

Diplomatic Asylum: A Necessary Evil to the Protection of Human Rights*

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ABSTRACT

The institution of a diplomatic asylum is one of the controversial subject of international law which has different view among international jurists. A group of academicians contemplate the institution of asylum as a matter of violation of the right of sovereignty of the host Country and dissenting with the functions entrusted to the diplomatic mission. Others consider the asylum as the possibility of protecting the freedoms and lives of persons persecuted for keeping opposite political opinions specially on account of protection of human rights. The law of diplomatic asylum largely developed in Latin America which is based upon regional treaties but presently there is barely any regional restraint and is practiced by many states without any legal justification. Various states endure to accept high-profile persons into their embassies in violation of these international legal authorities. The issue of diplomatic asylum is still a very complex and there is an inconsistency between attitudes and practice that makes the issue of diplomatic asylum a vague one. Every new instance of protecting in the embassy or consulate brings many doubts and raises many questions regarding diplomatic asylum that what actually is the current position of diplomatic asylum in context to public international law, especially with reference to Vienna Conventions on Diplomatic and Consular Relations, 1961, with other human right instruments or in the context of relevant case laws and on what basis it could be granted and what could be the possible consequences of such a protection. The present research paper attempts to find out answers to these questions and to determine the role of diplomatic asylum in the context of public international law.

Key words: diplomatic asylum, Latin America, international law, human rights.

Introduction

Traditionally, before the start of human rights law, legal issues arising from extraterritorial asylum were mostly talked in the context of 'diplomatic asylum', a term which refers to asylum in the embassies or other premises of a State that are situated in the territory of another State¹. Legal discourse on diplomatic asylum mainly focused on the probable friction arising out of the grant of extraterritorial asylum between the State giving asylum and the territorial State. Because extraterritorial asylum may create affront to the territorial sovereignty of the other

¹ F. Morgenstern, 'Diplomatic Asylum', 67 *The Law Quarterly Review* (1951) 362-382 at 362.

State, it was seen that it gave rise to questions of the legitimacy of diplomatic asylum under public international law. Both the development of human rights law and current policies of relocating migration management warrant a legal reaffirmation of the concept of extraterritorial asylum. Firstly, the various appearances of pre-border migration management question the extent to which existing discourse on diplomatic asylum can be incidental to a more general theory on the legality of the extraterritorial asylum. Secondly, in the present context importance of human rights, including the acceptance that human rights obligations can even bind a State when it is active in a foreign territory, require a determination of whether there can be the circumstances under which the requested State is under a human rights obligation, vis-à-vis an individual, to grant shelter and how such an obligation can be accommodated with possible concurrent and conflicting obligations the requested State may have vis-à-vis to the territorial State².

Definition-History of the Concept of Diplomatic Asylum

Diplomatic asylum denotes to the protection of an individual by a diplomatic mission and the individuals can be either a national of the receiving (or territorial) State, the sending (or extraterritorial) State or of a third State.³ Moreover, diplomatic asylum refers to “a refuge that is granted to a political offender or a person qualifying as a political offender or a person qualifying as a political persecuted in a diplomatic or consular mission.”⁴

² Maarten den Heijer, ‘Europe and Extraterritorial Asylum’ (Doctoral dissertation, Institute of Immigration Law, Faculty of Law, Leiden University) at 113.

³ A. Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), at 187.

⁴ J. Kleiner, *Diplomatic Practice: Between Tradition and Innovation* (Singapore: World Scientific Publishing Co. Pte.Ltd., 2010) at 167.

The notion of giving shelter to a persecuted person can be traced back to the ancient times⁵. The idea of a "sacred place" where a refugee could not be apprehended was well established and based on the belief that the rage of God would fall upon the violator of sanctuary. Concept of asylum can also be found in the early civilizations of Egypt, Greece, Rome and India. Regarding the historical development of Diplomatic asylum in legations and consulates, it could be said that the development of this kind of asylum could be divided into four stages with distinct features. The first in this regard was diplomatic asylum as a religious asylum, when criminal offenders sought asylum in sacred places; second kind was diplomatic asylum after establishment of first permanent missions, when common offender sought asylum in places of diplomatic envoys; third in this category was diplomatic asylum as protection in diplomatic premises only for political offenders and the fourth was, diplomatic asylum as codified legal institute or protection on humanitarian grounds. The institution of the grant of asylum developed mostly in Latin America and now days it is a legal issue which is regulated by various regional conventions. This kind of asylum was also in practice among European legations. But from the beginning of twentieth century the grant of diplomatic asylum showed that it was granted in rare cases and only on humanitarian issues. Various historical examples indicated that the persons used to sought the shelter in both, diplomatic legations as well as consulates, because both enjoy the inviolability from other State's jurisdiction. As a matter of rule, the privileges and immunities of consular officials are less extensive than those of diplomatic officials⁶.

