[316] and the notion that the receiving State may demand the removal of the individual allowing the granting State to demand the necessary guarantees for this[317]. The Treaty also reaffirms that the practice of diplomatic asylum is reserved for political offenders[318] but limits the scope more by upholding that political offenders convicted of common crimes in the past are not eligible to receive diplomatic asylum.[319]

139. Article 5 of the Treaty shows clear similarities with the principles found in the Rules of La Paz and the Rules of Asunción.[320] Similarly stating that the individual cannot commit acts that may disturb the public peace, take part in political activities or have communication with outside persons.[321] Violation of these obligations can result in the termination of the asylum.[322] Indeed, in the Assange case, Julian Assange was removed from the Ecuadorian embassy due to breaching his agreement with Ecuador. His behaviour constituted of, *inter alia*, allegedly intervening in foreign affairs of other States, criticising the Ecuadorian government and mistreating guards.[323]

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[312] Article 2 Havana Convention.
[313] Article 3 Convention on Political Asylum.
[314] Treaty on Asylum and Political Refuge (adopted 4 August 1939, entered into force 29 December 1954) [1943] 37(3) American Journal of International Law, 99.
[315] Preamble Treaty on Asylum and Political Refuge; Asylum Advisory Opinion, [85].
[316] Article 4 Treaty on Asylum and Political Refuge.
[317] Article 6 Treaty on Asylum and Political Refuge.
[318] Article 2 Treaty on Asylum and Political Refuge.
[319] Article 3 Treaty on Asylum and Political Refuge.
[320] See *supra* Chapter III.b.i.
[321] Article 5 Treaty on Asylum and Political Refuge.
[322] *Ibid.*
[323] Esther Addley, 'The seven-year itch: Assange's awkward stay in the embassy' (The Guardian, 11 April 2019) <www.theguardian.com/media/2019/apr/11/how-ecuador-lost-patience-with-houseguest-julian-assange> assessed on 16 April 2022; Dan Collyns, "Rude, ungrateful and meddling': why Ecuador turned on Assange' (The Guardian, 11 April 2019) <www.theguardian.com/media/2019/apr/11/julian-assange-ecuador-president-lenin-moreno-evict-from-embassy> accessed on 17 April 2022; Guy Davies, 'Assange's Ecuador Embassy life: 'discourteous and aggressive' behavior and bad hygiene reports' (ABC News, 11 April 2019) <https://abcnews.go.com/International/assanges-ecuador-embassy-life-discourteous-aggressive-behavior-bad/story?id=62330593> accessed on 17 April 2022.

140. The Treaty also provides that the State granting diplomatic asylum is not obliged to admit the individual to its territory,[324] as well as governing the severance of diplomatic relations or the settlement of disputes.[325]

141. However, due to the limited State parties to the Treaty,[326] its legal value is limited.

e. The Convention on Diplomatic Asylum

142. The Caracas Convention on Diplomatic Asylum[327] was adopted on 28 March 1954 as a response to the *Asylum* judgement of the ICJ. Indeed, the Court's judgement in *Asylum* revealed the lack of detailed and specific regulation on diplomatic asylum, therefore stimulating the Latin American States to adopt another Convention on the matter.[328] Thus, the Convention on Diplomatic Asylum is the most comprehensive instrument on diplomatic asylum in Latin America.

143. Likewise to the previous treaties[329], Article I of the Convention on Diplomatic Asylum defines the places where diplomatic asylum may be granted:

> "*Asylum granted in legations, war vessels, and military camps or aircraft, to persons being sought for political reasons or for political offenses shall be respected by the territorial State in accordance with the provisions of this Convention.*
>
> *For the purposes of this Convention, a legation is any seat of a regular diplomatic mission, the residence of chiefs of mission, and the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings.*
>
> *War vessels or military aircraft that may be temporarily in shipyards, arsenals, or shops for repair may not constitute a place of asylum.*"[330]

144. Article II of the Convention on Diplomatic Asylum stipulates that "every State has the right to grant asylum; but it is not obligated to do so or to state its

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[324] Article 1 Treaty on Asylum and Political Refuge; Asylum Advisory Opinion, [85].
[325] Article 10 and 16 Treaty on Asylum and Political Refuge.
[326] The Treaty has six State parties: Chile, Argentina, Peru, Bolivia, Paraguay, and Uruguay. Only two States, Paraguay and Uruguay, ratified the Treaty. See Ronning, 55.
[327] Convention on Diplomatic Asylum (adopted on 28 March 1954, entered into force 29 December 1954) 1438 UNTS 101. It has fourteen State parties: Argentina, Brazil, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. Six States (Bolivia, Chile, Colombia, Cuba, Honduras and Nicaragua) signed the Convention but never ratified it.
[328] Asylum Advisory Opinion, [86].
[329] Article 2(1) of the Havana Convention, Article 1(1) of the Convention on Political Asylum, Article 2 and 9 of the Treaty on Asylum and Political Refuge contain analogous provisions.
[330] Article I Convention on Diplomatic Asylum.

reasons for refusing it."[331] Consequently, an individual cannot claim a right to diplomatic asylum.

145. Key characteristics of diplomatic asylum in Latin America, in line with the previous principles and conventions[332], are also again reaffirmed: the reservation of the practice for political offenders[333], the notification requirement[334], the urgency requirement and the requirement of the shortest possible duration[335], the obligation for the individual not to act in a way that disturbs the public peace or interfere in the political affairs of the territorial State[336], the right of the receiving State to request the departure of the individual from the territory[337] and the right of the granting State to demand safe conduct[338].

146. Furthermore, Article VI of the Convention codifies a definition for urgent cases:

> "*Urgent cases are understood to be those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution and cannot, without risk, ensure his safety in any other way.*"[339]

147. Lastly, the issue of qualification of the offence is also addressed as this was one of the main issues in the *Asylum* case.[340] Article IV of the Convention stipulates that the granting State is competent to qualify the nature of the offence as political or not.[341]

3.2.3. Conclusion

148. The Latin American treaty framework encompasses the fundamental principles found in the Rules of Lima, La Paz and Asunción, to which other States outside of Latin America agreed to, and the treaties with only Latin American State parties. However, not all treaties mentioned can be understood as representative of all Latin American States due to their limited State parties.[342]

149. Nevertheless, the rules found in the Havana Convention (sixteen State parties), the Convention on Political Asylum (fourteen State parties) and the

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[331] Article II Convention on Diplomatic Asylum.
[332] See UNGA, Question of Diplomatic Asylum Part II, [81] for an extensive comparison.
[333] Article I and III Convention on Diplomatic Asylum.
[334] Article VIII Convention on Diplomatic Asylum.
[335] Article V Convention on Diplomatic Asylum.
[336] Article XVIII Convention on Diplomatic Asylum.
[337] Article XI Convention on Diplomatic Asylum.
[338] Article XII Convention on Diplomatic Asylum.
[339] Article VI Convention on Diplomatic Asylum.
[340] Asylum (Colombia v. Peru), 273.
[341] Article IV Convention on Diplomatic Asylum.
[342] Namely the Treaty on International Penal Law and the Treaty on Asylum and Political Refuge.

Convention on Diplomatic Asylum (sixteen State parties) are binding for their State parties. These treaties entail some of the key features of a Latin American treaty-based right to diplomatic asylum, such as the reservation of the right for political offenders, the requirement of urgency and notification, the requirement of the individual respecting certain obligations limiting its conduct and the right of qualification being accorded to the granting State.[343] The right to grant diplomatic asylum, provided by the treaties, solves, to some extent, the issue of a derogation of the receiving State's sovereignty.[344] Indeed, if the conditions under the treaties are respected, the receiving State, if it is party to them, will have to respect the grant of the diplomatic asylum.[345]

150. There exists no similar framework on diplomatic asylum for other regions in the world, thus, this treaty law framework is confined to the Latin American region. Indeed, Article 34 VCLT stipulates that a treaty cannot create legally binding obligations for third States without their consent.[346] Consequently, the Latin American treaty law provides a legal basis for diplomatic asylum in Latin America only, resulting in a limited legal value.[347]

3.3. IS DIPLOMATIC ASYLUM A RULE OF CUSTOMARY INTERNATIONAL LAW?

151. The Preamble of the VCDR provides: "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."[348] As established above,[349] the VCDR does not contain any provisions regarding diplomatic asylum. Thus, reference to customary international law could open the way to granting asylum within embassies.[350]

152. Pursuant to Article 38(1)(b) of the Statute of the ICJ, customary rules are accepted as a source of international law.[351] Customary international law can have a universal or regional scope. Claims have been put forth that diplomatic asylum has become a customary rule of international law, thus providing the necessary legal basis.[352] This section will assess whether diplomatic asylum has attained the status of a rule of customary international law or a regional customary rule.

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[343] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 332; Riveles, 146; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 407.
[344] den Heijer, 108; Denza, *Diplomatic asylum*, 1426.
[345] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 332; Wilde, 202.
[346] Article 34 VCLT.
[347] Jeffery, 16.
[348] Preamble VCDR.
[349] See *supra* Chapter III.a.
[350] Denza, *Diplomatic asylum*, 1433.
[351] Article 38(1)(b) of the Statute of the ICJ.
[352] Ronning, 42; den Heijer, 112.

3.3.1. The requirements for the formation of a customary rule

153. The reference in Article 38(1)(b) to "international custom, as evidence of a general practice accepted as law" puts forward two elements: State practice (objective element) and acceptance as law or *opinio juris sive necessitatis*[353] (subjective element).[354]

154. To establish a rule of customary international law, careful analysis of the relevant State practice and *opinio juris* is required. Guidance on how to identify the necessary evidence to conclude a customary rule can be found in the case law of the ICJ and the ILC Draft conclusions on identification of customary international law.

a. State practice

155. State practice, in order to create a rule of customary international law, needs to be virtually uniform and extensive, according to the ICJ in the 1969 *North Sea Continental Shelf* Case.[355] This implies a certain degree of consistency, i.e. a pattern of behaviour should be able to be determined.[356] The ICJ decided in the *Asylum* case that a customary rule must be "in accordance with a constant and uniform usage practised by the States in question"[357]. This implies that there must not be too much uncertainty and contradiction.[358] Indeed, absolute uniformity is not required.[359] Furthermore, "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law"[360].

156. There is no standard on the number of States required for State practice to be sufficient.[361] The ILC has concluded that "it is not necessary to show that all States have participated in the practice in question."[362] What is more important is that the participating States are representative, this can be determined by taking into account the various interests at stake and the various geographical regions.[363]

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[353] Or simply '*opinio juris*'.
[354] Article 38(1)(b) of the Statute of the ICJ; Malcolm Shaw, *International Law* (8th edn, CUP 2017), 55; Gleider Hernandez, *International law* (OUP 2019), 35.
[355] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgement) [1969] ICJ Rep 3, [74].
[356] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, 137.
[357] Asylum (Colombia v. Peru), 276.
[358] *Ibid.*, 277.
[359] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14, [186].
[360] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgement) [1969] ICJ Rep 3, [74].
[361] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, 136.
[362] *Ibid.*
[363] *Ibid.*

157. Also to be taken into account is the participation of specially affected States in the practice.[364] Specially affected States are States whose interests are specifically affected, making their State practice more pervasive than that of States less affected by the alleged rule.[365]

158. Finally, State practice can stem from, but is not limited to:

> "*diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.*"[366]

b. Opinio juris

159. *Opinio juris* is the belief that the settled practice is rendered obligatory by the existence of a rule of law.[367] Indeed, States must have accepted the general practice as law; they must be convinced that they are conforming to a legal obligation.[368]

160. To satisfy the requirement of *opinio juris*, it should be demonstrated that the States engaging in the relevant practice and those in a position to react to it have recognised the practice as being in accordance with customary international law.[369] It is not necessary to show that all States have accepted as law the alleged norm of customary international law; all that is required is broad and representative acceptance, as well as no or limited objection.[370] When the international community is profoundly divided on whether a certain practice constitutes the expression of *opinio juris*, it must be concluded that there is no *opinio juris*.[371]

161. Forms of evidence of *opinio juris* can be found in, but are not limited to:

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[364] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgement) [1969] ICJ Rep 3, [74]; ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, 136.
[365] *Ibid.*
[366] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, Conclusion 6(2), 133.
[367] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgement) [1969] ICJ Rep 3, [77].
[368] *Ibid.*; ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, Conclusion 9, 138.
[369] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14, [207]; ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, 139.
[370] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, 139.
[371] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [67].

> "*public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.*"[372]

3.3.2. Customary international law

Having established the requirements for State practice and *opinio juris* under customary international law, the question remains whether diplomatic asylum fulfils those requirements. The following section will try to provide an answer to this question.

a. State practice pertaining to diplomatic asylum

162. To give a clear overview of notable twentieth and twenty-first century State practice of diplomatic asylum in a broad sense, this part is divided into the six continents excluding Antarctica. The division is based on the State which grants diplomatic asylum.

163. These cases depict various situations of, *inter alia*, diplomatic asylum during political instability or as a solution in order to provide territorial asylum within the territory of the sending State. Additionally, different qualifications have been given for the grant of diplomatic asylum, States on occasion refer to the practice of "temporary shelter" or "diplomatic protection".

a.1. Africa

164. Not much State practice in Africa supporting a right to grant diplomatic asylum can be found. In 1990, Algeria and Egypt provided asylum to Albanians in their embassies in Tirana, Albania's capital during the collapse of the communist regime.[373] In the same year, Nigeria also granted diplomatic asylum to approximately 1800 people in its embassy in Liberia.[374] Lastly, Amadou Toumani Toure, former Malian President, was granted asylum in Senegal's diplomatic premises in Mali for two days in April 2012.[375]

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[372] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, Conclusion 10(2), 140.

[373] X, 'Evolution in Europe; Albanians Take Refuge in Embassies' (The New York Times, 4 July 1990) <www.nytimes.com/1990/07/04/world/evolution-in-europe-albanians-take-refuge-in-embassies.html> accessed on 3 March 2022 ("The New York Times, 4 July 1990"); Maud S. Beelman, 'Albanians seek asylum in embassies' (The Washington Post, 4 July 1990) <www.washingtonpost.com/archive/politics/1990/07/04/albanians-seek-asylum-in-embassies/dc3df555-c311-4ba3-bb6d-19120a43f952> accessed on 3 March 2022.

[374] Kenneth B. Noble, '5 nations moving troops to Liberia' (The New York Times, 11 August 1990) <www.nytimes.com/1990/08/11/world/5-nations-moving-troops-to-liberia.html> accessed 3 March 2022.

[375] X, 'Mali's Amadou Toumani Toure in Senegal's embassy' (BBC, 18 April 2012) <www.bbc.com/news/world-africa-17753998> accessed on 4 March 2022; X, 'Mali's ex-leader Amadou Toumani Toure flees to Senegal' (BBC, 20 April 2012) <www.bbc.com/news/world-africa-17782979> accessed on 4 March 2022.

a.2. Asia

165. Compared to the African continent, Asian States count more incidents of granting diplomatic asylum. Most of these cases are isolated incidents. These include Saudi Arabia granting asylum to Iraqi Sharif Ali bin al-Hussein in 1958,[376] Albanians being granted asylum in the Chinese embassy in Albania in 1990,[377] Taiwan[378] providing asylum in its embassy in Honduras to the daughter of the former President of Honduras out of humanitarian concerns,[379] or Mohamed Nasheed, former President of the Maldives, finding asylum in India's embassy in the Maldives.[380] Furthermore, Thailand granted extraterritorial asylum in 2005 to seven North Koreans in its embassy in Hanoi.[381] Finally, Iranian defector Shahram Amiri entered the Pakistani embassy in Washington D.C. to seek asylum.[382]

166. There is, however, one incident where diplomatic asylum was specifically not granted. Vietnam rejected granting diplomatic asylum to Kim Ryen-hi, a North Korean defector, in its South Korean embassy in March 2016.[383] South Korean authorities entered the embassy after receiving the ambassador's permission to remove Ms Ryen-hi.[384]

167. Several Asian States, such as Turkey, Indonesia, North Korea, Japan and South Korea, have granted diplomatic asylum on multiple occasions. Turkey has granted diplomatic asylum on four occasions. Firstly, during the Spanish Civil War to 932 individuals.[385] Secondly, to Miklós Kállay, former Prime Minister of Hungary, in 1944 in the Turkish legation in Hungary.[386] Thirdly, to

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[376] Jeffrey Gettleman, 'The King is dead (has been for 46 years) but two Iraqis hope: long live the King!' (The New York Times, 28 January 2005) <https://www.nytimes.com/2005/01/28/world/middleeast/the-king-is-dead-has-been-for-46-years-but-two-iraqis-hope.html> accessed on 13 March 2022.

[377] The New York Times, 4 July 1990; Maud S. Beelman, 'Albanians seek asylum in embassies' (The Washington Post, 4 July 1990) <www.washingtonpost.com/archive/politics/1990/07/04/albanians-seek-asylum-in-embassies/dc3df555-c311-4ba3-bb6d-19120a43f952> accessed on 3 March 2022.

[378] Taiwan's legal status under international law is disputed. See Björn Ahl, 'Taiwan' *MPEPIL* (2020), [1].

[379] Central News Agency, 'Minister defends asylum for daughter of deposed Honduran president' (Taiwan News, 29 September 2009) <www.taiwannews.com.tw/en/news/1069083> accessed on 4 March 2022.

[380] R.K. Radhakrishnan, 'Nasheed leaves Indian embassy after 'deal'' (The Hindu, 23 February 2013) <www.thehindu.com/news/international/south-asia//article60440899.ece> accessed on 4 March 2022.

[381] Grant McCool, 'Four North Koreans enter Danish embassy in Hanoi' (Reuters, 11 July 2007) <www.reuters.com/article/us-korea-north-vietnam-idUSHAN33274320070711> accessed on 13 April 2022.

[382] Korva Coleman, 'Iranian Scientist In Pakistani Embassy' (NPR, 13 July 2010) <www.npr.org/sections/thetwo-way/2010/07/13/128483547/iranian-scientist-in-pakistani-embassy?t=1649852285004> accessed on 13 April 2022.

[383] Choe Sang-Hun, 'North Korean defector in the south seeks Vietnam's help to return home' (The Orange County Register, 8 March 2016) <www.ocregister.com/2016/03/08/north-korean-defector-in-the-south-seeks-vietnams-help-to-return-home> accessed on 4 March 2022.

[384] *Ibid.*

[385] Roncal, 101.

[386] Péter Kovács and Tamás Vince Ádány, 'The Non-Customary Practice of Diplomatic Asylum' in Behrens (ed), *Diplomatic Law in a New Millennium* (OUP 2017) ("Kovács and Ádány"), 185.

thirty-two Albanians in July 1990.[387] Lastly, to Anwar Ibrahim, Malaysia's opposition leader, in 2008 in Kuala Lumpur for security reasons.[388]

168. In two instances, both dating back more than fifty years, Indonesia granted diplomatic asylum in favour of Filipino Alfredo B. Saulo[389] in 1958 and in favour of Laotian Kong Le[390] in 1966.

169. North Korea has only granted asylum in its diplomatic premises twice to its own citizens.[391] As diplomatic asylum cases mostly constitute cases where asylum is afforded to non-nationals, these North Korean cases are not typical diplomatic asylum cases. Besides North Korea, Japan has also granted diplomatic asylum to North Koreans. In 2002, Japan granted asylum to five North Koreans in its consulate in Shenyang, China.[392] Chinese officials entered the consulate without the consular staff's consent to remove the North Koreans from the premises.[393] Japan also granted diplomatic asylum to twenty-nine North Korean asylum seekers in 2004 in its embassy in Beijing.[394]

170. Finally, South Korea is the Asian State with the most State practice regarding diplomatic asylum. Eight occasions have been recorded in which South Korea granted diplomatic asylum.[395] In all these cases, asylum was granted to North Koreans.[396]

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[387] The New York Times, 4 July 1990.

[388] X, 'Malaysia's Anwar taking refuge at Turkish embassy' (Reuters, 29 June 2008) <www.reuters.com/article/us-malaysia-anwar-embassy-idUSSP18535820080629> accessed 13 March 2022.

[389] Supreme Court of the Philippines 31 August 1960, G.R. No. L-15474, *Alfredo B. Saulo v Brig. Gen. Pelagio Cruz*; Official Gazette of the Republic of the Philippines, 'Official Week in Review: November 9 – November 15, 1958' (1958).

[390] Hughes-Gerber, 139.

[391] Bernard D. Nossiter, 'U.S. threatens to expel envoy in assault case' (The New York Times, 22 July 1983) <www.nytimes.com/1983/07/22/nyregion/us-threatens-to-expel-envoy-in-assault-case.html> accessed on 7 March 2022; Joshua Berlinger, 'North Koreans hiding in Malaysian embassy return to Pyongyang' (CNN, 31 March 2017) <https://edition.cnn.com/2017/03/31/asia/kim-jong-nam-malaysia-north-koreans> accessed on 7 March 2022.

[392] Ministry of Foreign Affairs Japan, 'Press Conference 14 May 2002' <www.mofa.go.jp/announce/press/2002/5/0514.html> accessed on 7 March 2022.

[393] *Ibid.*

[394] X, '29 North Korean Defectors Burst into Japanese School in Beijing' (Radio Free Asia, 1 September 2004) <www.rfa.org/english/news/politics/noko_schooldefect090104-20040901.html> accessed 7 March 2022.

[395] On 23/24 May 2002, on 27 May 2002, from June to September 2002, from September to October 2002, in October 2003, on 15 November 2004, in December 2013 and in July 2016.

[396] Hughes-Gerber, 141.

a.3. Australia

171. There is only one case where diplomatic asylum was granted by a State from the Australian continent. In 1989, Australia granted asylum to a Chinese citizen, Hou Dejian, in the Australian embassy in Beijing.[397]

a.4. Europe

172. There is considerably more State practice regarding diplomatic asylum stemming from Europe. Some isolated instances concern Austria[398], Norway[399], Bulgaria[400] and Portugal[401].

173. France, on the other hand, has granted diplomatic asylum on eleven occasions. Most of these cases date from the twentieth century. In 1915, diplomatic asylum was given to former Haitian President Jean Vilbrun Guillaume Sam in France's embassy in Haiti.[402] During the Spanish Civil War, France also granted asylum to José Ungría Jiménez and 900 asylees in its diplomatic premises in Spain.[403] Other occasions where France granted diplomatic asylum date from 1978[404], 1980[405], 1982[406] and 1990[407]. The first case of diplomatic asylum granted by France in the twenty-first century occurs in 2002 to Alassane Ouattara, now President of the Ivory Coast.[408] Two years later, in

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[397] Stephen McDonell, 'Tiananmen Square crisis station: the Australian embassy in 1989' (ABC News, 12 June 2014) <www.abc.net.au/news/2014-06-03/tiananmen-square-crisis-station-the-australian-embassy-in-1989/5498406?nw=0&r=Collection> accessed on 8 March 2022.

[398] To 137 individuals during the Spanish Civil War. Roncal, 101.

[399] To 900 individuals during the Spanish Civil War. Roncal, 101.

[400] In 1990 to asylum seekers in Albania. The New York Times, 4 July 1990.

[401] To João Bernardo Vieira, former President of Guinea-Bissau, in 1999. X, 'Deposed Guinea-Bissau's president arrives in Portugal' (BBC News, 11 June 1999) <http://news.bbc.co.uk/2/hi/africa/366762.stm> accessed on 26 April 2022.

[402] U.S. Department of State, 'Secretary of Legation Davis to the Secretary of State' (12 January 1916) <https://history.state.gov/historicaldocuments/frus1916/d352> accessed on 8 March 2022; Roger D. McGrath, 'Haitian-Building' (The American Conservative, 1 April 2010) <www.theamericanconservative.com/articles/haitian-building> accessed on 8 March 2022.

[403] Roncal, 101.

[404] To a Soviet citizen of Armenian descent. See Ludwik Dembinski, *The modern law of diplomacy: external missions of states and international organizations* (Nijhoff 1988), 249.

[405] To Adolphus Tolbert, son of the former president of Libya. See Ludwik Dembinski, *The modern law of diplomacy: external missions of states and international organizations* (Nijhoff 1988), 249.

[406] To Ange-Félix Patassé of the Central African Republic. See Roger East and Richard J. Thomas, *Profiles of People in Power: The World's Government Leaders* (Routledge 2003), 97.

[407] Two incidents can be registered: in July 1990, asylum was granted to several Albanian asylum seekers in Tirana, Albania and from October 1990 to August 1991, asylum was also granted to Michel Aoun, a Lebanese politician. See The New York Times, 4 July 1990; Maud S. Beelman, 'Albanians seek asylum in embassies' (The Washington Post, 4 July 1990) <www.washingtonpost.com/archive/politics/1990/07/04/albanians-seek-asylum-in-embassies/dc3df555-c311-4ba3-bb6d-19120a43f952> accessed on 3 March 2022; Nick B. Williams Jr, 'Lebanon's Aoun Gives In, Granted Asylum by France: Mideast: Christian strongman is chased from palace by Syrian bombardment. He orders his troops to support President Hrawi' (Los Angeles Times, 14 October 1990) <www.latimes.com/archives/la-xpm-1990-10-14-mn-3591-story.html> accessed on 8 March 2022.

[408] X, 'France sends troops to Ivory Coast' (BBC, 22 September 2002) <http://news.bbc.co.uk/2/hi/africa/2273859.stm> accessed on 8 March 2022; Amy McKenna,

December 2004, four North Koreans found asylum in the French mission in Vietnam.[409] Finally, in 2009, France granted diplomatic asylum to Andry Rajoelina, currently President of Madagascar.[410]

174. Hungary has granted diplomatic asylum in four sparse instances. During the Spanish Civil War, eighteen persons found asylum in Hungary's mission in Spain.[411] In 1988, twelve people of the Hungarian minority from Romania were granted diplomatic asylum and in 1990, it was granted to four Albanian asylum seekers.[412] More recently, in 2018, the ex-Prime Minister of Macedonia, Nikola Gruevski, received diplomatic asylum by Hungary.[413]

175. Switzerland granted diplomatic asylum to eighty-five individuals during the Spanish Civil War,[414] several Cuban asylum seekers in Havana in 1990,[415] its own citizens, Max Goeldi and Rachid Hamdani, in Libya in 2008[416] and Emin Huseynov, Azerbaijani journalist and human rights activist, from August 2014 to June 2015 in its embassy in Baku[417].

176. Germany has the most State practice regarding diplomatic asylum out of all European States. During the Spanish Civil War, Germany granted diplomatic asylum to eighty asylum seekers.[418] During the Second World War, Germany also granted diplomatic asylum to Ferenc Szálasi, leader of the Hungarian pro-Nazi party, and some of his close collaborators.[419] In 1984, Germany granted diplomatic asylum nine times, most of these cases concern East German citizens. In Prague, diplomatic protection was granted to twenty-five Czechs.[420] In January,

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'Alassane Ouattara' (Britannica, 15 April 2011) <www.britannica.com/biography/Alassane-Ouattara> accessed on 8 March 2022.

[409] Grant McCool, 'N.Koreans in Hanoi ask Danes to send them to South' (Reuters, 12 July 2007) <www.reuters.com/article/idUSSP39350> accessed on 8 March 2022.

[410] X, 'Are Malagasies turning against the French?' (France24, 11 March 2009) <https://observers.france24.com/en/20090311-malagasies-turning-against-french-madagascar-riots-rajoelina-ravalomanana> accessed on 8 March 2022.

[411] Roncal, 101.

[412] Kovács and Ádány, 193; The New York Times, 4 July 1990*;* Maud S. Beelman, 'Albanians seek asylum in embassies' (The Washington Post, 4 July 1990) <www.washingtonpost.com/archive/politics/1990/07/04/albanians-seek-asylum-in-embassies/dc3df555-c311-4ba3-bb6d-19120a43f952> accessed on 3 March 2022

[413] Fanni Kaszás, 'Former PM Gruevski Sought Asylum at Hungarian Embassy Outside Macedonia' (Hungary Today, 15 November 2018) <https://hungarytoday.hu/former-pm-gruevski-sought-asylum-at-hungarian-embassy-outside-macedonia> accessed on 8 March 2022.

[414] Roncal, 101.

[415] Pascal Fletcher, 'Cubans seek refuge in Swiss embassy' (The Washington Post, 24 July 1990) <www.washingtonpost.com/archive/politics/1990/07/24/cubans-seek-refuge-in-swiss-embassy/fd195069-84bb-4c7f-8f9f-7bfa5628f13a> accessed on 8 March 2022.

[416] Denza, *commentary VCDR*, 115.

[417] X, 'Swiss fly out opposition journalist hiding at its Azerbaijan embassy' (The Guardian, 14 June 2015) <www.theguardian.com/world/2015/jun/14/swiss-fly-out-opposition-journalist-hiding-at-its-azerbaijan-embassy> accessed on 8 March 2022.

[418] Roncal, 101.

[419] Kovács and Ádány, 186.

[420] Andy Park, 'The bizzare history of embassy asylum' (SBS News, 21 August 2012) <www.sbs.com.au/news/article/the-bizzare-history-of-embassy-asylum/ujfay97k4> accessed on 8 March 2022.

diplomatic asylum was given to twelve East Germans in Berlin.[421] In February to a prominent East German family[422] and to fifty East Germans[423] in Prague and to forty-eight East Germans[424] in Berlin. In October to 161 East Germans in Prague again.[425] In November to seven East Germans and three Poles in Warsaw,[426] fifteen East Germans in Budapest[427] and several East Germans in Bucharest[428].

177. In July 1990, 162 Albanian asylum seekers also received diplomatic asylum in Germany's embassy in Tirana.[429] In 2002, there are two incidents of Germany granting diplomatic asylum to North Koreans in Beijing. In April, to one North Korean man[430] and in September, to fifteen North Koreans in Germany's diplomatic compound[431]. Finally, in 2005, former Togolese Home Secretary François Boko was granted diplomatic asylum in Germany's embassy in Lomé.[432]

178. Looking at the practice of Spain regarding diplomatic asylum in the twentieth and twenty-first centuries, four incidents can be identified. Firstly, asylum was granted in 1932 to Gabriel and Mario Menocal y Moreno, both Cubans, in Spain's embassy in Cuba.[433] Secondly, at least eighteen asylum seekers found asylum in Spain's diplomatic mission in Havana in 1990.[434] Thirdly, in 2002, Spain granted diplomatic asylum to twenty-five North Koreans in Beijing, China.[435] Lastly, in the fourth case, diplomatic asylum was given to Leopoldo López and his wife in the Spanish ambassador's residence in Caracas from April 2019 to October 2020.[436]

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[421] AP, 'East German premier's kin seek asylum in west' (The New York Times, 26 February 1984) <www.nytimes.com/1984/02/26/world/east-german-premier-s-kin-seek-asylum-in-west.html> accessed on 8 March 2022.
[422] *Ibid.*
[423] Riveles, 157.
[424] John Benjamin Roberts, 'Diplomatic Asylum: An Inappropriate Solution for East Germans Desiring to Move to the West' [1987] 1(2) Temple International And Comparative Law Journal 231, 234.
[425] *Ibid.*
[426] *Ibid.*
[427] *Ibid.*
[428] *Ibid.*
[429] The New York Times, 4 July 1990.
[430] X, 'Korean seeks asylum at Beijing embassy' (CNN, 26 April 2002) <http://edition.cnn.com/2002/WORLD/asiapcf/east/04/25/china.nkorea> accessed on 8 March 2022.
[431] X, 'North Koreans seek asylum in Germany' (News24, 3 September 2002) <www.news24.com/news24/north-koreans-seek-asylum-in-germany-20020903> accessed on 8 March 2022.
[432] Jeevan Vasagar, 'German centre torched in Togo' (The Guardian, 30 April 2005) <www.theguardian.com/world/2005/apr/30/westafrica.jeevanvasagar> accessed on 8 March 2022.
[433] U.S. Department of State, 'The Chargé in Cuba (Reed) to the Secretary of State' (7 October 1932) <https://history.state.gov/historicaldocuments/frus1932v05/d608> accessed on 8 March 2022.
[434] Pascal Fletcher, 'Cubans seek refuge in Swiss embassy' (The Washington Post, 24 July 1990) <www.washingtonpost.com/archive/politics/1990/07/24/cubans-seek-refuge-in-swiss-embassy/fd195069-84bb-4c7f-8f9f-7bfa5628f13a> accessed on 8 March 2022.
[435] X, 'North Korean defectors leave Beijing' (Chicago Tribune, 15 March 2002) <www.chicagotribune.com/news/ct-xpm-2002-03-15-0203150311-story.html> accessed on 8 March 2022.
[436] Emma Anderson, 'Venezuelan opposition leader seeks refuge in Spanish embassy' (Politico, 1 May 2019) <https://www.politico.eu/article/venezuelan-opposition-leader-leopoldo-lopez-seeks-refuge-in-spanish-embassy> accessed on 8 March 2022.

179. Belgium, The Netherlands and Romania all granted diplomatic asylum in their embassies to asylum seekers during the Spanish Civil War.[437] Besides these instances, both The Netherlands and Romania have granted diplomatic asylum on another occasion in 2008. The Netherlands granted diplomatic asylum to Morgan Tsvangira[438] and Romania granted it to its own nationals Adrian and Roman Mocanu[439]. Belgium has granted it on two other separate occasions, namely in 1956[440] and 1990[441].

180. There are five cases in which Italy constitutes the State granting diplomatic asylum. The first two of these cases happened during the 1973 Chilean *coup d'état*.[442] Additionally, Italy granted asylum to twenty asylum seekers in its embassy in Albania and to several asylum seekers in its embassy in Cuba in 1990.[443] Recently, in 2019, Américo de Grazia, Mariela Magallanes and five others received diplomatic asylum in Italy's mission in Caracas.[444]

181. The Holy See has granted diplomatic asylum on three occasions: in 1944 to the Horthy family,[445] in 1989 to Manuel Noriega[446] and in 2008 to Nixon Moreno[447].

182. Although the UK rejects the concept of diplomatic asylum,[448] there have been four instances in which the UK has granted diplomatic asylum. The first

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[437] Roncal, 101.

[438] X, 'Tsvangirai seeks embassy refuge' (BBC, 23 June 2008) <http://news.bbc.co.uk/1/hi/7469705.stm> accessed on 8 March 2022.

[439] X, 'Mocanu brothers are denied trial in Romania' (Moldova Azi, 27 February 2009) <www.azi.md/ru/story/1562> accessed on 8 March 2022.

[440] To Hungarians Ferenc B. Farkas and Judith Maléter. See Judit Antónia Farkas, 'Sheltered by the embassy of Belgium in Budapest' [2016] VII(5) Hungarian Review.

[441] Several Cuban asylum seekers received asylum in Belgium's embassy in Havana, Cuba. See X, 'Cubans Seek Asylum at Belgian Envoy's Havana Residence' (Los Angeles Times, 29 May 1994) <www.latimes.com/archives/la-xpm-1994-05-29-mn-63682-story.html> accessed on 8 March 2022.

[442] X, 'Portraits of the Two Candidates in Brazil's Run-Off Presidential Election' (Tehran Times, 27 October 2002) <www.tehrantimes.com/news/92172/Portraits-of-the-Two-Candidates-in-Brazil-s-Run-Off-Presidential> accessed on 8 March 2022; Ewen MacAskill and Jonathan Franklin, 'Latin America's Schindler: a forgotten hero of the 20th century' (The Guardian, 14 December 2016) <www.theguardian.com/world/2016/dec/14/roberto-kozak-chile-latin-america-schindler> accessed on 8 March 2022.

[443] The New York Times, 4 July 1990; X, 'Embassies in Cuba Sealed Off as 9 More Seek Refuge' (Los Angeles Times, 22 July 1990) <www.latimes.com/archives/la-xpm-1990-07-22-mn-901-story.html> accessed on 8 March 2022.

[444] Lucia I. Suarez Sang, 'Venezuelan opposition members seek refuge in foreign embassies as Maduro cracks down' (Fox News, 10 May 2019) <www.foxnews.com/world/venezuelan-opposition-refuge-foreign-embassies-maduro-crackdown> accessed on 8 March 2022.

[445] Kovács and Ádány, 186.

[446] Don Phillips, 'Noriega seeks asylum with Vatican' (The Washington Post, 25 December 1989) <www.washingtonpost.com/archive/politics/1989/12/25/noriega-seeks-asylum-with-vatican/f47fc737-de1f-4ef4-8150-d5118908ca2e> accessed on 8 March 2022.

[447] Maria Carolina Gonzalez, 'Tear gas fired at Vatican diplomatic center in Venezuela' (CNN, 19 January 2009) <http://edition.cnn.com/2009/WORLD/americas/01/19/venezuela.tear.gas> accessed on 8 March 2022.