The practice started in Latin America and later on reached the newly-formed International Court of Justice ("ICJ") in 1950 when it re-viewed the case of Peruvian opposition leader

⁵ S. Prakash Sinha, *Asylum and International Law* (The Hague: MartinusNijhoff Publishers, 1971) at 5.

⁶ Dixon Martin, *The Textbook on International Law* (Oxford: Oxford University Press, 2007) at 199-200.

Victor Raúl Haya de la Torre in its consecutive opinions.⁷ Colombia granted Haya de la Torre asylum in its embassy that was situated in Lima and asked for the safe passage out of Peru, but the ICJ held that this grant was in violation of the existing law pertaining to diplomatic asylum. When Peru asked to order Colombia to surrender Haya de la Torre, however, the ICJ stated that this was not needed and the parties should reach a negotiated solution to the impasse. Although the OAS Convention on Diplomatic Asylum, 1954 helped to standardize this practice in Latin America, there was no widely recognized multilateral treaty that provided the right to grant diplomatic asylum outside of that region. For example, the Vienna Convention on Diplomatic Relations, 1961⁸ recognized the inviolability of diplomatic missions⁹, but failed to establish an exclusive right to grant diplomatic asylum. Similarly, the Vienna Convention on Consular Relations, 1963¹⁰ states that “consular premises shall not be used in any ways or manner that are incompatible with the exercise of consular functions,” but it does not explicitly question the diplomatic asylum rights¹¹. Today, many key international actors do not recognize a formal right to grant diplomatic asylum. However, some still provide diplomatic asylum-like refuge to certain opposition political leaders. For example, in year 1956, the United States granted refuge to anticommunist leader Cardinal József Mindszenty in its Budapest embassy. Mindszenty lived in the embassy compound for about fifteen years before moving to the Rome¹². Similarly, in year 1989, the United States of America accepted Tiananmen Square, demonstration leader Fang Lizhi and his wife Li Shuxian into its

⁷*Haya de la Torre, (Colombia v. Peru)* 1951. I.C.J. 71 (June 13) available online at <http://www.icj-cij.org/docket/index.php?sum=68&code=haya&p1=3&p2=3&case=14&k=d4&p3=5> 1951 I.C.J. 71 (last visited on 13 February 2017).

⁸ Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227.

⁹ Art. 22 VCDR.

¹⁰ Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77.

¹¹ Art. 55 VCCR.

¹² Anthea J. Jeffrey, ‘Diplomatic Asylum: Its Problems and Potential As a Means of Protecting Human Rights’, 1 (1) *South African Journal on Human Rights* (1985) 10-30 at 10, 12.

Beijing embassy. Fang and Li were later on allowed to leave after the United States, China, and Japan reached a negotiated settlement¹³. The court's opinions in these cases have been popularly construed to suggest that diplomatic asylum can exist either through explicit treaties or reciprocal.

Diplomatic asylum and theories of Immunity

Long before the Vienna Conventions on Diplomatic Asylum and Consular Relations came into being, diplomatic and consular immunities were present in the customary international law. The concept of immunity can be categorized on three theories: theory of personal representation, theory of extraterritoriality and theory of functional necessity. The theory of personal representation is the oldest among all. Under the theory of personal representation, diplomats that are acting on behalf of a sovereign State embody the ruler of that State. An insult to the representative of a sovereign State under this theory constitutes an insult to the foreign State itself.¹⁴ Under the second theory that is the theory of extraterritoriality, the diplomat legally resides on the land of the sending State despite the fact that the diplomat lives abroad. Therefore, the foreign envoy is not subject to the laws of the receiving State due to a lack of a local residence. Extraterritoriality infers that the premises of a mission in the theory are outside the territory of the receiving State and represent a kind of extension of the territory of the sending State¹⁵. Thus the sovereign of the State has no right to exercise any jurisdictional act over the

¹³Y P. Yam, 'Profile: Fang Lizhi – Fundamental Rights, Fundamental Physics', 270(5)*Scientific American* (1994) at 39-40.