[448] Foreign Secretary William Hague, 'Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange' (UK Foreign Secretary, 16 August 2012) <www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange> accessed on 8 March 2022.

case happened in 1945 to Nicolae Rădescu, a Romanian general, in its embassy in Bucharest.[449] The second case concerned the notable Durban Six case from 1984.[450] In this case, six South Africans found asylum in the British consulate in South Africa.[451] Four years later, the third case followed where asylum was granted to Olivia Forsyth, a former spy, in the British embassy in Luanda, Angola.[452] Lastly, in 2002, two Afghan brothers sought asylum in the British consulate in Melbourne, Australia resulting in the previously mentioned *Bakhtiari* case.[453]

183. Sweden has been confronted with diplomatic asylum in its own diplomatic missions on three occasions. Once during the Spanish Civil War[454], during the 1973 Chilean *coup d'état*[455] and in 2004 with two North Korean asylum seekers[456]. Denmark has dealt with diplomatic asylum in two instances which both concerned North Koreans seeking asylum in the Danish embassy in Hanoi, Vietnam.[457]

184. Former Yugoslavia has dealt with diplomatic asylum two times: during the Spanish Civil War[458] and to Imre Nagy, a Hungarian communist politician, in 1956[459]. Former Czechoslovakia has granted diplomatic asylum on three occasions. Likewise to Yugoslavia, Czechoslovakia granted diplomatic asylum during the Spanish Civil war.[460] The other two occasions date from 1990, namely to asylum seekers in Albania[461] and to Cuban asylum seekers in Havana, Cuba[462]. There is no indication that any of the succeeding States have granted diplomatic asylum since the dissolution of Yugoslavia and Czechoslovakia.[463]

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[449] X, 'British embassy shelters Radescu; Rumanian Ex-Premier, Criticized by Moscow, Asked Asylum From Political Foes Tass Hears of "Astonishment"' (The New York Times, 10 March 1945) <www.nytimes.com/1945/03/10/archives/british-embassy-shelters-radescu-rumanian-expremier-criticized-by.html> accessed on 8 March 2022.

[450] Riveles, 139.

[451] *Ibid.*, 140.

[452] David Crary, 'Police Identify British Native as Spy' (AP, 3 February 1989) <https://apnews.com/article/e4e91aaadb9a9db7fcfa33ff8af355ee> accessed on 8 March 2022.

[453] R (B & Others), [7]. See *supra* Chapter II.c.iii.

[454] Roncal, 101.

[455] Marvine Howe, 'Swedish Ambassador Extends Shelter To Refugees of Chile's Political Storm' (The New York Times, 29 September 1973) <www.nytimes.com/1973/09/29/archives/swedish-ambassador-extends-shelter-to-refugees-of-chiles-political.html> accessed on 8 March 2022.

[456] Grant McCool, 'N.Koreans in Hanoi ask Danes to send them to South' (Reuters, 12 July 2007) <www.reuters.com/article/idUSSP39350> accessed on 8 March 2022.

[457] *Ibid.*; John Ruwitch, 'North Koreans seek asylum at Danish embassy in Vietnam' (Reuters, 24 September 2009) <www.reuters.com/article/us-korea-north-vietnam-asylum-idUSTRE58N11P20090924> accessed on 8 March 2022.

[458] Roncal, 101.

[459] Kovács and Ádány, 189.

[460] Roncal, 101.

[461] The New York Times, 4 July 1990.

[462] X, 'Seven Cubans Seek Refuge in Czechoslovak Embassy' (AP, 1O July 1990) <https://apnews.com/article/0b91f381e69e86c434df928601233cba> accessed on 8 March 2022.

[463] The modern States emerging from Yugoslavia (Croatia, Slovenia, Serbia, Bosnia and Herzegovina, Montenegro, Macedonia and Kosovo, although the statehood of Kosovo is disputed) have not granted diplomatic asylum. Since the dissolution of Czechoslovakia in 1993, neither the Czech Republic or Slovakia show practice of granting diplomatic asylum. Hughes-Gerber, 146, 152; Discover Czechia, 'A Brief History of the Czech Republic' (Czech Universities, 31 August 2019)

185. Finally, Greece and Poland have both granted diplomatic asylum in 1990 in their diplomatic premisses in Albania to asylum seekers.[464] Moreover, Poland granted diplomatic asylum during the Spanish Civil War.[465] Greece also granted diplomatic asylum in 1999 to Abdullah Öcalan, leader of the Kurdistan Workers' Party, in Nairobi.[466]

a.5. North America

186. There are thirty cases of diplomatic asylum spread over the US and Canada. Even though the US has denounced the practice of diplomatic asylum on multiple occasions,[467] there are twenty-five instances in which the US has granted diplomatic asylum.

187. Out of all these cases, two involved US citizens[468], one involved citizens of East Timor[469], three involved Cubans[470], one involved Costa Ricans[471], four involved citizens of African States (Burundi[472], Central African Republic[473] and Sudan[474]), one involved a Hungarian[475], five involved Soviet citizens[476], three

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<www.czechuniversities.com/article/a-brief-history-of-the-czech-republic> accessed 26 April 2022; Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, *International Law: a European Perspective* (Hart Publishing 2019), 234; Gleider Hernandez, *International law* (OUP 2019), 127.

[464] The New York Times, 4 July 1990.

[465] Roncal, 101.

[466] X, 'Ocalan fallout hits Greece' (BBC, 18 February 1999) <http://news.bbc.co.uk/2/hi/europe/281322.stm> accessed on 8 March 2022.

[467] Asylum Advisory Opinion, [161]; Kovács and Ádány, 199. See *infra* Chapter III.c.ii.2.

[468] Liz Dee, 'A Thieving U.S. Citizen Wreaks Havoc at the U.S Embassy in Nicaragua' (Association for Diplomatic Studies & Training, 17 March 2015) <https://adst.org/2015/03/an-unwelcome-guest-at-embassy-managua> accessed on 9 March 2022; Victoria Nuland, 'Daily Press Briefing - January 30, 2012' (US Department of State) <https://2009-2017.state.gov/r/pa/prs/dpb/2012/01/182732.htm> accessed on 9 March 2022.

[469] Sukino Harisumarto, 'Suharto, Clinton discuss East Timor' (UPI, 16 November 1994) <www.upi.com/Archives/1994/11/16/Suharto-Clinton-discuss-East-Timor/3048784962000> accessed on 9 March 2022.

[470] Marian Nash Leich, 'Digest of United States Practice in International Law 1980' (Office of the Legal Adviser Department of State), 203; Mike Clary, 'Trumpeter Arturo Sandoval Is Denied U.S. Citizenship' (Los Angeles Times, 23 April 1997) <www.latimes.com/archives/la-xpm-1997-04-23-ca-51420-story.html> accessed on 9 March 2022; Norman Kempster, 'Fidel Castro's Daughter Gets U.S. Asylum: Defection: Longtime critic of the Cuban dictator flees island. She is now in Atlanta' (Los Angeles Times, 23 December 1993) <www.latimes.com/archives/la-xpm-1993-12-23-mn-4825-story.html> accessed on 9 March 2022.

[471] US Office of the Historian, Papers relating to the foreign relations of the United States, with the address of the president to congress December 4, 1917, File No. 818.00/151.

[472] X, 'Crisis deepens as president flees to US embassy' (The Irish Times, 25 July 1996) <www.irishtimes.com/news/crisis-deepens-as-president-flees-to-us-embassy-1.70561> accessed on 9 March 2022; X, 'In Burundi, 100 Students Seek Refuge at US Embassy' (VOA News, 25 June 2015) <www.voanews.com/a/ap-burundi-student-us-embassy/2837365.html> accessed on 9 March 2022.

[473] Hughes-Gerber, 158.

[474] Kovács and Ádány, 198.

[475] Riveles, 157.

[476] FBI, 'Hollow Nickel/Rudolf Abel' <www.fbi.gov/history/famous-cases/hollow-nickel-rudolph-abel> accessed on 9 March 2022; Liz Dee, 'The Day Stalin's Daughter Asked for Asylum in the U.S.' (Association for Diplomatic Studies & Training, 28 February 2013) <https://adst.org/2013/02/the-day-stalins-daughter-asked-for-asylum-in-the-u-s> accessed on 9 March 2022; Oleg Skripnik, 'How did a group of Soviet Pentecostals end up living in the U.S. embassy?' (Russia Beyond, 15 August 2016) <https://www.rbth.com/arts/people/2016/08/15/how-did-a-group-

involved Chinese citizens[477], another three involved East Germans[478] and two concerned North Koreans[479].

188. There are five cases in which Canada has granted diplomatic asylum. During the 1973 Chilean *coup d'état* it granted diplomatic asylum to fifty Chileans.[480] During the Tehran hostage crisis, Canada also granted diplomatic asylum to six US diplomats.[481] In 2002 and 2004, North Koreans found asylum in Canada's embassy in Beijing[482] and in 2014 Ukrainian anti-government protesters were also granted diplomatic asylum[483].

a.6. Latin America

189. Latin American State practice shows the most States exercising diplomatic asylum. Argentina has given diplomatic asylum on two occasions, both during the Spanish Civil War.[484] Bolivia[485], Costa Rica[486], Ecuador[487], Haiti[488] and Nicaragua[489] have all granted diplomatic asylum on one occasion.

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of-soviet-pentecostals-end-up-living-in-the-us-embassy_621237> accessed on 9 March 2022; X, 'Soviet soldier leaves U.S. embassy in Afghanistan' (The New York Times, 5 November 1985) <www.nytimes.com/1985/11/05/world/soviet-soldier-leaves-us-embassy-in-afghanistan.html> accessed on 9 March 2022; Rossitto, 120.

[477] Chi Wang, *A Compelling Journey from Peking to Washington: Building a New Life in America* (Hamilton Books 2011), 105; James H. Williams, 'Fang Lizhi's Expanding Universe' [1990] 123 The China Quarterly 459, 459; X, 'Top China cop seeks refuge in US consulate?' (NBC News, 8 February 2012) <www.nbcnews.com/id/wbna46306742> accessed on 9 March 2022; Kovács and Ádány, 198.

[478] James M. Markham, 'East Germany tries accommodation' (The New York Times, 1 February 1984) <www.nytimes.com/1984/02/01/world/east-germany-tries-accommodation.html> accessed on 9 March 2022; John Benjamin Roberts, 'Diplomatic Asylum: An Inappropriate Solution for East Germans Desiring to Move to the West' [1987] 1(2) Temple International And Comparative Law Journal 231, 234.

[479] Robin Wright, Henry Chu and Barbara Demick, '2 North Koreans Seek Asylum at U.S. Embassy in Beijing' (Los Angeles Times, 27 April 2002) <www.latimes.com/archives/la-xpm-2002-apr-27-mn-40327-story.html> accessed on 9 March 2022; Hughes-Gerber, 158.

[480] Kovács and Ádány, 182.

[481] X, 'North Koreans seek asylum in Canadian Embassy' (CBC News, 12 May 2002) <www.cbc.ca/news/world/north-koreans-seek-asylum-in-canadian-embassy-1.324415> accessed on 9 March 2022; X, 'Canada closes embassy in Iran, to expel Iranian diplomats' (Reuters, 7 September 2012) <www.reuters.com/article/us-canada-iran-idUSBRE8860QC20120907> accessed on 9 March 2022.

[482] X, '44 North Koreans Storm Canadian Embassy in Beijing' (Radio Free Asia, 29 September 2004) <www.rfa.org/english/news/politics/china_nkorea-20040929.html> accessed on 9 March 2022.

[483] Murray Brewster, 'CP investigation: Canadian embassy had role in 2014 Ukraine uprising' (CTV News, 12 July 2015) <www.ctvnews.ca/politics/cp-investigation-canadian-embassy-had-role-in-2014-ukraine-uprising-1.2465670> accessed on 9 March 2022.

[484] Roncal, 101; Kovács and Ádány, 184.

[485] Roncal, 101.

[486] To Carlos Ortega, Venezuelan political leader. See X, 'Venezuelan strike boss granted Costa Rica asylum' (CNN, 14 March 2003) <http://edition.cnn.com/2003/WORLD/americas/03/14/venezuela.asylum.reut> accessed on 9 March 2022.

[487] To Julian Assange in the Ecuadorian embassy in London, UK. See Behrens, *Diplomatic interference and the law*, 237.

[488] During the Spanish Civil War. See Roncal, 101.

[489] To Alberto Pizango in the Peruvian capital, Lima. See Rory Carroll, 'Peruvian indigenous leader seeks asylum in Nicaragua's embassy' (The Guardian, 9 June 2009)

190. Mexico has granted diplomatic asylum the most out of all States in Latin America, counting seventeen occasions. The oldest one dates from 1932.[490] During the Spanish Civil War and its aftermath, Mexico also granted diplomatic asylum to several Spanish asylum seekers.[491] Former President of Guatemala, Juan José Arévalo Bermejo, received asylum in 1944 in Mexico's embassy in Guatemala City.[492] Three years later, asylum was granted to former President of Nicaragua, Leonardo Argüello Barreto, in Mexico's embassy in Nicaragua.[493] In 1954, diplomatic asylum was given to former President of Guatemala, Jacobo Árbenz Guzmán, and his family.[494]

191. In a span of eight years, Mexico granted diplomatic asylum six times: in 1973[495], 1974[496], twice in 1976[497], 1978[498] and 1981[499]. Moreover, in 1985, a Nicaraguan rebel leader received diplomatic asylum.[500] Five years later, Mexico granted asylum to former National Bank of Panama manager Rafael Arosemena in its diplomatic mission in Panama City[501] and most recently, in 2002, it granted diplomatic asylum to twenty-one Cubans[502].

<www.theguardian.com/world/2009/jun/09/peru-amazon-protests-indigenous-leader> accessed on 9 March 2022.

[490] Hughes-Gerber, 207.

[491] Roncal, 101.

[492] Hughes-Gerber, 54.

[493] US Office of the Historian, 'The Chargé in Nicaragua (Bernbaum) to the Secretary of State', File No. 817.00/5–2747.

[494] X, 'Guatemalans get haven; Mexico Gives Asylum to Two Who Fled During Revolt' (The New York Times, 3 July 1954) <www.nytimes.com/1954/07/03/archives/guatemalans-get-haven-mexico-gives-asylum-to-two-who-fled-during.html> accessed on 9 March 2022.

[495] During the Chilean *coup d'état.* See Kovács and Ádány, 182.

[496] To a former rector of the University of Buenos Aires. See Jonathan Kandell, 'Argentines given embassy refuge' (The New York Times, 25 September 1974) <www.nytimes.com/1974/09/25/archives/argentines-given-embassy-refuge-former-university-rector-threatened.html> accessed on 10 March 2022.

[497] To the former president of Argentina and an Argentinean journalist. See Marlise Simons, 'Historically Mexico Has Been a Haven for Political Exiles' (The Washington Post, 21 December 1979) <www.washingtonpost.com/archive/politics/1979/12/21/historically-mexico-has-been-a-haven-for-political-exiles/4431fa4e-6e5d-48e5-87fa-36abce63dddc> accessed on 10 March 2022; John Reichertz, 'Peronist holds Latin American record for asylum' (UPI, 3 September 1981) <www.upi.com/Archives/1981/09/03/Peronist-holds-Latin-American-record-for-asylum/6484368337600> accessed on 10 March 2022.

[498] To Sergio Ramirez Mercado. See X, 'Sergio Ramirez Mercado' (The New York Times, 16 July 1979) <www.nytimes.com/1979/07/16/archives/sergio-ramirez-mercado-left-the-country-in-1964-faces-a-stern-test.html> accessed on 10 March 2022.

[499] To Gabriel García Márquez, Columbian author. See X, 'Gabriel Garcia Marquez, Colombia's best-known novelist, sought political asylum' (UPI, 26 March 1981) <www.upi.com/Archives/1981/03/26/Gabriel-Garcia-Marquez-Colombias-best-known-novelist-sought-political-asylum/3477354430800> accessed on 10 March 2022.

[500] X, 'Around the world; U.S. Said to Withhold Visa for Former Rebel' (The New York Times, 11 June 1985) <www.nytimes.com/1985/06/11/world/around-the-world-us-said-to-withhold-visa-for-former-rebel.html> accessed on 9 March 2022.

[501] John Otis, 'Panama's 'untouchables' cause frustration, tensions' (UPI, 20 October 1990) <www.upi.com/Archives/1990/10/20/Panamas-untouchables-cause-frustration-tensions/8111656395200> accessed on 9 March 2022.

[502] X, '21 Cubans Hole Up in Embassy' (Los Angeles Times, 1 March 2002) <www.latimes.com/archives/la-xpm-2002-mar-01-mn-30481-story.html> accessed on 9 March 2022.

192. After Mexico, Brazil has the most cases: fourteen in total. Two occasions date from 1932.[503] Brazil also provided asylum in its diplomatic mission during the Spanish Civil war.[504] In 1947, asylum was granted to author Augusto Roa Bastos in Brazil's embassy in Asunción, Paraguay.[505] In Portugal in 1959, the Brazilian embassy granted diplomatic asylum to the defeated Presidential candidate, Humberto Delgado.[506] Two years later, Brazil granted asylum to Olga Morgan, widow of a Cuban opposition leader.[507]

193. Brazil has granted diplomatic asylum twice in Haiti[508] and twice in Bolivia[509]. Additionally, asylum was granted in 1982 to a former Guatemalan Minister[510], in 2005 in Ecuador to the former President of Ecuador[511], in 2009 to José Manuel Zelaya Rosales, former President of Honduras[512], and most recently in 2019 to several Venezuelan troops in Brazil's embassy in Caracas[513].

194. The Dominican Republic and Uruguay have each granted diplomatic on three occasions. Both during the Spanish Civil War.[514] The Dominican Republic then twice in Haiti, once in 1963 to opponents of the Duvalier regime[515] and once in 1988 to Franck Romain, former Mayor of Port-au-Prince[516]. Uruguay granted

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[503] To former Cuban President, his nephew and a member of the House of Representatives See US Office of the Historian, 'The Ambassador in Cuba (Guggenheim) to the Secretary of State', File No. 837.00/3295.

[504] Roncal, 101.

[505] Hughes-Gerber, 60.

[506] X, 'Foe of Salazar is given asylum; Brazilian embassy shelters Delgado, loser in Portugal presidency race in '58' (The New York Times, 13 January 1959) <www.nytimes.com/1959/01/13/archives/foe-of-salazar-is-given-asylum-brazilian-embassy-shelters-delgado.html> accessed on 11 March 2022.

[507] Aran Shetterly, *The Americano: Fighting with Castro for Cuba's Freedom* (Algonquin Books 2007), 272.

[508] In 1967 to Leon Veillard, attorney, and in 1986 to Albert Pierre, police chief. See Hughes-Gerber, 56; X, 'Ex-Duvalier Police Chief Granted Asylum in Brazil' (AP News 25 February 1986) <https://apnews.com/article/036cc76abfef320e7a528019a3fdcf85> accessed on 10 March 2022.