¹⁴Mitchell S. Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' 4(1)*American University International Law Review* (1989),173-205 at177

¹⁵B. Sen, *A Diplomat's Handbook of International Law and Practice* (3rd edn., Hague: MartinusNijhoff Publisher, 1988) at 96.

places which enjoy extraterritoriality¹⁶. Diplomatic asylum was considered as a vital part of diplomatic law until the nineteenth century. The concept of extraterritoriality was later on rejected by law writers and replaced by functional necessity. From the nineteenth century functional necessity is the prime theory and presents the justification of immunities. It justifies immunity for the purpose of permitting diplomats to conduct their diplomatic functions. According to this theory the diplomats have privileges and immunities to be able them to perform his/her diplomatic functions. A diplomat needs to be free from the local jurisdiction so as to exercise the task given to him by the sending State. This theory is included in Vienna Convention on Diplomatic Relations, 1961 and Vienna Convention on Consular Relations, 1963 and is the dominant (but not exclusive) theory that based diplomatic immunity in contemporary international law.¹⁷ From the nineteenth century, when the theory of functional necessity became the leading one, asylum in legations and consulates is criticized, because it is not being included in the functions of diplomatic or consular missions.

Difference between Diplomatic and Territorial asylum

The distinction between the territorial and the extraterritorial asylum has long standing in international law. The notion of territorial asylum was traditionally implicit as the right of States to grant the asylum to aliens on their territory, which may be proclaimed vis-à-vis the pursuing State¹⁸. In this manner, the right to grant asylum has often been linked to the right to refuse extradition. In the *Asylum Case*, the International Court of Justice paralleled the right of a State

¹⁶ Barker J. Craig, *The Protection of Diplomatic Personnel* (Burlington: Ashgate Publishing Limited, 2006) at 55.

¹⁷ Harvey J. Langholtz and Chris E. Stout, *The Psychology of Diplomacy* (Westport: Praeger Publishers, 2004) at 245.

¹⁸ A. Grahl-Madsen, *Territorial Asylum* (Stockholm: Almqvist & Wiksell International, 1980) at 2.

not to extradite aliens present in its territory with the right to grant asylum and confirmed that this right is a normal exercise of the territorial sovereignty:

‘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.’¹⁹

The Declaration on Territorial Asylum that was adopted by the UN General Assembly in 1967 affirms that the grant of asylum is a peaceful and humanitarian act, a normal exercise of State sovereignty, and that it shall be respected by all the other States²⁰. The right of States to grant asylum on their territory may thus be seen as stemming directly from the principle of territorial sovereignty and thus the derivative notion of States having exclusive control over the individuals present on its territory. While this principle is usually invoked for recognizing the power of States to exclude aliens but its reverse implication is that States are also free to admit anyone they choose to admit²¹. It follows that the right to grant territorial asylum is subject only to the extradition treaties and other overriding rules of international law. Since it cannot benefit from the shield of territorial sovereignty, the grant of extraterritorial asylum is altogether a different matter. The question if the States are entitled or not to grant asylum outside their territories has most frequently been referred in the context of so-called ‘diplomatic asylum’, addressing to asylum on the premises not only of the embassies and legations, but also include asylum being

¹⁹ *Asylum Case (Colombia v Peru)*, I.C.J. Reports 1950, p. 274

²⁰ General Assembly : Art.1, GA Res. 2312(XXII), 14 December 1967.

²¹ F. Morgenstern, ‘The Right of Asylum’, 26 *British Year Book of International Law* (1949) at 327.

given in warships, military camps or other military facilities²². The legal principles pertaining to the question of legitimacy of diplomatic asylum do essentially not differ from those applicable to other kinds of extraterritorial asylum, the main difference being that the certain diplomatic and consular immunities apply only to the former. The problem with accepting a right on the side of States to grant extraterritorial, or diplomatic, asylum has been rightly articulated in the Asylum Case:

‘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 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 derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.’²³

The problem that extraterritorial asylum will normally intrude upon the sovereignty of the territorial State has to some extent been relieved by the accepted practice that States do not interfere with one another’s grant of diplomatic asylum and that the persons granted diplomatic asylum are permitted safe-conducts out of the country to the territory of the State granting diplomatic asylum. These practices have under strictly defined the conditions that have been codified in various regional treaties for example the Havana Convention of 1928; Montevideo Convention on Political Asylum of 1933; Montevideo Treaty on Political Asylum and Refuge of 1939; and the Caracas Convention of 1954. The general features of these treaties is that

²² Convention on Diplomatic Asylum (28 March 1954) 18 OAS Treaty Series No. 18, Article I defines, “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”.

²³ *Asylum Case (Colombia v Peru)*, I.C.J. Reports 1950, p. 274

diplomatic asylum may be granted in the urgent situations and for the requisite period to ensure safety of the person seeking the asylum²⁴ ; that States may only grant diplomatic asylum to persons who are sought for political reasons as opposed to common criminals²⁵ ; and that the territorial State may at all times request that the person granted asylum is removed from its territory²⁶. These conventions do not give rise to single entitlement to receive asylum and petitioned States are thus free to refuse asylum also even when the grant would be lawful vis-à-vis the territorial State²⁷. Although various regional Conventions speak of beneficiaries as ‘refugees’, this term does not exactly correspond to the definition of a refugee in the Refugee Convention of 1951²⁸: the right to grant asylum is invigorated only in respect of political offenders or, alternatively, persons fleeing from mob violence²⁹.

Academic Opinions on Diplomatic Asylum Law

International legal commentators have different opinion over the notion of diplomatic asylum. Formal academic rejections of the practice of diplomatic asylum started as early as the later half of nineteenth century. The initial critics of the practice of diplomatic asylum reasoned that diplomatic asylum constituted a “derogation” of the sovereignty of the host State. They believed that the practice actually grew from an abuse of recognition that failed to properly consider the host country’s interest in its domestic affairs³⁰.

²⁴Art.2, Havana Convention 1928; Art. V, Caracas Convention 1954.

²⁵ Art.1, Havana Convention 1928; Art. 3, Montevideo Treaty 1939; Art. III, Caracas Convention 1954.

²⁶ Art.2, Havana Convention 1928; Art.6, Montevideo Treaty 1939 ; Art. XI Caracas Convention 1954.

²⁷ Art. II, Caracas Convention1954.

²⁸ Art. 1, Convention Relating to the Status of Refugees 1951.

²⁹ Art. VI of the 1954 Caracas Convention also covers individuals being sought by private persons or mobs over whom the authorities have lost control.

³⁰ John Bassett Moore, ‘Asylum in Legations and Consulates and in Vessels.II’, 7(2)*Political Science Quarterly*(1892)197-231 at198.

This criticism continued until the beginning of twentieth century. Academic commentators recommended that host countries often allowed asylees of diplomatic asylum to remain inside embassy compounds for some practical reasons not because they recognized the practice. They further directed that even the asylum-granting country may not have felt that their action was legally justified. Persistence that practice had been established on this basis, they argued, would be harmful for the development of international legal custom³¹. Effectually, these commentators reasoned that a grant of diplomatic asylum is always a suspect³². They suggested the practice was more a political matter than of law and even indicated that its recognition is nothing more than a political “out” for those seeking to meddle in a host country’s internal affairs. Even in the cases of humanitarian concern, they said that the granting of diplomatic asylum is no more excusable than a case of political interference from an objective legal point of view³³.

In divergence, other commentators have sought to graft the practice of diplomatic asylum onto existing international law. During the apartheid era in South Africa, many argued that diplomatic asylum should be granted to activists on humanitarian grounds³⁴. Specifically, they indicated that the U.N. Charter established an obligation to accept anti-apartheid activists and was given international consensus that South Africa’s actions represented crimes against humanity.

³¹ C Neale Ronning, *Diplomatic Asylum; Legal Norms and Political Reality in Latin American Relations*(The Hague: M. Nijhoff, 1965) at 27–28.

³² Alona E. Evans, ‘The Colombian-Peruvian Asylum Case: The Practice of Diplomatic Asylum’, 46(1) *American Political Science Review* (1952) 142-157 at 142, 144.

³³ John Bassett Moore, ‘Asylum in Legations and Consulates and in Vessels.II’, 7(2) *Political Science Quarterly*(1892)197-231 at 198.

³⁴ Anthea J. Jeffrey, ‘Diplomatic Asylum: Its Problems and Potential As a Means of Protecting Human Rights’, 1 *South African Journal on Human Rights* (1985) 10-30 at 10, 12 .