[509] In 1981 former Defence Minister of Bolivia, Hugo Céspedes, and 2012 to a senator. See Behrens, *Diplomatic interference and the law*, 243; Jonathan Watts, 'Bolivian senator's bolt to Brazil sparks diplomatic row' (The Guardian, 27 August 2013) <www.theguardian.com/world/2013/aug/27/bolivian-senator-brazil-diplomatic> accessed on 10 March 2022.

[510] X, 'Five members of council quit in protest' (UPI, 31 August 1983) <www.upi.com/Archives/1983/08/31/Five-members-of-council-quit-in-protest/4263431150400> accessed on 10 March 2022.

[511] X, 'Ousted Ecuador president gets Brazil asylum' (NBC News, 20 April 2005) <www.nbcnews.com/id/wbna7574996> accessed on 10 March 2022.

[512] *Certain Questions concerning Diplomatic Relations (Honduras v. Brazil)* (Institution of proceedings) [2009] ICJ, [3].

[513] X, 'Various' Venezuelan troops seek asylum in Brazil embassy: official' (France24, 30 April 2019) <www.france24.com/en/20190430-various-venezuelan-troops-seek-asylum-brazil-embassy-official-0> accessed on 10 March 2022.

[514] Roncal, 101.

[515] Hughes-Gerber, 56.

[516] X, 'The World' (Los Angeles Times, 3 January 1989) <www.latimes.com/archives/la-xpm-1989-01-03-mn-64-story.html> accessed on 10 March 2022.

diplomatic asylum in 1932 to two Cubans[517] and, recently, in 2018 to Peru's ex-President[518].

195. Peru has been confronted with diplomatic asylum in its own diplomatic missions on four occasions. Firstly, during the Spanish Civil War.[519] Secondly, concerning five prisoners in Venezuela in 1961.[520] Thirdly, during the Mariel Cuban exodus to almost ten thousand Cubans.[521] Lastly, in 1989, asylum was granted to an individual on the US most-wanted list and eleven others in the Peruvian ambassador's residency in Panama City.[522]

196. There are seven cases in which Chile has granted diplomatic asylum. Twice during the Spanish Civil War and its aftermath.[523] In 1991, to Erich Honecker, East German leader, in the Chilean embassy in Moscow, Russia.[524] Three times in 2017 in the embassy in Venezuela[525] and once in 2019 to Leopoldo Lopez in Chile's diplomatic residence in Venezuela[526].

197. Cuba and Paraguay both granted diplomatic asylum during the Spanish Civil War.[527] Cuba also gave diplomatic asylum to Luis Gomez in 1989.[528] Juan

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[517] US Office of the Historian, The Chargé in Cuba (Reed) to the Secretary of State, File No. 837.00/3368.

[518] X, 'Peru ex-president Garcia asked for asylum in Uruguay: foreign ministry' (Reuters, 18 November 2018) <www.reuters.com/article/us-peru-asylum-idUSKCN1NN0S2> accessed on 10 March 2022.

[519] Roncal, 101.

[520] Hughes-Gerber, 71.

[521] X, 'Fidel Castro announces Mariel Boatlift, allowing Cubans to emigrate to U.S.' (History.com, 24 November 2009) <www.history.com/this-day-in-history/castro-announces-mariel-boatlift> accessed on 10 March 2022.

[522] Andrew Scott, 'Peru Says It Grants Asylum to High Noriega Aide, 11 Others With AM-Panama, Bjt' (AP News, 10 January 1990) <https://apnews.com/article/4984dd8225c5f893de99141120e42072> accessed on 10 March 2022.

[523] Roncal, 101.

[524] Marc Fisher, 'Honecker rebuffed by Chile in quest for political asylum' (The Washington Post, 13 December 1991) <www.washingtonpost.com/archive/politics/1991/12/13/honecker-rebuffed-by-chile-in-quest-for-political-asylum/6fe6c2f1-f22f-4637-bc62-16f187499092> accessed on 12 March 2022.

[525] To Venezuelan opposition politicians and five Venezuelan judges. See X, 'Chile says will give Venezuelan politician asylum if requested' (Reuters, 6 April 2017) <www.reuters.com/article/us-venezuela-politics-chile-idUSKBN1782HS> accessed on 12 March 2022; X, 'Five Venezuelan judges get asylum in Chile' (The Santiago Times, 21 October 2017) <https://santiagotimes.cl/2017/10/21/five-venezuelan-judges-get-asylum-in-chile> accessed on 12 March 2022; Alexandra Ulmer and Deisy Buitrago, 'Venezuela opposition leader Guevara seeks refuge in Chile ambassador's home' (Reuters, 5 November 2017) <www.reuters.com/article/us-venezuela-politics-idUSKBN1D50LN> accessed on 12 March 2022.

[526] X, 'Venezuela's Lopez leaves Chile diplomatic residence for Spain's embassy: Chile foreign minister' (Reuters, 1 May 2019) <www.reuters.com/article/us-venezuela-politics-chile-lopez-idUSKCN1S72YF> accessed on 12 March 2022.

[527] Roncal, 101.

[528] X, 'Former Noriega associates allowed to leave country' (UPI, 11 May 1991) <www.upi.com/Archives/1991/05/11/Former-Noriega-associates-allowed-to-leave-country/2802673934400> accessed on 9 March 2022.

Domingo Perón, former Argentinian President, was given asylum in Paraguay's embassy in Buenos Aires in 1955.[529]

198. Looking at the practice of Colombia regarding diplomatic asylum six occasions can be identified: to two Cubans in the Colombian legation in Havana in 1932[530], to eight asylees during the Spanish Civil War[531], to Haya de la Torre in 1949, leading to the famous *Asylum* judgement by the ICJ[532], to Alan García, ex-President of Peru, in the Colombian embassy in Peru in 1992[533], to Prosper Avil, Haitian military dictator, in 1995 in the ambassador's residence in Porte-au-Prince[534] and to Pedro Carmona who had attempted to overthrow the Venezuelan President in 2005[535].

199. Venezuela granted diplomatic asylum on five separate occasions. Firstly, to Colombian leaders of the opposition liberal party in 1952 in Bogota.[536] Secondly, in 1959, to Manuel Urrutia who was the first President of the 1959 revolutionary government in Cuba.[537] Thirdly, Venezuela granted diplomatic asylum to persons with links to the overthrown Allende government after the 1973 *coup d'état* in Chile[538] and then in 1979 to Cuban refugees[539]. Lastly, in 1985 to Lt. Roberto Granera, a military doctor, in the Venezuelan embassy in Nicaragua.[540]

200. Finally, Panama also granted diplomatic asylum five times. First during the Spanish Civil War,[541] then, in 1947, to captain Francisco Aguirre Baca in

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[529] X, 'Argentina thanks Paraguay for granting General Peron asylum in 1955' (Merco Press, 12 September 2013) <https://en.mercopress.com/2013/09/12/argentina-thanks-paraguay-for-granting-general-peron-asylum-in-1955> accessed on 9 March 2022.

[530] US Office of the Historian, List of Persons <https://history.state.gov/historicaldocuments/frus1932v05/persons> accessed on 12 March 2022.

[531] Roncal, 101.

[532] Asylum (Colombia v. Peru), 273.

[533] X, 'Former president Alan Garcia granted asylum in Colombia' (UPI, 1 June 1992) <www.upi.com/Archives/1992/06/01/Former-president-Alan-Garcia-granted-asylum-in-Colombia/6684707371200> accessed on 12 March 2022.

[534] X, 'Haitian legislator shot dead' (The Washington Post, 9 November 1995) <www.washingtonpost.com/archive/politics/1995/11/09/haitian-legislator-shot-dead/2e907720-f454-4cf1-9221-decd31016180> accessed on 12 March 2022.

[535] James Anderson, 'Venezuela Coup Leader Gets Asylum' (AP News, 27 May 2002) <https://apnews.com/article/99645a978534a3670509d0a13d5ef209> accessed on 12 March 2022.

[536] X, 'Asylum in Venezuelan Embassy; Take Refuge in Venezuelan Embassy embassy asylum for 2 Colombians' (The New York Times, 13 September 1952) <www.nytimes.com/1952/09/13/archives/2-colombian-liberal-chiefs-get-asylum-in-venezuelan-embassy-take.html> accessed on 12 March 2022.

[537] Wolfgang Saxon, 'Manuel Urrutia; was foe of Castro' (The New York Times, 6 July 1981) <www.nytimes.com/1981/07/06/obituaries/manuel-urrutia-was-foe-of-castro.html> accessed on 12 March 2022.

[538] Ludwik Dembinski, *The modern law of diplomacy: external missions of states and international organizations* (Nijhoff 1988), 249.

[539] Kathleen Dupes Hawk, Ron Villella, Adolfo Leyva de Varona, Kristen Cifers, and Bob Graham, *Florida and the Mariel Boatlift Of 1980: The First Twenty Days* (University of Alabama Press 2014), 29.

[540] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 331.

[541] Roncal, 101.

Nicaragua[542]. As Venezuela did, Panama also granted diplomatic asylum to 250 persons with links to the overthrown Allende government in Chile after the 1973 *coup d'état*.[543] Recently, in 2017, asylum was granted to Venezuelan judges in the diplomatic mission of Panama in Venezuela[544] and in 2019 to eighteen national guardsmen[545].

a.7. Conclusion

201. In the foregoing, the State practice concerning diplomatic asylum was studied for each continent. An analysis will now be made to determine whether this is sufficient to constitute the necessary State practice.

202. State practice regarding diplomatic asylum from Africa and Australia is near non-existent. Combined, there are only five cases: four from Africa and one from Australia. There are more cases of diplomatic asylum in Asia, however, they are limited to only twenty-five occasions by twelve different States, including Taiwan, whose statehood is disputed.

203. Europe counts twenty-one States having granted diplomatic asylum in seventy-five separate incidents. Five of those incidents include grants of diplomatic asylum by former States, Yugoslavia and Czechoslovakia. This does not fulfil the requirements of extensive and consistent State practice. Motivations by European States to grant diplomatic asylum differ: some have only granted asylum in their embassies during political unrest, some due to humanitarian considerations and some only to a specific group of people.

204. North American State practice entails thirty cases of diplomatic asylum, only encompassing the US and Canada. State practice in Latin America comprises seventy-five cases by seventeen States. The Latin American State practice fulfils the requirement of being extensive: seventeen out of twenty-two States have granted diplomatic asylum at least once.[546]

205. In sum, only fifty-seven States have granted diplomatic asylum at least once, with practice from Africa and Australia almost completely non-existent. It is thus clear that the State practice concerning diplomatic asylum from the twentieth and twenty-first centuries is insufficient to fulfil the requirement of being widespread in order to constitute a rule of customary international law.[547] The

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[542] US Office of the Historian, The Chargé in Nicaragua (Bernbaum) to the Secretary of State, File No. 817.00/5–2747.
[543] Ludwik Dembinski, *The modern law of diplomacy: external missions of states and international organizations* (Nijhoff 1988), 249.
[544] X, 'Panama grants asylum to Venezuela judges' (Panama Newsroom, 4 August 2017) <www.newsroompanama.com/news/panama-grants-asylum-venezuela-judges> accessed on 12 March 2022.
[545] Joshua Goodman, 'Embassy a 'golden cage' to foe of Maduro' (Arkansas Democrat Gazette, 13 May 2019) <www.arkansasonline.com/news/2019/may/13/embassy-a-golden-cage-to-foe-of-maduro-> accessed on 12 March 2022.
[546] Asylum (Colombia v. Peru) (Dissenting opinion Judge Azevedo), 336; Rossitto, 128; Wilde, 203.
[547] den Heijer, 113; Juergen Kleiner, *Diplomatic Practice: Between Tradition And Innovation* (World Scientific Publishing Company 2009), 168.

requirement of consistency is also unsatisfied due to the variation in circumstances and duration of the asylum, the only consistent feature recognisable is the denial of diplomatic asylum for individuals accused or convicted of common crimes.[548]

b. *Opinio juris* pertaining to diplomatic asylum

206. As the above-mentioned concludes that State practice is insufficient for a customary rule, the assessment of *opinio juris* on diplomatic asylum becomes moot. Indeed, the belief that something is the law is merely aspiration without the accompanying practice.[549] Therefore, the formulation of a customary rule on a right to grant diplomatic asylum is precluded. Nevertheless, in order to be comprehensive, the *opinio juris* will still be discussed.

207. In many cases of diplomatic asylum, the motivation of the granting State for the asylum is difficult to identify. Some States legitimate granting diplomatic asylum based on humanitarian considerations, others reject the practice completely, and others have granted diplomatic asylum while still rejecting the practice.

208. There is not much *opinio juris* stemming from African States. Egypt[550] and Nigeria[551] have rejected the concept of diplomatic asylum. Conversely, Liberia has stated that:

> "*The right to grant diplomatic asylum should be accorded to diplomatic missions. (...) The right of diplomatic asylum should be allowed [to] persons who have committed political offences and, on humanitarian grounds, to persons fleeing from imminent personal danger of persecution (...).*"[552]

209. With regard to Asian States, several States have expressed their views on diplomatic asylum with India[553], Japan[554] and Bahrain[555] explicitly rejecting the practice of diplomatic asylum. On the other hand, concerning the Australian

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[548] Kovács and Ádány, 201; den Heijer, 113.
[549] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, 126.
[550] UNGA, Question of Diplomatic Asylum Part II, [141]. ("Egypt proposed making specific the diplomatic agent's obligation to surrender any persons wanted by the local authorities for crimes or offences.")
[551] UNGA, 'Summary record of the 1511th meeting' (1974) UN Doc. A/C.6/SR.1511, [30]. ("His [Nigerian] Government did not recognize that institution [diplomatic asylum] as a part of customary international law.")
[552] UNGA, Question of Diplomatic Asylum Part I, 24.
[553] UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [23]. ("The Government of India did not recognize the right of foreign and Commonwealth missions in India to give asylum to any person or persons within their premises.")
[554] Porcino, 439; den Heijer, 113.
[555] UNGA, Question of Diplomatic Asylum Part I, 15. ("Generally, Bahrain supports the traditional view and does not favour according unqualified recognition to diplomatic asylum.")

continent, Australia has stated that it considers "that the institution of diplomatic asylum was now recognized in international law for humanitarian reasons"[556].

210. In Europe, there is evidence of States accepting diplomatic asylum in exceptional circumstances based on humanitarian considerations, but ultimately rejecting diplomatic asylum as part of customary international law.[557] Austria, for example, stated in 1973 that diplomatic asylum was not recognised in general international law[558], but later, in 1975, specified that:

> "*Any such interference with another State's sovereignty is only justifiable under special circumstances: where a person is in immediate, serious danger, or where a State persecutes the person concerned in a manner incompatible with minimum standards of human rights. It is only in such cases that some kind of customary right might perhaps be deduced from the humanitarian principles of the law of nations, although the institution of "diplomatic asylum" is unknown to general international customary law.*"[559]

211. Similarly, Norway is of the opinion that diplomatic asylum is not a recognised institution in international law but that:

> "*There may, exceptionally, be cases in which humanitarian considerations and the necessity of protecting fundamental human rights are of decisive importance. In the view of the Norwegian Government, it would be inhuman and repugnant in specific situations not to use a possibility of protecting the life of a person or of saving him from inhuman treatment or punishment. For humanitarian reasons it should therefore be considered legitimate for diplomatic missions to grant protection in their premises in such exceptional situations.*"[560]

212. Sweden adopted the same approach as Norway and used the exact wording with regard to exceptional humanitarian circumstances.[561] Denmark[562] and Belgium[563] also adopted similar positions.

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[556] UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [1].
[557] UNGA, Question of Diplomatic Asylum Part I, 22; Porcino, 440.
[558] UNGA, 'Agenda Item 90: Draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons' (1973) UN Doc. A/C.6/SR.1421, [10].
[559] UNGA, Question of Diplomatic Asylum Part I, 14.
[560] UNGA, Question of Diplomatic Asylum Part I, 26.
[561] *Ibid.*, 29.
[562] *Ibid.*, 19.
[563] *Ibid.*, 15; UNGA, 'Summary record of the 1511th meeting' (1974) UN Doc. A/C.6/SR.1511, [34].

213. Some States are restrictive in their position: the UK[564], former Czechoslovakia[565], France[566], Poland[567] and Germany[568] generally reject the practice. Consequently, scholars agree that the practice of diplomatic asylum is not recognised in Europe.[569]

214. The US, as part of North America, has explicitly stated it does not recognise diplomatic asylum, although having on occasion granted diplomatic asylum.[570] Canada has stated that it is of the view that general international law does not recognise diplomatic asylum but that its policy is to "only (...) grant protection in Canadian diplomatic premises for purely humanitarian reasons."[571] Lastly, Latin American States have generally supported a position in favour of diplomatic asylum.[572]

215. The IACtHR concluded in 2018 that the *opinio juris* necessary for a customary rule is not present for all Member States[573] of the OAS.[574] The Court based this conclusion on the fact that not all OAS Member States are parties to the conventions on diplomatic asylum, which are, furthermore, not uniform in their terminology as they respond to arising situations concerning diplomatic asylum.[575] Additionally, participating States in the procedure expressed that there

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[564] Foreign Secretary William Hague, 'Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange' (UK Foreign Secretary, 16 August 2012) <www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange> accessed on 8 March 2022. ("The UK does not accept the principle of diplomatic asylum.")

[565] UNGA, Question of Diplomatic Asylum Part I, 18. ("The Czechoslovak Socialist Republic does not recognize the institution of diplomatic asylum.")

[566] UNGA, Question of Diplomatic Asylum Part I, 21. (Stating that "Diplomatic asylum is not an institution of international law. There is no generally recognized customary law on the subject.")

[567] UNGA, Question of Diplomatic Asylum Part I, 27. ("The Polish Government believes that this institution is incompatible with generally recognized principles of diplomatic and consular law")

[568] Presse- und Informationsamt der Bundesregierung, Regierungspressekonferenz vom 15. August 2014 <www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-15-august-845252> accessed on 27 April 2022. ("There is no such thing as diplomatic asylum under German international and constitutional law.")

[569] Rossitto, 112; Riveles, 148; Juergen Kleiner, *Diplomatic Practice: Between Tradition And Innovation* (World Scientific Publishing Company 2009), 167.

[570] See the US Declaration upon adoption of the 1933 Convention on Political Asylum (*supra* Chapter III.b.ii.3); UNGA, Question of Diplomatic Asylum Part II, [220]; Asylum Advisory Opinion, [161]; Rossitto, 111.

[571] UNGA, Question of Diplomatic Asylum Part I, 17.

[572] Uruguay, Mexico, Chile, Argentina and Costa Rica in UNGA, Question of Diplomatic Asylum Part II, [223]; Venezuela in UNGA, 'Agenda Item 90: Draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons' (1973) UN Doc. A/C.6/SR.1421, [7]; Brazil in UNGA, 'Summary record of the 1555th meeting' (1975) UN Doc. A/C.6/SR.1555, [1]; Ecuador in UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [27]; Bolivia in UNGA, 'Report of the International Law Commission on the work of its eleventh session' (1959) UN Doc. A/C.6/SR.606, [35]; Colombia in Asylum (Colombia v. Peru), 276; Porcino, 441.

[573] The organisation counts thirty-five Member States; including all Latin American States, Canada, the US, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Trinidad and Tobago, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Saint Lucia and Jamaica. See OAS, 'Member States' (2022) <www.oas.org/en/member_states/default.asp> accessed on 23 April 2022.

[574] Asylum Advisory Opinion, [162].

[575] *Ibid.*, [159].

> "*is no uniform position in the Latin American sub-region to conclude that diplomatic asylum is part of regional custom, and that it is only a treaty-based system. Furthermore, (...) there is no legal obligation to grant diplomatic asylum, as it constitutes an act of foreign policy.*"[576]

216. The inconsistent and conflicting way in which States have rejected diplomatic asylum while still allowing for the possibility to grant protection in their embassies based on humanitarian grounds vitiates the idea that there is sufficient *opinio juris* to form a rule of customary international law. Additionally, the absence of recognition from African and Asian States highlights the lack of *opinio juris* to establish a rule of customary international law.

3.3.3. Regional custom

217. Besides universal custom, regional customary law can exist. Regional custom entails a rule of customary law only to a specific region, it thus only applies to a limited number of States.[577] It has the same requirements as universal customary international law, with the exception that the needed State practice and *opinio juris* are limited to the region in question.[578]

218. On a regional level, the State practice and *opinio juris* of Africa, Australia, Asia, Europe and North America cannot fulfil the requirements for a regional customary rule. Yet, it is alleged that the Latin American practice and treaties fulfil the necessary requirements to constitute regional customary law.[579] In the *Asylum* case, Colombia argued that this is indeed the case and that, consequently, diplomatic asylum is a regional custom in Latin America.[580] The ICJ, however, deemed this not proven.[581] According to the Court, there has been:

> "*So much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant*

[576] *Ibid.*, [160].
[577] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc. A/73/10, Conclusion 10(2), 155.
[578] *Ibid.*, 156.
[579] Wilde, 203; Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn), fn 111; Hugo Caminos, David W. Kennedy and George A. Zaphiriou, 'The Latin American Contribution to International Law' [1986] 80 American Society of International Law 157, 160; Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019), 103.
[580] Asylum (Colombia v. Peru), 276.
[581] *Ibid.*, 277.

> *and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.*"[582]

219. However, it must be noted that the ICJ was specifically dealing with the question whether a State can unilaterally determine the nature of the offence.[583] Additionally, this judgement dates from 1950, therefore legitimately raising the question whether the State practice and *opinio juris* of Latin American States have changed since then.

220. Analysis shows that there is considerable discussion regarding the question whether Latin American practice concerning diplomatic asylum entails a rule of regional customary law.

221. As established above, Latin American State practice fulfils the requirement of being extensive.[584] Nevertheless, it must also be constant in order to fulfil the necessary requirements of State practice for a rule of regional customary law. The 1975 report on diplomatic asylum by the UN General Assembly agreed that the Latin American practice is widespread but far from constant, instead "based on an amalgam of political, legal and humanitarian considerations."[585] Similarly, Shah, Morgenstern and Rossitto considered the Latin American State practice inconsistent.[586] Rossitto observed:

> "*The practice of granting diplomatic asylum in Latin America, although widespread, is somewhat erratic. Indeed, this practice has been inconsistent at different times and has varied from country to country.*"

222. If this reasoning is followed, one of two requirements for customary law, namely State practice, is not fulfilled, therefore making an assessment of *opinio juris* in Latin America moot.

223. However, there are also arguments that the Latin American State practice does satisfy the requirement of being constant. For example, the practice in Latin America shows similar characteristics, namely that the individual concerned has often committed a political offence, only urgent cases enjoy diplomatic asylum and, in most instances, safe passage is granted.[587]

224. In the hypoworkthat the Latin American practice satisfies the requirements of State practice, the corresponding *opinio juris* must also be satisfied. There is certainly support for the existence of *opinio juris* concerning diplomatic asylum in Latin America, specifically from Latin American States themselves.[588]

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[582] *Ibid.*
[583] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 330.
[584] See *supra* Chapter III.c.ii.1.
[585] UNGA, Question of Diplomatic Asylum Part II, [141].
[586] Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [7]; Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 367; Rossitto, 128; Porcino, 435.
[587] Hughes-Gerber, 154. See also *supra* Chapter III.b.iii.
[588] Porcino, 441; Hughes-Gerber, 168. For statements of Latin American States recognising diplomatic asylum, see n 571.

Nevertheless, Jeffery concluded that the *opinio juris* is missing, basing this approach on Ronning's authoritative analysis of Latin American practice.[589] Ronning concluded that:

> "*In a large number of cases the action gives no indication of having sprung from any recognition of legal right or duty under international law – American or general. This, of course, does not prove that a feeling of legal obligation was not present in any of them. But it does show that the mere citation of a long list of cases where protection has been afforded and respected in one form or another cannot of itself serve as the basis for a rule of law which would be applicable where circumstances such as those described above*[590] *(...) do not prevail.*"[591]

225. It can also not be neglected that the IACtHR, which has jurisdiction over all Latin American States, declared the *opinio juris* lacking.[592] Though, it should be noted that the Americas were examined as a whole in order to determine whether or not a regional custom existed.

226. Given the discourse on whether all requirements for regional customary law are fulfilled, it seems pre-emptive to conclude that diplomatic asylum constitutes regional customary law in Latin America.

3.3.4. Conclusion

227. On a universal level, the majority of legal opinion concurs – rightly so – that diplomatic asylum does not satisfy the necessary requirements to constitute a rule of customary international law.[593] Although several States have granted diplomatic asylum on multiple occasions, the State practice is too inconsistent and not extensive or representative enough. Further, the accompanying requirement of opinio juris is insufficient as multiple States have explicitly rejected the practice. Concludingly, diplomatic asylum has not attained the status of a rule of customary international law.

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[589] Jeffery, 15; Värk, 245.

[590] Ronning describes six circumstances: (1) cases where the receiving State has no charges against the individual; (2) cases where the individual leaves the diplomatic premises after a short time when he is no longer in danger; (3) cases where the receiving State would rather expel the individual instead of inflicting punishment and therefore cooperates in granting safe conduct; (4) cases where asylum is granted with the approval of the receiving State; (5) cases where the diplomatic agent has exercised the "right to asylum" in excess of what his Government would normally claim; and (6) cases where the receiving State objects to the diplomatic asylum but where the sending State will not surrender the individual and the receiving State wishes to avoid a political impasse, it agrees with safe conduct out of the country. Ronning, 45-50.

[591] Ronning, 50-51 (emphasis in original).

[592] Asylum Advisory Opinion, [162].

[593] Denza, *Diplomatic asylum*, 1426; den Heijer, 113; Porcino, 445; Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 333-334; Jeffery, 16; Värk, 257; Juergen Kleiner, *Diplomatic Practice: Between Tradition And Innovation* (World Scientific Publishing Company 2009), 167.

228. Some States make an exception for the illegality of diplomatic asylum based on humanitarian concerns, however, whether customary international law accepts diplomatic asylum based on humanitarian considerations seems doubtful.[594] It is regarded more as a practice rather than a legal right.[595] For this reason, the interstate multilateral or bilateral conventions concerning diplomatic asylum, as well as domestic legislation, must govern the grant and scope of diplomatic asylum.[596]

229. No regional custom of diplomatic asylum can be determined with regard to Africa, Australia, Asia, Europe and North America. Dispute exists, though, on the existence of a regional custom in Latin America. The ICJ decided in the *Asylum* case that there exists no regional customary law concerning diplomatic asylum. Academic commentary is divided on this matter. The ICJ's approach has been followed by other scholars, similarly observing that the necessary requirements for regional custom are not fulfilled in Latin America.[597] Nevertheless, other scholars have argued in favour of diplomatic asylum recognised as a regional custom in Latin America.[598]

230. It must be concluded that this discourse precludes the observation that granting diplomatic asylum has attained the status of a rule of regional customary law with certainty. Even Crawford in 2019 was cautious in concluding regional custom in Latin America exists on diplomatic asylum.[599] Additionally, it is worth noting that the Latin American practice seems to be more treaty based, as explained above[600], rather than reflecting a customary rule.

4. A MODERN INTERNATIONAL LAW PERSPECTIVE ON DIPLOMATIC ASYLUM

231. Besides the possible legal bases for diplomatic asylum discussed above, other sources, provided by treaty or custom, can be consulted to determine whether a legal basis for granting diplomatic asylum finds its roots here. The discourse on diplomatic asylum has traditionally been approached from the perspectives of States and their obligations towards each other. The increasing importance of human rights law in international law and the subsequent protection regime it affords to individuals cannot be ignored in the development

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[594] See *infra* Chapter IV.a.
[595] Vicente Marotta Rangel, 'International Law, Regional Developments: Latin America' *MPEPIL* (2008), [30]; Värk, 257.
[596] Asylum advisory opinion, [163].
[597] Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [7]; Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 367; Rossitto, 128.
[598] Hugo Caminos, David W. Kennedy and George A. Zaphiriou, 'The Latin American Contribution to International Law' [1986] 80 American Society of International Law 157, 160; Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019), 103; Hughes-Gerber, 169.
[599] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019), 381.
[600] See *supra* Chapter III.b.

of public international law. Therefore, humanitarian considerations and human rights obligations might provide a new framework on diplomatic asylum.

4.1. HUMANITARIAN CONSIDERATIONS

232. Latin American States have long argued that the practice of diplomatic asylum stems from humanitarian considerations.[601] Similarly, in 1950, the Institute of International Law drafted a resolution protecting the right of diplomatic asylum on humanitarian grounds.[602] On multiple occasions, States have also referred to humanitarian considerations as a possible way to legitimate the grant of diplomatic asylum.[603]

233. By means of example, in the *Tehran* case[604], Canada decided to grant refuge to six US diplomats in its embassy premises. The Canadian Legal Adviser to the Department of External Affairs expressed his views on the lawfulness of Canada's actions and stated:

> "*Canada upheld rather than violated international law in granting refuge to six members of the Embassy and helping them to exercise their inalienable right to leave the country. Likewise I do not agree that Canada was "more or less guilty of violating its own international rule of thumb" in granting refuge to the six Americans. While Canada has not adhered to the Latin American view*[605] *of diplomatic asylum, we have always acknowledged that under international law an embassy can provide a safe haven when the person seeking refuge faces a serious and imminent risk of violence against which the local authorities are unable to offer protection or which they themselves incite or tolerate.*"[606]

234. This section will examine the possibility of humanitarian considerations as a legal basis for diplomatic asylum.

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[601] UNGA, Question of Diplomatic Asylum Part II, [24]; Värk, 245.

[602] Article 3(2) L'Institut de Droit international, 'L'asile en droit international public (à l'exclusion de l'asile neutre), Session de Bath', (1950) stating that diplomatic asylum can be granted when the life, physical safety or liberty of an individual is threatened by violence emanating from the local authorities or against which the latter are powerless to defend him, or which they tolerate or even provoke.

[603] See for example in particular Belgium, Canada, Jamaica, Norway, Denmark and Sweden in UNGA, Question of Diplomatic Asylum Part I, 15, 17, 19, 24, 26, 29. Australia in UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [1]. Chile, Uruguay, Mexico, Costa Rica and Argentina in UNGA, Question of Diplomatic Asylum Part II, [223], [271]. Colombia in UNGA, 'Summary record of the 1511th meeting' (1974) UN Doc. A/C.6/SR.1511, [10]. Brazil in UNGA, 'Summary record of the 1555th meeting' (1975) UN Doc. A/C.6/SR.1555, [3].

[604] ICJ, 'United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)' (International Court of Justice, 2022) <www.icj-cij.org/en/case/64> accessed on 14 May 2022.

[605] See *supra* Chapter III.b. The Latin American asylum tradition is referred to as the set of treaties dealing with the legal concept of asylum with typically Latin American connotations in addition to the non-extradition clause for political crimes. See Asylum Advisory Opinion, [93].

[606] L.H. Legault, 'Canadian Practice in International Law during 1979 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs' [1981] 19 Canadian Yearbook of International Law 320, 326 (emphasis added).

4.1.1. Legal nature of humanitarian considerations

235. Humanitarian considerations, read in combination with the ICJ's reference to "elementary considerations of humanity" in the 1949 Corfu Channel case[607], would confirm the qualification of humanitarian considerations as a source for legal obligations.[608] However, in the 1966 South West Africa cases, the Court declared:

> "*Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law.*"[609]

236. This statement seems to be incompatible with the Court's earlier position in the *Corfu Channel* case, suggesting that the Court has changed its opinion on the matter. Yet, in the *Nicaragua* case of 1986, the Court refers to the elementary considerations of humanity, as mentioned in *Corfu Channel*, again.[610] Thus, some ambiguity exists on the legal status of humanitarian considerations in public international law, which in turn provides difficulties for the qualification of humanitarian considerations as a legal basis provided by treaty or custom.

4.1.2. Scope of humanitarian considerations as a legal basis

237. Jurisprudence and scholars have argued that diplomatic asylum can be granted based on humanitarian considerations in the face of an immediate threat to the individual.[611] The threat could come in the form of immediate death or injury at the hands of a mob, or the failure of the receiving State to provide fair trial guarantees.[612] In such instances, the diplomatic asylum would not constitute a derogation of the sovereignty of the receiving State.[613]

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[607] *Corfu Channel Case (UK v. Albania)* (Merits) [1949] ICJ Rep 4, 22. The Court held "Such obligations are based (...) on certain general and well-recognized principles, namely: elementary considerations of humanity."

[608] UNGA, Question of Diplomatic Asylum Part II, [223]; UNGA, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [5]; G. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law' [1950] 27 British Yearbook of International Law 1, 17, 33; Richard L. Fruchterman, 'Asylum: Theory and Practice' [1972] 26(2) The JAG Journal 169, 176.

[609] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (Second phase judgement) [1966] ICJ Rep 6, [50].

[610] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14.

[611] Asylum (Colombia v. Peru), 282; Asylum Advisory Opinion, [155]; R (B & Others), [88]; Jennings and Watts, *Oppenheim's international law*, 1084; Denza, *Diplomatic asylum*, 1426, 1430; Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [1], [8]; UNGA, Question of Diplomatic Asylum Part II, [315]-[318]; Kovács and Ádány, 200; Jeffery, 13.

[612] Denza, *Diplomatic asylum*, 1426, 1430; Behrens, *Diplomatic Interference and the Law*, 244; Kovács and Ádány, 200.

[613] UN General Assembly, 'Summary record of the 1505th meeting' (1974) UN Doc. A/C.6/SR.1505, [6]; den Heijer, 110.

238. The ICJ has elaborated on both instances in the *Asylum* case.[614] With regard to a threat to the life of the individual, the ICJ held 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."[615]

239. In a similar *rationale*, when in situations of political turmoil justice is substituted by arbitrary action and not adequately administered, the grant of diplomatic asylum would not constitute a violation of the principle of non-interference.[616] Thus, if the receiving State fails to guarantee a fair trial according to Article 14 of the International Covenant on Civil and Political Rights ("ICCPR")[617] or by, for example, threatening the individual with death or arbitrary imprisonment without the benefit of a trial, diplomatic asylum should be respected.[618] Morgenstern contends that "it probably cannot be maintained that asylum can never be granted against prosecution by the local government."[619]

240. In the view of the ICJ:

> "*In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if in the guise of justice arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.*"[620]

241. However, the Court limits this approach by following this with:

> "*The safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them.*"[621]

242. With regards to the Court's reasoning, it must be remarked that the ICJ was providing an interpretation of the 1928 Havana Convention on Asylum. Therefore, these statements should be approached with caution as it is unsure

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[614] Denza, *Diplomatic asylum*, 1430.
[615] Asylum (Colombia v. Peru), 282.
[616] den Heijer, 110; Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 376.
[617] Article 14 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ("ICCPR"). Fair trial rights are also guaranteed under Article 6 ECHR, Article 8 ACHR and Article 7 of the African (Banjul) Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[618] Jeffery, 14; Riveles, 152; Porcino, 454.
[619] Felice Morgenstern, 'Diplomatic Asylum' [1951] 67 Law Quarterly Review 362, 376.
[620] Asylum (Colombia v. Peru), 284.
[621] *Ibid.*

whether the ICJ intended to provide an interpretation applicable outside the context of the Colombian-Peruvian *Asylum* case.

243. Nevertheless, in the Bakhtiari case of 2004[622], the Court of Appeal of England and Wales made a similar reasoning. According to the Court, international law is not breached when an individual, facing the risk of death or injury as a result of lawless disorder, is afforded asylum in diplomatic premises.[623] Further, the Court held that:

> "*Should it be clear (...) that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum.*
> *It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum.*"[624]

244. The Court did not elaborate on what entails "a lesser level of threatened harm" but did provide that the threat of indefinite detention does not reach the threshold necessary to justify diplomatic asylum.[625] It seems that failure to clearly define the threshold for the legality of diplomatic asylum based on humanitarian considerations is deliberate so as to be able to decide each case individually based on flexibility and pragmatism.

4.1.3. Cases of temporary refuge

245. When discussing humanitarian considerations, reference is often made to temporary refuge. International law does not provide a clear definition of temporary refuge.[626] Moreover, different terms such as "temporary protection" and "temporary shelter" are used interchangeably. Generally, in cases of temporary refuge, protection is offered in the sending State's embassy so long as the reasons justifying it continue to exist.[627] Temporary refuge occurs during exceptional emergency circumstances, such as mob violence or in a state of anarchy, to save human life when there is imminent danger to it.[628] It cannot

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[622] See *supra* Chapter II.c.iii.
[623] R (B & Others), [88].
[624] *Ibid.*, [88]-[89].
[625] *Ibid.*, [95].
[626] Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn), 292.
[627] Richard L. Fruchterman, 'Asylum: Theory and Practice' [1972] 26(2) The JAG Journal 169, 170; Värk, 249; US Department of State, 'United States: Policy Guidelines for Asylum Requests' [1972] 11(1) International Legal Materials 228, 231.
[628] Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [8]; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Nijhoff 1988), 360; Grahl-Madsen, 46; Richard L. Fruchterman, 'Asylum: Theory and Practice' [1972] 26(2) The JAG Journal 169, 170.

provide protection against local agents of the receiving State exercising their lawful authority.[629]

246. A distinction must be drawn between temporary refuge and formally granting an individual diplomatic asylum based on humanitarian considerations. In the case of temporary refuge, the individual is surrendered to the receiving State upon the request from the local authorities or leaves the diplomatic premises on their own accord.[630] Conversely, diplomatic asylum withdraws the individual from the jurisdiction of the receiving State as the sending State refuses to surrender the individual to the authorities of the receiving State.[631]

247. Furthermore, temporary refuge differs from diplomatic asylum as with the former, the sending State cannot demand safe conduct for the individual out of the territory of the receiving State.[632] Safe conduct is not pursued in cases of temporary refuge. The allowance of safe conduct is the essential turning point which transforms temporary refuge into the practice of (diplomatic) asylum.[633]

248. Temporary refuge generally does not provoke much controversy.[634] Peru submitted in its counter-memorial in the *Asylum* case that States use the notion of temporary refuge to reconcile the protection of human rights with their desire to respect the sovereignty of the receiving State.[635] Indeed, States seem to be more compelled to accept temporary refuge under international law. France, India, Spain, Sri Lanka and the UK recognised that providing temporary refuge to persons threatened with violent and disorderly action in embassies is not the same as recognising the right of diplomatic asylum.[636] The US has adopted a similar policy.[637]

4.1.4. Conclusion

249. Besides the support for this approach in legal doctrine, jurisprudence and even from the States, there is no specific international treaty law provision or a rule of customary international law that recognises a right to grant extraterritorial asylum in exceptional humanitarian circumstances.[638] Consequently,

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[629] Grahl-Madsen, 6.
[630] *Ibid.*; Ronning, 8.
[631] Ronning, 8.
[632] Grahl-Madsen, 49.
[633] Porcino, 438.
[634] Grahl-Madsen, 6; Ronning, 8; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Nijhoff 1988), 358.
[635] *Asylum (Colombia v. Peru)* (Counter-Memorial submitted by the Government of the Republic of Peru) 21 March 1950, 121.
[636] UNGA, Question of Diplomatic Asylum Part II, [224].
[637] US Department of State, 'United States: Policy Guidelines for Asylum Requests' [1972] 11(1) International Legal Materials 228, 231; Felice Morgenstern, 'Extra-Territorial Asylum' [1948] 25 British Yearbook of International Law 236, 247.
[638] den Heijer, 114. The Latin American tradition of asylum has made reference to humanitarian considerations several times. See Article 2 of the Havana Convention on Asylum, Article 3 of the Montevideo Convention on Political Asylum and Article VI Caracas Convention on Diplomatic Asylum (*supra* Chapter III.b.ii).

humanitarian considerations do not fall within the category of a treaty or custom, therefore this constitutes a weak legal basis as per the *Asylum* case.

250. States appear to have diverging views on what humanitarian considerations entail, as shown by the responses in the 1975 report on diplomatic asylum by the UN General Assembly.[639] Additionally, international law does not provide a clear and precise definition of humanitarian considerations. This seems deliberate so that States retain their discretionary power in determining diplomatic asylum, therefore, it is unlikely that States will come together to define the circumstances in which diplomatic asylum based on humanitarian considerations can be granted.[640] Due to the foregoing, the question arises whether humanitarian considerations can be interpreted with enough precision to allow for the adoption of a rule with a normative character.[641] This ambiguity vitiates the possible legal basis humanitarian considerations can constitute for diplomatic asylum.

251. For this reason, in order for humanitarian considerations to form a clear legal basis for diplomatic asylum, improving the framework on the necessary threshold for humanitarian considerations, which State can determine whether this threshold is met and what the subsequent legal consequences entail, would be beneficial for all parties involved. This can be done through a new treaty or a soft law instrument, such as a code of conduct or a resolution. A soft law instrument might be more readily accepted by States, although it will also be harder to enforce since soft law instruments are not as legally binding.[642]

252. The concept of temporary refuge provides a modest answer on how sending States can balance their interest in maintaining friendly relations with the receiving State and their humanitarian considerations. Temporary refuge could thus be a limited recognition of the practice of diplomatic asylum.[643] Nevertheless, temporary refuge does not provide the same level of protection to an individual as diplomatic asylum.

253. Concludingly, it seems that humanitarian considerations do not produce the necessary legal certainty as a legal basis for diplomatic asylum. For this reason, granting diplomatic asylum based on humanitarian considerations could be regarded as a humanitarian practice rather than a legal right. However, the support for this stance indicates that international law might be evolving to include a legal right to grant diplomatic asylum based on humanitarian

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[639] By means of example, Pakistan asserted that diplomatic asylum may be granted when there is an imminent danger to life but not a danger to liberty. Denmark provided that "on the basis of humanitarian considerations a person may be granted temporary protection provided he is exposed to an imminent physical threat." Jamaica supports "the broad humanitarian grounds which provide the basis for a grant of diplomatic asylum." UNGA, Question of Diplomatic Asylum Part I, 27, 19, 24.

[640] Denza, *Diplomatic asylum*, 1439; Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 410.

[641] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 334.

[642] Daniel Thürer, 'Soft Law' *MPEPIL* (2009), [2]-[3].

[643] Riveles, 158.

considerations. Moreover, reference to the sending State's human rights obligations *vis-à-vis* an individual requesting protection can strengthen the legality of diplomatic asylum based on humanitarian considerations. The following section will address whether a sending State's human rights obligations can provide a legal basis for diplomatic asylum.

4.2. HUMAN RIGHTS OBLIGATIONS

254. Several authors have claimed that the modern day importance of human rights instruments should be taken into consideration when addressing a legal basis for diplomatic asylum.[644] While human rights treaties do not contain any specific provisions with regard to diplomatic asylum, (the threat of) violating a human rights treaty by surrendering the individual requesting protection to the authorities of the receiving State could provide a legal basis for diplomatic asylum.[645]

255. This reasoning relies on the extraterritorial application of refugee and human rights treaties and the principle of *non-refoulement*. This section will examine the sending State's obligations under *non-refoulement* and the extraterritorial reach of these obligations in embassies.

4.2.1. A State's obligation under non-refoulement

256. The principle of *non-refoulement* is a cornerstone for the protection of asylum seekers.[646] It is a fundamental principle found in international refugee law[647] and is, in this area, recognised as a customary rule of international law.[648] *Non-refoulement* is not exclusive to international refugee law, it is also found in international human rights law[649] and regional human rights law[650]. Under human rights law, *non-refoulement* is in the process of becoming part of customary law.[651]

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[644] Kovács and Ádány, 202; Riveles, 142, 152; Ogg, 81; Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 341; den Heijer, 114; Wilde, 196.
[645] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 345.
[646] UNHCR Advisory Opinion, [5]; Asylum Advisory Opinion, [179].
[647] Article 33 Refugee Convention; Article II(3) OAU Convention Governing Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.
[648] Asylum Advisory Opinion, [179]; UNHCR Advisory Opinion, [15]; *Hirsi Jamaa v. Italy* App. No. 27765/09 (ECtHR, 23 February 2012) ("Hirsi Jamaa v. Italy") (Concurring Opinion Judge Pinto de Albuquerque), 64; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), [216].
[649] Article 6 and 7 ICCPR; Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[650] Article 3 ECHR; Article 22(8) ACHR.
[651] UNHCR Advisory Opinion, [21].

257. *Non-refoulement* prohibits States from returning an individual from their jurisdiction to a country where they risk serious harm.[652] Indeed, if there are substantial grounds for believing that a person would be at risk of irreparable harm upon return, including persecution, torture, cruel, inhuman or degrading ill-treatment or punishment, or other serious human rights violations, they cannot be returned to the country that demands the return.[653]

258. The positive obligation inherent to the *non-refoulement* principle obligates States to take all necessary measures to prevent violations of human rights, even when the harm would be caused by conduct that is not attributable to them.[654] Indeed, the diplomatic agents of the sending State would not have committed the human rights violations themselves, they have "only" made these violations possible through the transferral of the individual.[655]

259. It is worth noting that international refugee law and international human rights law are two legal systems that are complementary and mutually reinforcing.[656] The rules regarding *non-refoulement* are overlapping but not identical. For instance, there are differences in the scope.[657]

260. The *non-refoulement* provision found in the Refugee Convention limits itself to individuals who fall within the definition of a refugee according to Article 1(A)(2) of the Refugee Convention and are not subject to one of its exclusion provisions.[658] This definition is declaratory in nature, thus recognition by a State is not necessary.[659] As soon as an individual fulfils the requirements of the definition, they are a refugee.[660] When diplomatic asylum concerns practice where asylum is given within the territory of the country of the refugee, the individual seeking protection would not fall under this protection regime. To be a recipient of this regime, individuals will need to cross a State's border and seek asylum in an embassy outside of their country of origin.[661]

261. International human rights law has been used to achieve protection under *non-refoulement* for persons who do not fulfil the requirements of Article 1A(2)

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[652] Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 60; UNHCR Advisory Opinion, [15]

[653] Asylum Advisory Opinion, [190]; OHCHR, 'The principle of non-refoulement under international human rights law' (ohchr.org, 2020), 1.

[654] Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 70; Asylum Advisory Opinion, [194], [197].

[655] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 345.

[656] UNHCR Advisory Opinion, [34].

[657] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Ryan and others (eds), *Extraterritorial Immigration Control* (Brill 2010), 71.

[658] UNHCR Advisory Opinion, [6]. See *supra* Chapter II.b.i. for the definition

[659] Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 63; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), [90]; Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn), 307.

[660] Ogg, 87; UNHCR Advisory Opinion, [6].

[661] Denza, *Diplomatic asylum*, 1426; Ogg, 87.

of the Refugee Convention's strict definition of a refugee.[662] The *non-refoulement* obligation indirectly found in Article 6 and 7 ICCPR, as interpreted by the Human Rights Committee ("HRC"), applies to all persons, irrespective of their nationality and is not limited to the territory of a State.[663] Similarly, *non-refoulement* under the ECHR and ACHR extends to all persons.[664] The scope of *non-refoulement* under international human rights law is thus broader than under international refugee law.[665]

262. It is well accepted that States need to respect the above-mentioned *non-refoulement* obligations within their territories.[666] However, with diplomatic asylum, the obstacle seems to be whether these obligations also apply in a State's embassy abroad. The next section will consider whether human rights and refugee treaties containing an obligation of *non-refoulement* apply extraterritorially.

4.2.2. The extraterritorial application of human rights and refugee treaties

263. The extraterritorial application of human rights and refugee treaties ensures that the location of the diplomatic mission outside the territory of the sending State does not obstruct the applicability of a State's obligations under international law.[667]

264. Before turning to the assessment of the extraterritorial application of human rights and refugee treaties and the subsequent *non-refoulement* obligation for the sending State, an important distinction needs to be made between jurisdiction under general international law and international human rights law.[668]

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[662] Ogg, 85.

[663] HRC, 'General comment No. 36: Article 6 (Right to life)' (2019) UN Doc. CCPR/C/GC/36, [31] ("The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status."); HRC, 'General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' (1992) UN Doc. HRI/ GEN/1/Rev.7, [9] ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*"); HRC, 'General Comment Nr. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, [12]; Asylum Advisory Opinion, [186]; UNHCR Advisory Opinion, [19], [20]; James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, CUP 2021), 460.

[664] Eman Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill Nijhoff 2016), 36; Asylum Advisory Opinion, [186], [192].

[665] Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 421; OHCHR, 'The principle of non-refoulement under international human rights law' (ohchr.org, 2020), 1.

[666] Ogg, 86.

[667] Behrens, *Diplomatic interference and the law*, 250; Guy S. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' [1994] 6(1) International Journal of Refugee Law 103, 103.

[668] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' [2008] 8(3) Human Rights Law Review 411, 417.

265. Jurisdiction under general international law "is the authority of the State, based in and limited by international law, to regulate the conduct of persons, both natural and legal, by means of its own domestic law."[669] Conversely, jurisdiction under international human rights law is a matter of fact based on the exercise of power by a State.[670] This jurisdiction can be established through a State having effective overall control over territory (spatial jurisdiction)[671] or when a State exercises authority or control through its State agents over an individual (personal jurisdiction)[672].[673] As diplomatic mission premises are part of the territory of the receiving State,[674] personal jurisdiction is most relevant within the context of diplomatic asylum.

266. This section will examine the extraterritorial application of human rights and refugee instruments containing *non-refoulement* obligations, first discussing the ICCPR as a universal treaty. Two prominent regional treaties will also be examined: the ECHR as the ECtHR has led jurisprudential developments with regard to extraterritoriality, and the ACHR as the Latin American region can be credited with paving the path for extraterritorial human rights protection.[675] Finally, the extraterritorial application of the Refugee Convention under international refugee law will be analysed.

a. The International Covenant on Civil and Political Rights

267. The jurisdiction clause of the ICCPR is found in Article 2(1) ICCPR. It indicates that State parties to the ICCPR must respect and ensure the enjoyment of its rights "to all individuals within its territory and subject to its jurisdiction".[676] Besides the traditional territorial interpretation of this Article,[677] an extraterritorial interpretation has also been accepted.

268. The ICJ declared in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[678] that

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[669] *Ibid.*, 420.
[670] *Ibid.*, 435, 436.
[671] *Al-Skeini and Others v. UK* App. No. 55721/07 (ECtHR, 7 July 2011) ("Al-Skeini and Others v. UK"), [138], [139]; Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in van Aaken and Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018), 98.
[672] Al-Skeini and Others v. UK, [133]-[137]; Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in van Aaken and Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018), 98.
[673] Elena Pribytkov, 'Extraterritorial obligations in the United Nations system: UN treaty bodies' in Mark and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021), 96.
[674] Jean d'Aspremont, 'Premises of Diplomatic Missions' *MPEPIL* (2009), [3].
[675] Wilde, 196.
[676] Article 2(1) ICCPR; Christian Tomuschat, 'International Covenant on Civil and Political Rights (1966)' *MPEPIL* (2019), [22].
[677] The provision can be interpreted literally as constituting cumulative conditions, namely only covering individuals both present in the State territory and subject to that State's jurisdiction. The HRC, followed by the ICJ, have distanced themselves from this approach.
[678] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 ("Wall Opinion").

jurisdiction is primarily territorial but that, at times, it can be exercised outside the national territory.[679] The Court held that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"[680].

269. While an advisory opinion of the ICJ is not legally binding,[681] it carries great weight and moral authority.[682] Accordingly, the ICJ's decision in the *Wall Advisory Opinion* is a strong authority that the *non-refoulement* obligations found in the ICCPR apply extraterritorially.

270. The ICJ based this conclusion on the *travaux préparatoires* of the ICCPR and the practice of the HRC. The Court concluded as to the *travaux préparatoires* that these "show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."[683]

271. Concerning the practice of the HRC, the HRC has stated in the 1981 case of *Lilian Celiberti de Casariego v. Uruguay* with regard to Article 2(1) ICCPR:

> "*It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.*"[684]

272. Concludingly, State parties to the ICCPR are obliged to respect and ensure the Covenant rights to all persons who are within their territory and persons subject to their jurisdiction extraterritorially, including the prohibition of *refoulement* found in Article 6 and 7 ICCPR.[685]

b. The European Convention on Human Rights

273. Article 1 of the ECHR states that every contracting Party "shall secure to everyone within their jurisdiction" the Convention's rights and freedoms.[686] A State's jurisdiction within the meaning of Article 1 ECHR is primarily territorial but the ECtHR has deemed that Article 1 ECHR does not specifically limit its applicability to the concerned State's territory.[687]

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[679] Wall Opinion, [109].
[680] *Ibid.*, [111].
[681] Karin Oellers-frahm, 'The International Court of Justice, Article 96' in Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012), 1987.
[682] ICJ, 'Advisory Jurisdiction' (International Court of Justice, 2022) <www.icj-cij.org/en/advisory-jurisdiction< accessed on 12 May 2022.
[683] Wall Opinion, [109].
[684] *Lilian Celiberti de Casariego v. Uruguay* App. No. 56/1979 (HRC, 29 July 1981), [10.3].
[685] *Ibid.*, [111]; Article 2(1) ICCPR; HRC, 'General Comment Nr. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, [10]; UNHCR Advisory Opinion, [37].
[686] Article 1 ECHR.
[687] *M.N. and Others v. Belgium* App. No. 3599/18 (ECtHR, 5 March 2020), [98]; Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 342.

274. The ECtHR has accepted an extraterritorial approach in a variety of cases.[688] In *Loizidou v. Turkey*, the Court held that "the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties."[689] To establish circumstances capable of giving rise to the extraterritorial application of the ECHR, the Court has concluded that this "must be determined with reference to the particular facts"[690].

275. In the case of *Al-Saadoon and Mufdhi v. UK*, the Court confirmed that "the *Soering* principle against *refoulement* would apply where an individual sought and was refused refuge in a Contracting State's embassy."[691] The decision of the ECtHR in *Hirsi Jamaa v. Italy*, further highlighted the extraterritorial application of *non-refoulement* obligations.[692]

c. The American Convention on Human Rights

276. Article 1(1) of the ACHR stipulates that State parties to the Convention must respect and ensure the rights and freedoms recognised in the Convention to all persons subject to their jurisdiction.[693] The Inter-American Commission on Human Rights has held that it does not believe that the term "jurisdiction" is limited to the national territory of a State party.[694] Furthermore, the Commission has stated that it "is of the view that a State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that State's own territory."[695] Indeed, the IACtHR has affirmed that obligations incumbent on State parties to the ACHR are not restricted to a State's territory.[696]

277. Thus, extraterritorial jurisdiction under the American Convention is possible when a person is present in the territory of the receiving State but subject to the control of the sending State.[697] Specifically with the *non-refoulement* obligation in Article 22(8) of the ACHR, the IACtHR has concluded:

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[688] *Hanan v. Germany* App. No. 4871/16 (ECtHR, 16 February 2021), [142]; Al-Skeini and Others v. UK, [132], [133]; *Bankovic and Others v. Belgium and Others* App. No. 52207/99 (ECtHR, 12 December 2001), [67], [73]; Hirsi Jamaa, [72]-[75]; *Medvedyev and Others v. France* App. No. 3394/03 (ECtHR, 29 March 2010), [65].
[689] *Loizidou v. Turkey* (preliminary objections) App. No. 15318/89 (ECtHR, 23 March 1995), [62].
[690] Al-Skeini and Others v. UK, [132].
[691] *Al-Saadoon and Mufdhi v. UK* App. No. 61498/08 (ECtHR, 2 March 2010), [139].
[692] Hirsi Jamaa v. Italy, [80], [81], [137]. The Court concluded that in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the extraterritorial jurisdiction of Italy. By transferring the applicants to Libya, Italy breached the prohibition on *refoulement*. See also Wilde, 198.
[693] Article 1(1) ACHR.
[694] *Saldaño v. Argentina* (Petition) Inter-American Commission of Human Rights Report No. 38/99 (11 March 1999), [17].
[695] *Ibid.*
[696] Asylum Advisory Opinion, [172], [173]; *The environment and human rights*, Advisory Opinion OC-23/17, IACtHR Series A No. 23 (15 November 2017), [74], [75], [77], [78].
[697] *Alejandre v. Cuba* Inter-American Commission of Human Rights Report No. 86/99 (29 September 1999), [23].

> "the scope of protection against *refoulement* is not limited to the person being in the territory of the State, but also obliges States extraterritorially, provided that the authorities exercise their authority or effective control over such persons, as may be the case in legations, which by their very nature are in the territory of another State with its consent."[698]

d. The Refugee Convention

278. The Refugee Convention does not contain any general jurisdiction clauses similar to the above-mentioned treaties. Several Articles mention their specific scope of application, however, Article 33 of the Refugee Convention, which deals with the prohibition on *refoulement*, does not include any provisions on its *ratione loci*.[699] For this reason, other sources must be consulted to decide upon the extraterritorial application of Article 33 of the Refugee Convention.

279. The US Supreme Court decided in *Sale* that the text of Article 33 makes it clear that it does not govern a State party's conduct outside its national border.[700] The Court based this interpretation on the Refugee Convention's negotiating history.[701] In *Roma Rights*, the UK House of Lords agreed with the US Supreme Court, also basing this conclusion on the *travaux préparatoires* of the Convention and corresponding interpretation rules.[702]

280. These judgements have been heavily scrutinised and received considerable criticism by legal commentary[703] and other authorities. Firstly, following the US Supreme Court *Sale* judgement, the Inter-American Commission of Human Rights judged that Article 33 of the Convention has no geographical limitations.[704]

281. Secondly, the Office of the United Nations High Commissioner for Refugees ("UNHCR") deemed the *Sale* decision "a setback to modern international refugee law"[705]. The UNHCR has repeatedly supported the extraterritorial reach of Article 33 of the Refugee Convention. In its *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967*

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[698] Asylum Advisory Opinion, [188].
[699] den Heijer, 123.
[700] US Supreme Court 21 June 1993, *Sale v. Haitian Centers Council*, 509 US 155, 182.
[701] *Ibid.*, 184-187.
[702] *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55, [17].
[703] For example, Henkin stated that "the Supreme Court has adopted an eccentric, highly implausible interpretation of a treaty." in L. Henkin, 'Notes from the President', ASIL Newsletter, September – October 1993. See also Guy S. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' [1994] 6(1) International Journal of Refugee Law 103, 103-109; den Heijer, 125-132; Harold Koh, 'Reflections on Refoulement and Haitian Centers Council' [1994] 35(1) Harvard International Law Journal 1, 1-20.
[704] *The Haitian Centre for Human Rights et al. v. United States* Inter-American Commission of Human Rights Report No. 51/96 (13 March 1997), [157].
[705] UNHCR, 'UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council' [1993] 32(4) International Legal Materials 1215, 1215.

Protocol, the UNHCR concluded that there is only a geographical restriction "with regard to the country where a refugee may not be sent to, not the place where he or she is sent from."[706]

282. While interpreting the Convention, the UNHCR reasons that Article 33 is not limited to a State's territory as this would be inconsistent with the humanitarian object and purpose of the Convention.[707] Accordingly, the Refugee Convention can be applied extraterritorially.[708] Nevertheless, the UNHCR advisory opinions are not legally binding despite their authoritative nature.[709]

283. Finally, judicial authority supporting the extraterritorial operation of the Refugee Convention is found in the concurring opinion of Judge Pinto de Albuquerque in the *Hirsi Jamaa v. Italy* case before the ECtHR.[710] To substantiate his argument, Judge Pinto de Albuquerque refers to Article 31 of the VCLT which provides that not only the ordinary meaning of a treaty must be taken into account but also its context, object and purpose.[711] The Refugee Convention declares in its Preamble that it strives to "assure refugees the widest possible exercise of these fundamental rights and freedoms" thus indirectly laying the groundwork for an extraterritorial application.[712]

284. Legal doctrine has also accepted the extraterritorial application of Article 33 of the Convention.[713] Kälin, Caroni and Heim observe: "in the absence of any clause restricting the applicability of the 1951 Convention to a State's own territory, one must assume that Art. 33 applies anywhere a State exercises jurisdiction over a refugee."[714] Lauterpacht and Bethlehem take the same position, explaining that "the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs"[715].

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[706] UNHCR Advisory Opinion, [26].
[707] *Ibid.*, [29].
[708] *Ibid.*
[709] Michael Barutciski, 'The limits to the UNHCR's supervisory role' in Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (CUP 2013), 67, 68; *Ahmadou Sadio Diallo (Guinea v. Congo)* (Merits) [2010] ICJ Rep 639, [66]-[67].
[710] Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 65.
[711] Article 31(1) VCLT; Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 67.
[712] Preamble Refugee Convention.
[713] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Ryan and others (eds), *Extraterritorial Immigration Control* (Brill 2010); Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn), 310-311; James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, CUP 2021), 384; X, 'The Michigan Guidelines on Refugee Freedom of Movement' (2018) 39(1) Michigan Journal of International Law, [9]; den Heijer, 114; Wilde, 122.
[714] Walter Kälin, Martina Caroni, and Lukas Heim, 'Article 33, para. 1', in Zimmermann and others (eds), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011), 1361.
[715] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), [67].

285. In sum, the aforementioned authorities in combination with academic commentary confirm that the Refugee Convention applies extraterritorially.

4.2.3. Does the sending State exercise jurisdiction over individuals who enter their embassies for protection?

286. As it has been accepted that a State's obligations, including the principle of *non-refoulement*, under refugee and human rights treaties are not limited to the territory of a State but also apply to extraterritorial State action,[716] it must now be examined what State action establishes extraterritorial jurisdiction. It is difficult to determine a precise test that triggers the jurisdiction of diplomatic agents over individuals. Domestic, regional and international treaty bodies and courts have used various tests to determine when extraterritorial personal jurisdiction is established.[717] Generally, the pattern of applying a test of "authority and effective control" can be identified.[718]

287. The HRC provided in its *General Comment no. 31*:

> "*A State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.*"[719]

288. In 1992, the European Commission of Human Rights established in the *W.M. v. Denmark* case that:

> "Diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they *exercise authority* over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged."[720]

289. In *Al-Skeini and others v. UK*, the ECtHR further explained:

> "It is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of

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[716] Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 65; HRC, 'General Comment Nr. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, [12].
[717] *Ahmadou Sadio Diallo (Guinea v. Congo)* (Merits) [2010] ICJ Rep 639, [66]-[67].
[718] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), [63]; Walter Kälin, Martina Caroni, and Lukas Heim, 'Article 33, para. 1', in Zimmermann and others (eds), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011), 1361; James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, CUP 2021), 384.
[719] HRC, 'General Comment Nr. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, [10] (emphasis added).
[720] W.M. v. Denmark, [1] (emphasis added).

> international law, may amount to an exercise of jurisdiction when these agents *exert authority and control* over others."[721]

290. The test of authority and effective control has been accepted by other treaty bodies, such as the UNHCR and IACtHR.[722] Opinions differ, however, on the interpretation of "effective control".[723] The HRC takes an open approach to the notion of effective control, suggesting that personal jurisdiction can be established through a personal link between the State and the victim through the State's action.[724] The IACtHR seems to have a similar stance, stating:

> "*The Court considers that the general obligations established by the American Convention are applicable to the actions of diplomatic agents deployed in the territory of third States, provided that the personal link of jurisdiction with the person concerned can be established.*"[725]

291. The ECtHR has confirmed and elaborated on the test of authority and effective control in other cases.[726] It seems to have adopted a higher standard for "effective control".[727] In *M.N. and Others v. Belgium*, the ECtHR specified that the "mere administrative control exercised by the State of the premises of its embassies is not sufficient to bring every person who enters those premises within its jurisdiction."[728] Thus, the mere presence of the individual in the embassy is not sufficient to establish jurisdiction.[729]

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[721] Al-Skeini and Others v. UK, [134] (emphasis added).

[722] UNHCR Advisory Opinion, [35], [43]; Asylum Advisory Opinion, [188], [192]; *Saldaño v. Argentina* (Petition) Inter-American Commission of Human Rights Report No. 38/99 (11 March 1999), [19]. *The environment and human rights*, Advisory Opinion OC-23/17, IACtHR Series A No. 23 (15 November 2017), [81]; R (B & Others), [66].

[723] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Ryan and others (eds), *Extraterritorial Immigration Control* (Brill 2010), 89.

[724] See for example *Delia Saldias de Lopez v. Uruguay* App. No. 52/1979 (HRC, 29 July 1981), [12.2] ("the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."); Ogg, 99; Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Ryan and others (eds), *Extraterritorial Immigration Control* (Brill 2010), 87.

[725] Asylum Advisory Opinion, [177].

[726] Hirsi Jamaa v. Italy, [74]; *Issa and Others v. Turkey* App. No. 31821/96 (ECtHR, 16 November 2004), [71]; *M.N. and Others v. Belgium* App. No. 3599/18 (ECtHR, 5 March 2020), [106].

[727] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Ryan and others (eds), *Extraterritorial Immigration Control* (Brill 2010), 99.

[728] *M.N. and Others v. Belgium* App. No. 3599/18 (ECtHR, 5 March 2020), [119]; Council of Europe, 'Guide on Article 1 of the Convention: Obligation to respect human rights – Concepts of "jurisdiction" and imputability' (31 August 2021) <www.echr.coe.int/documents/guide_art_1_eng.pdf> accessed on 5 April 2022, [13].

[729] Andreina De Leo and Juan Ruiz Ramos, 'Comparing the Inter-American Court opinion on diplomatic asylum applications with MN and Others v Belgium before the ECtHR' (EU Immigration and Asylum Law and Policy, 13 May 2020) <https://eumigrationlawblog.eu/comparing-the-inter-american-court-opinion-on-diplomatic-asylum-applications-with-m-n-and-others-v-belgium-before-the-ecthr> accessed on 11 April 2022.

292. Even if a stricter requirement to establish jurisdiction would be applied, national jurisprudence indicates that "individuals may be within the "authority and control" of diplomatic and consular staff when they are on the premises of an embassy or consulate which has assumed responsibility for their protection"[730].

293. Whether a State's involvement amounts to the exercise of authority and control in order to establish jurisdiction is a matter of fact.[731] The Court in question must examine, on the basis of the particular facts in each case, if there are exceptional circumstances that justify personal extraterritorial jurisdiction.[732]

294. What follows is an assessment of the possible actions or omissions by the sending State's diplomatic agents that can establish jurisdiction over individuals seeking diplomatic asylum. The national court in *R (B & Others) v SSFCA* and the European Commission of Human Rights in *W.M. v. Denmark* have indicated that providing food, water and shelter, assuring that individuals are safe or considering their request for assistance and conducting negotiations on their behalf, puts them under the sending State's jurisdiction.[733] Even minimal contact between individuals and the embassy staff can be enough to establish authority and control.[734]

295. Concludingly, States can exercise extraterritorial personal jurisdiction through activities of their diplomatic agents abroad when they exert authority and control over individuals.[735] This can be established, *inter alia*, when the diplomatic agents engage with asylum seekers by listening to their claim and providing temporary protection.[736] Indeed, a voluntary act by the sending State can contribute to establishing jurisdiction.[737] Conversely, if an embassy refuses to consider the asylum seeker's claim and instantly removes the individual from the embassy premises, it is not likely that jurisdiction would be established.[738]

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[730] *Sandiford, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2013] EWHC 168 (Admin) (04 February 2013), [39]. See also R (B & Others), [66].
[731] *M.N. and Others v. Belgium* App. No. 3599/18 (ECtHR, 5 March 2020), [102]; *Sandiford, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2013] EWCA Civ 581 (22 May 2013), [47].
[732] *M.N. and Others v. Belgium* App. No. 3599/18 (ECtHR, 5 March 2020), [113]; Hirsi Jamaa v. Italy, [73]; *The environment and human rights*, Advisory Opinion OC-23/17, IACtHR Series A No. 23 (15 November 2017), [104].
[733] R (B & Others), [10], [13], [14], [64], [66]; W.M. v. Denmark, [1]; Ogg, 101; Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 345.
[734] Ogg, 102.
[735] HRC, 'General Comment Nr. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, [10]; Al-Skeini and Others v. UK, [134]; Hirsi Jamaa v. Italy, [74]; W.M. v. Denmark, [1]; R (B & Others), [66]; Asylum Advisory Opinion, [177], [188], [192], [194].
[736] Ogg, 102.
[737] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 345.
[738] Ogg, 102; Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 345.

4.2.4. Does non-refoulement provide a legal basis for diplomatic asylum?

296. Once jurisdiction has been established, the whole range of obligations under the human rights or refugee instrument becomes applicable and enforceable *vis-à-vis* the State, including the *non-refoulement* obligation.[739] Thus, the question remains: if the sending State's obligations under *non-refoulement* are engaged, would there be a breach of these obligations if diplomatic asylum would not be granted? And could this, therefore, provide a legal basis for diplomatic asylum?

a. Is the surrender of an individual from an embassy considered refoulement under international human rights law?

297. The HRC, ECtHR and IACtHR have confirmed that the principle of *non-refoulement* would be engaged where an individual sought and was refused refuge in a State's embassy.[740] The specific action which leads to the surrender of the individual does not influence the applicability of *non-refoulement*, the obligation applies to all forms of return of a person to another State.[741] According to the jurisprudence of the ECtHR, a State has breached its obligations under *non-refoulement* if it has taken action "which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[742] Importantly, denying visa applications in the embassy would not be sufficient to establish a breach of *non-refoulement* as this would not create an adequate causal link to any future violations of the *non-refoulement* principle.[743]

298. Several authors have taken a similar approach.[744] Goodwin-Gill and McAdam argued:

> "Principles of international human rights law which prevent States from exposing individuals within their territory or jurisdiction to particular forms of serious harm may prevent the diplomatic mission from removing the individual."[745]

299. Similarly, den Heijer concluded:

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[739] Behrens, *Diplomatic interference and the law*, 253; Al-Skeini and Others v. UK, [137].
[740] *Mohammad Munaf v. Romania* App. No. 1539/2006 (HRC, 21 August 2009), [14.2], [14.5]; *Al-Saadoon and Mufdhi v. UK* App. No. 61498/08 (ECtHR, 2 March 2010), [139]; Asylum Advisory Opinion, [188]-[189].
[741] *Wong Ho Wing v. Peru* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 297 (30 June 2015), [130]; *Babar Ahmad and Others v. UK* App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR, 10 April 2012), [168], [176]; Asylum Advisory Opinion, [190]; *Jama Warsame v. Canada* App. No. 1959/2010 (HRC, 21 July 2011), [8.3].
[742] *Soering v. UK* App. No. 14038/88 (ECtHR, 7 July 1989), [91].
[743] Thomas Gammeltoft-Hansen, *International Refugee Law and the Globalisation of Migration Control* (CUP 2011), 134; Vladislava Stoyanova, 'M.N. and Others v Belgium: no ECHR protection from *refoulement* by issuing visas' (EJIL:Talk!, 12 May 2020) <www.ejiltalk.org/m-n-and-others-v-belgium-no-echr-protection-from-refoulement-by-issuing-visas > accessed on 11 April 2022.
[744] Riveles, 152; Ogg, 106-107; Joanne Foakes and Eileen Denza, 'Privileges and Immunities of Diplomatic Missions' in Roberts (ed), *Satow's Diplomatic Practice* (7th edn, OUP 2016), [13.26].
[745] Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn), 324.

> "*The prohibition on refoulement established under the ECHR and ICCPR articulates the essential protective duty of a State party not to expose a person within its jurisdiction to a real risk of ill-treatment. If it is established that a person can be considered to be within the state's jurisdiction, the state becomes bound to comply with this protective duty, regardless of whether the person is on the territory of that state, in his country of origin or in a third state from which the threat of ill-treatment stems.*"[746]

300. Therefore, there are strong grounds to support the argument that an embassy must provide protection, in the form of diplomatic asylum, to an individual who falls within the scope of *non-refoulement*.[747]

301. However, there has also been criticism to this approach. Particularly, Noll argued in 2005 that the ICCPR does not impose a legal obligation for the sending State to process an asylum claim in its embassies.[748] His argumentation was, amongst others, based on the fact that the ICCPR precludes extraterritorial application.[749] Though, as established above, the ICJ and HRC have clearly established that this is not the case.[750] On the other hand, Noll did seem to conclude that under the ECHR there exists an obligation to consider a claim for asylum in embassies.[751]

302. Finally, it is important to note that the IACtHR determined that the fact that an individual cannot be returned under *non-refoulement* does not necessarily mean that the State must grant asylum in its embassy.[752] The Court suggested that the State could take separate diplomatic measures such as requesting the receiving State to issue a *laissez-passer*, or other measures in accordance with international law to ensure that the individual's human rights are guaranteed.[753] Indeed, diplomatic asylum is not the only means available for a State to protect human rights. The sending State must investigate the particular circumstances in each case by, *inter alia*, conducting an individual risk assessment, similarly as in the procedure of evaluating territorial asylum, and will determine whether diplomatic asylum is the best answer to the issue at hand.[754]

b. Is the surrender of an individual from an embassy considered refoulement under international refugee law?

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[746] den Heijer, 114; Wilde, 140.
[747] Asylum Advisory Opinion, [188], [192], [194], [197]; Ogg, 107.
[748] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' [2005] 17(3) International Journal of Refugee Law 542.
[749] *Ibid.*, 557-564.
[750] See *supra* Chapter IV.b.ii.1.
[751] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' [2005] 17(3) International Journal of Refugee Law 542, 564-570.
[752] Asylum Advisory Opinion, [198].
[753] *Ibid.*
[754] Asylum Advisory Opinion, [194]; Ogg, 112; Hughes-Gerber, 187.

303. Article 33 of the Refugee Convention proclaims that a State cannot expel or return a refugee "in any matter whatsoever".[755] This suggests a broad interpretation, including a wide array of practices.[756] Riveles, Lauterpacht and Bethlehem argued that non-refoulement should apply when individuals flee within their own country to the diplomatic premises of a third State.[757] Lauterpacht and Bethlehem reasoned:

> "*The principle of non-refoulement will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State (...). In principle, in such circumstances, the protecting State will be subject to the prohibition on refoulement to territory where the person concerned would be at risk.*"[758]

304. However, this approach might be difficult to reconcile with the definition of a refugee pursuant to Article 1(A)(2) of the Refugee Convention since this requires individuals to be outside their country of origin. Thus, when the embassy, located in the territory of the State of nationality of the individual, does not grant protection, the embassy has not expelled or returned the individual to another territory.[759] Accordingly, there would not be a violation of *non-refoulement* contrary to the Refugee Convention as the individual in question does not qualify as a refugee.[760]

305. A violation may occur if the receiving State intends to return the individual to a third State where they would risk serious harm. This undertaking is often referred to as "indirect *refoulement*". Indirect *refoulement* is the transfer of a person to another State which might return them to a third State where they risk ill-treatment.[761] Goodwin-Gill and McAdam caution against the use of this terminology as it confuses the legal basis for State liability.[762]

306. While the receiving State that actually returns the individual to a third State where they risk serious harm bears primary responsibility for the conduct, the

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[755] Article 33 Refugee Convention.
[756] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' [2005] 17(3) International Journal of Refugee Law 542, 553.
[757] Riveles, 152; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), [114].
[758] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller and others (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), [114].
[759] Ogg, 108.
[760] *Ibid.*
[761] *T.I. v. UK* App. No. 43844/98, decision as to the Admissibility (ECtHR, 7 March 2000), 15; Eman Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill Nijhoff 2016), 109-110.
[762] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), 252-253.

sending State who made this possible by surrendering the individual to the receiving State may be held jointly liable.[763] According to Article 16 of the Articles on the Draft Responsibility of States for Internationally Wrongful Acts, a State which:

> "aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[764]

307. Returning an individual to the authorities of the receiving State knowing that their intention is to expel or return them to another territory contrary to the obligations of *non-refoulement* can be considered as aiding or assisting the receiving State.[765] The sending State would be jointly responsible for this breach of international law according to the law of State responsibility.[766]

308. If individuals seek protection in an embassy outside their country of origin, it seems that the principle of *non-refoulement* applies *vis-à-vis* the sending State and the sending State would be responsible for breaching *non-refoulement* pursuant to the Refugee Convention if it refuses to grant protection.[767] Nevertheless, it cannot be ignored that under the Refugee Convention, it is more difficult to conclude that refusing to grant protection constitutes *non-refoulement*.

309. Noll made a similar observation. He argued that the Refugee Convention does not imply a legal obligation for the sending State to process an asylum claim in its embassies.[768] Professor Noll determined that a refusal to provide protection in an embassy could never be construed as expelling or returning a person under the Refugee Convention because the embassy does not exercise control or jurisdiction over the person in question.[769] Further, he claims that if the receiving State intends to remove the asylum seeker, the receiving State is the "primary agent of removal," and so the sending State's responsibility cannot be engaged.[770]

310. Conversely, as addressed above, jurisprudence has accepted the jurisdiction of diplomatic agents over individuals.[771] Secondly, the matter of establishing jurisdiction should not be confused with determining whether *non-*

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[763] *Ibid.*
[764] Article 16 ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (2001) UN Doc. A/56/10, Chap. IV.
[765] Ogg, 110-111; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), 252-253.
[766] Ogg, 110-111.
[767] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), 252; Ogg, 112.
[768] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' [2005] 17(3) International Journal of Refugee Law 542.
[769] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' [2005] 17(3) International Journal of Refugee Law 542, 555.
[770] *Ibid.*
[771] See *supra* Chapter IV.b.iii.

refoulement is breached when an individual under the sending State's jurisdiction is expelled or returned.[772]

311. Likewise to Noll, Hughes-Gerber concluded that *non-refoulement* cannot be a legal basis for diplomatic asylum, even when motivated by human rights considerations.[773] She substantiates this by referring to the fact that the sending State is outside its own jurisdiction and therefore does not have the authority to extradite an individual.[774] She fails to provide extensive reasoning behind her conclusion. Again, the extraterritoriality of jurisdiction in human rights and refugee treaties and the ensuing *non-refoulement* obligations are accepted. When a State's obligations under *non-refoulement* are engaged, the State would breach the prohibition on *refoulement* if it does not grant protection to the individual concerned.

4.2.5. Conclusion

312. The human rights obligations of a State with regard to an individual requesting protection in its embassy abroad are first and foremost guided by the prohibition on refoulement.[775] Although traditionally the receiving State is regarded as the guarantor of human rights provisions within its territory, human rights and refugee treaties to which the sending State is party to also impose obligations on the sending State in the territory of the receiving State. The sending State cannot evade its obligations merely because its diplomatic premises are located outside its own territory.

313. After careful examination, it is clear that the ICCPR, ECHR, ACHR and Refugee Convention engage a State's jurisdiction extraterritorially.[776] A precise test to determine whether the sending State has personal extraterritorial jurisdiction over an individual seeking protection in its embassy does not exist, however, most regional courts and international treaty bodies accept that the sending State must have authority and effective control over the individual.

314. Subsequently, this facilitates the question whether the *non-refoulement* provision pursuant to the Refugee Convention and/or human rights treaties provides a legal basis for diplomatic asylum.

315. The foregoing establishes that whether a sending State violates the principle of *non-refoulement* found in the Refugee Convention by surrendering the individual to the receiving State is difficult to ascertain and dependant on different factors, such as the location of the embassy inside or outside the territory of the State demanding the return. Additionally, in assessing whether *non-refoulement* is breached, one must remain cautious so that the protection given by the principle is not hollowed out for other refugees. Therefore, it is not

[772] Ogg, 107.
[773] Hughes-Gerber, 187.
[774] *Ibid.*, 186.
[775] den Heijer, 120.
[776] See *supra* Chapter IV.b.ii.

possible to conclude with certainty that *non-refoulement* under the Refugee Convention constitutes a legal basis for granting diplomatic asylum.

316. Nevertheless, the *non-refoulement* obligation incumbent on States through human rights treaties applies in States' embassies and must be respected when an individual seeking protection presents themselves at the embassy. Concludingly, the *non-refoulement* obligation found in human rights instruments can constitute a legal basis for granting diplomatic asylum. However, the sending State's obligations do not exist in a vacuum, and the State must balance its obligations under diplomatic law to the receiving State and its obligations under human rights law to the individual.[777] In other words, the sending State's human rights obligations do not substitute the obligations the sending State owes to the receiving State. Ultimately, diplomatic asylum is about reconciling this set of obligations. In each particular case, an assessment must be made by the sending State to determine the best action.

317. Codification of this approach would be beneficial as it creates more legal certainty and transparency for the parties involved and gives the sending State the opportunity to afford protection to the individual through a recognised procedure. However, as already established, States use the lack of codification in order to freely determine each case to their benefit. For this reason another possible option is the use of a soft law instrument. Although soft law instruments might lack binding effect, they might, in the long run, contribute to shaping binding norms on diplomatic asylum.[778] In the meantime, they can guide States in reconciling their divergent obligations to the receiving State and to the individual.[779]

318. The above aside, accepting human rights instruments, and specifically the incumbent prohibition of *refoulement*, as a legal basis for diplomatic asylum expresses the growing influence of human rights in international law and provides a wider level of protection to asylum seekers. In particular, individuals would not have to cross a border to find asylum and can thus find protection closer to home. Nevertheless, a critical note should be made that this favourable approach provided by human rights treaties creates a certain pull effect for persons wishing to escape the local authorities. Moreover, the embassy's capabilities to provide protection can be limited, and might eventually lead to human rights violations in the embassy itself. Indeed, the duration of the asylum and the uncertainty for the individual regarding its status might constitute violations of *inter alia* the freedom of movement[780], right to health[781], right to liberty[782], freedom of assembly[783]...

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[777] *Al-Saadoon and Mufdhi v. UK* App. No. 61498/08 (ECtHR, 2 March 2010), [140].
[778] Daniel Thürer, 'Soft Law' *MPEPIL* (2009), [28], [37].
[779] Hughes-Gerber, 203.
[780] Article 12 ICCPR; Article 22 ACHR; Article 2 Protocol No. 4 to the ECHR (adopted on 16 September 1963, entered into force 2 May 1968) ETS No. 46.
[781] Article 12 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[782] Article 9 ICCPR; Article 7 ACHR; Article 5 ECHR.
[783] Article 21 ICCPR ; Article 15 ACHR; Article 11 ECHR.

319. In the case of Assange, Assange was confined to a small room in the embassy and suffered physical and mental health issues due to his stay there.[784] The UN Working Group on Arbitrary Detention determined in 2015 that Assange's stay at the embassy entails arbitrary deprivation of liberty.[785] Thus, while the sending State might rely specifically on its human rights obligations to grant diplomatic asylum, the very same human rights obligations might be breached by the sending State *vis-à-vis* the diplomatic asylee.[786]

4.3. POSSIBLE CONFLICT OF NORMS

320. The argumentation in favour of a legal basis for granting diplomatic asylum through humanitarian considerations or a State's human rights obligations might come into conflict with the obligations the sending State owes to the receiving State, namely the diplomatic duty of non-interference and respect for local laws.[787] The sending State will be presented with a conflict of norms and its human rights obligations must be evaluated against the sovereignty of the receiving State.[788] Can these norms be reconciled?

321. If an assessment of the conflicting norms leads to the conclusion that the receiving State's interests are more important and that the sending State's right to grant protection is limited in so far as this does not intervene in the internal affairs of the receiving State, the rights the sending State seeks to protect may be restricted and lead to the conclusion that diplomatic asylum cannot be granted given the circumstances.[789]

322. The Court in *R (B & Others)* decided that providing protection in an embassy is only possible when this is compatible with public international law.[790] When the receiving State requests the surrender of an individual, the sending State's human rights obligations cannot require the sending State to refuse this request unless it is clear that the receiving State intends to expose the individual to treatment which constitutes a crime against humanity. In such circumstances, according to the Court, human rights obligations impose a duty on the sending State to grant diplomatic asylum.[791] Although this ruling seems to provide an easy solution to the reconciliation of the existing approach on diplomatic asylum with

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[784] Ewen MacAskill, 'Julian Assange's health in 'dangerous' condition, say doctors' (The Guardian, 24 January 2018) <www.theguardian.com/media/2018/jan/24/julian-assanges-health-in-dangerous-condition-say-doctors> accessed on 13 May 2022; Patrick Kingsley, 'Julian Assange's room at the Ecuadorean embassy: a glimpse inside' (The Guardian, 1 October 2012) <www.theguardian.com/media/shortcuts/2012/oct/01/julian-assanges-room-ecuadorean-embassy> accessed on 13 May 2022.

[785] HRC Working Group on Arbitrary Detention, 'Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)' (2015) UN Doc. A/HRC/WGAD/2015, [99].

[786] Hughes-Gerber, 188.

[787] Article 41 VCDR; *Al-Saadoon and Mufdhi v. UK* App. No. 61498/08 (ECtHR, 2 March 2010), [140]; Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 348.

[788] den Heijer, 157; Wilde, 140.

[789] Behrens, 'The Law of Diplomatic Asylum – a Contextual Approach', 348; den Heijer, 157.

[790] R (B & Others), [88].

[791] *Ibid.*

human rights, it essentially limits the scope of human rights to those rights that protect against the most heinous crimes in international law.[792]

323. The likely course of action of the sending State would be to enter into negotiations with the receiving State with the aim of finding a compromise between human rights obligations and the demands of the receiving State.[793] Arguably, if there is no objection to the diplomatic asylum by the territorial authorities of the receiving State, the grant could be perfectly legal.[794]

324. Another solution to the conflict of divergent norms is to resort to the notion of *jus cogens* rules, also referred to as peremptory norms. Article 53 VCLT defines a peremptory norm as:

> "*a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*"[795]

325. Peremptory norms of international law take precedence over conflicting treaty provisions.[796] When there appears to be a conflict between a State's primary obligations, one of which arises under a peremptory rule of general international law, such peremptory rule must prevail.[797] This clause provides that resorting to the secondary rules of State responsibility is not necessary.[798]

326. Arguments have been made that *non-refoulement* has attained the status of a peremptory norm of general international law.[799] If *non-refoulement* is to be accepted as a *jus cogens* rule then a State's obligations under *non-refoulement* would trump its obligations under the VCDR.

5. CONCLUSION

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[792] Maarten den Heijer, 'Diplomatic Asylum and the Assange Case' [2013] 26(2) Leiden Journal of International Law 399, 423.
[793] *Ibid.*, 424.
[794] den Heijer, 110; Ogg, 104; Prakash Shah, 'Asylum, Diplomatic' *MPEPIL* (2007), [8]. See also *supra* Chapter III.a.iii.
[795] Article 53 VCLT.
[796] Article 64 VCLT.
[797] ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10, 85, [3].
[798] *Ibid.*
[799] Section III(5) Cartagena Declaration on Refugees (1984) OAS Doc. OEA/Ser.L/V/II.66/doc.10 ("To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*."); UNGA, 'Report of the United Nations High Commissioner for Refugees' (1985) UN Doc. A/40/12, [23]; Hirsi Jamaa v. Italy (Concurring Opinion Judge Pinto de Albuquerque), 64; Jean Allain, 'The jus cogens nature of non-refoulement' [2002] 13(4) International Journal of Refugee Law, 533-558; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008), 55.

327. Diplomatic asylum, i.e. protection offered in the form of asylum by the sending State outside its territory, most commonly in its diplomatic premises, remains an ill-defined concept in international law. Although it is one of the oldest institutions in international law, it continues to cause uncertainty due to differing State practice and lack of codification. Jurisprudence has had the chance to assess some aspects of diplomatic asylum, but this has not caused the desired certainty.

328. At the present state of development in international law, a right to grant diplomatic asylum does not appear to exist, on the other hand, there also does not seem to exist an explicit prohibition on granting diplomatic asylum. Thus, it would be too drastic to conclude that diplomatic asylum is an abuse of international law. The majority of States seem to be content with the current situation in which the institution of diplomatic asylum is not explicitly accepted (apart from Latin American practice) but is still used in exceptional cases.

329. The grant of diplomatic asylum causes much controversy as it is considered a derogation of the sovereignty of the receiving State. Conversely to territorial asylum, diplomatic asylum withdraws the individual from the jurisdiction of the receiving State and constitutes a possible intervention in the internal affairs of said State. Therefore, a legal basis, provided by treaties or custom, is required in each particular case in order to justify diplomatic asylum.

330. This contribution has first assessed possible legal bases for granting diplomatic asylum from a traditional interstate perspective, where the duties that States owe to each other were emphasised. It concluded that the VCDR does not provide a legal basis for diplomatic asylum, although two provisions, Article 22 and 41 VCDR, affect and facilitate the practice. Further, the Latin American treaty-based system of protection provides a legal basis for diplomatic asylum in Latin America but only for those States that are parties to the convention that provides this legal basis. Lastly, after carefully analysing State practice and opinio juris concerning diplomatic asylum, it cannot be concluded that diplomatic asylum has attained the status of a rule of customary international law. Therefore, universal customary law cannot provide a legal basis for granting diplomatic asylum. With regard to the Latin American practice, there is not yet complete agreement within jurisprudence and legal doctrine on the customary status of diplomatic asylum in Latin America. Thus, it cannot be ascertained that diplomatic asylum is a rule of regional customary law for the Latin American States.

331. Secondly, humanitarian considerations and human rights obligations were examined in order to determine whether a legal basis for diplomatic asylum finds its roots here. As contemporary international law increasingly requires States to take human rights law into account, this might cause States' positions on diplomatic asylum to change. After examination, humanitarian considerations pose several issues when used as a possible legal basis. Indeed, international law fails to provide a clear definition and threshold for these considerations and States seem to be unwilling to come together in an attempt to resolve this issue in order to create a rule with a normative character. Accordingly, this provides a

weak legal basis, although, it must be noted, attitudes by legal doctrine and several States seem to shift in this regard. Human rights obligations, particularly the non-refoulement principle found in human rights treaties, have a more favourable approach. Within this framework, a State may refer to its obligations under non-refoulement to justify granting diplomatic asylum when an individual presents himself at an embassy. One key difference concerns the obligation of non-refoulement under the Refugee Convention. In this regard, the law is not yet sufficiently developed to be able to say with certainty that this constitutes a legitimate legal basis for extraterritorial asylum. Furthermore, a legal basis pursuant to humanitarian considerations or human rights obligations causes a conflict of norms in which the sending State has to find a balance between the rights of the receiving State and its obligations towards the individual seeking protection.

332. While codification of diplomatic asylum would remedy the present uncertainty and would give parties the necessary tools to evaluate and address diplomatic asylum, codification also poses the risk of authorising diplomatic asylum in an increasing number of cases while simultaneously limiting the sending State's flexibility in granting asylum in unexpected circumstances. It is precisely the flexibility provided by the current legal framework that prevents States from codifying diplomatic asylum on a universal level. Therefore, a possible interim solution can be provided by a soft law instrument. A soft law instrument can guide States when confronted with diplomatic asylum and offers sufficient flexibility.

333. Currently, the traditional perspective, in which States play the central role, still determines the general attitude on granting diplomatic asylum. However, human rights developments can alter the traditional legal relationship between States, and a modern approach in which States, encouraged by human rights, take more account of their obligations owed to individuals, is gradually being put forth. Accepting that human rights apply in the context of diplomatic asylum could have significant implications for the institution's future development, although this adds to the complexity of an already complicated matter. It changes the legal framework on diplomatic asylum to include not only the possibility of a State's right to grant diplomatic asylum, but also the possibility of an individual asserting his right to diplomatic asylum against a State. Nevertheless, it cannot be concluded that a shift has fully taken place, and even if a new approach inspired by human rights law takes over, it will not simply set aside interstate obligations. A balance will have to be found where these two positions are reconciled.

334. Concludingly, the current legal framework on diplomatic asylum strikes a tense balance between the receiving and sending States' rights and obligations. States are only willing to grant diplomatic asylum in exceptional circumstances, therefore limiting the practice to cases where the risks to the asylum seeker are particularly high or where the asylum seeker's interests coincide in some way with those of the granting State. Diplomatic asylum in this regard will continue to evolve and develop, possibly changing its status in customary international law.

335. In the end, it is important to keep in mind that diplomatic asylum does not exist in a vacuum. The practice of diplomatic asylum is an amalgam of principles of State sovereignty, diplomatic law and the protection of human rights. For the purposes of determining the grant of diplomatic asylum, States must balance these different objectives and will guide themselves through humanitarian motivations or political expediency. Diplomatic asylum may be understood as a disputable practice in strict legal terms, its implications can be of such significance that it remains in use by even the most disapproving countries. The present-day importance of human rights might lead to a broader acceptance of diplomatic asylum as the role diplomatic asylum can play in safeguarding fundamental human rights cannot be overlooked.