In the Durban Six case, which evolved around six prominent members of the South-African anti-apartheid movement who had been served detention orders and who sought refuge at the British consulate in Durban in year 1984. The British consulate complied with their request and promised that it would not force them out of the consulate, although the authorities also made clear that they would not be allowed to intervene on their behalf with the South African authorities and that they could not stay for the indefinite period.³⁵ Effectively, if the states could be allowed to use armed force to protect those threatened with imminent injury, then they should certainly be provided with the more limited ability to grant them the diplomatic asylum.

Some authors, who support the existence of a rule that exceptional humanitarian pressures justify the grant of diplomatic asylum, have referred to the widespread practice of granting of diplomatic asylum throughout the world, possibly necessitating a conclusion that the right to grant diplomatic asylum has established itself as a customary international law. It is true that, on occasions, States have granted diplomatic asylum to fugitives, also in clear opposition to local rules or demands of the host State. The Canadian government for an example, decided to grant refuge to six US diplomats on Canadian diplomatic premises during the Tehran hostage crisis and to subsequently make arrangements for their covert departure from Iran, which it later on justified by maintaining that it 'upheld rather than violated the international law'³⁶. Another very well-known example of granting the diplomatic asylum could be the case of providing aasylum to cardinal Mindszenty, who spent more than 15 years in the US embassy

³⁵ Susanne Riveles, 'Diplomatic Asylum as a Human Right: The Case of the Durban Six', 11 *Human Rights Quarterly* (1989), 139-159 at 139.

³⁶ *Case Concerning United States Diplomatic and Consular Staff in Tehran (Hostages Case) (United State of America v. Iran)*, judgment of 24 May 1980 I.C.J. 40, available on line at www.icj-cij.org/docket/files/64/6291.pdf (last visited 12 February 2017).

(1956-1971). Polish diplomatic embassy in Jakarta granted diplomatic asylum to refugees from East Timor. The mission of Chile in Moscow in 1991 also provided a shelter to Erich Honecker. In this line a latest case is that of Chen Guangcheng, a Chinese civil rights activist who worked on the human rights issues in rural areas of the People's Republic of China. In 2005, Chen gained international recognition for organising a landmark class-action lawsuit against authorities in Linyi, Shandong province, for the excessive enforcement of the one-child policy of the government of China. As a result of this lawsuit, Chen was placed under the house arrest from September 2005 to March 2006, followed by a formal arrest in June 2006 and on April 2012, Chen somehow escaped his house arrest and fled to the U.S. Embassy in Beijing. After negotiations with the Chinese government, he was allowed to leave the embassy for medical treatment in early May 2012³⁷. Other interesting cases that recently took place happened in June in 2012. It was a case of J. Assange, who was sheltered in the Embassy of Ecuador situated in London. The founder of WikiLeaks is identified because he published thousands of the American diplomatic notes with secret content. For some time Assange had been in Great Britain. Sweden authorities suspected him of sexual offences and, therefore, he is wanted. In June 2012, being afraid of judgment, he sheltered in the embassy and applied for the asylum. The decision was made by on June 2012. The statement of the authorities enumerated the reasons for granting asylum to Assange. They referred to the humanitarian law and the protection of an individual. The statement, however, does not focus on the legal aspects and does not specify the conditions needed to grant the diplomatic asylum³⁸. A lot of countries outside Latin America deny the very existence of diplomatic asylum. A Minister of Foreign Affairs in Great Britain W. Hague

³⁷ Available on line at www.en.wikipedia.org/wiki/Chen_Guangcheng(last visited on 3 March 2017)

³⁸ Julian Assange: Ecuador grants Wikileaks founder asylum, 16.08.2012, BBC News, available on line at <http://www.bbc.com/news/uk-19281492> (last visited 12 February 2017).

denied its existence in his statement in 16 June 2012. The problem between Ecuador and Great Britain should then also be analyzed outside the regulations of diplomatic asylum. Yet there is still the question about the status of Assange. He is not an asylum seeker, as he benefits from the protection of the Ecuadorian embassy in London. The effectiveness of such a protection is rather debatable. Great Britain Initially planned to attack embassy of Ecuador, referring to the decision of British Court. The reason for the reaction could primarily be the violation of British sovereignty by the discordant act of providing him with illegal asylum, which very much denies the functions of the diplomatic mission. In the end Great Britain gave up the idea to attack the embassy of Ecuador. As the attacking a diplomatic mission would not be legal. Inviolability of a diplomatic mission is undeniable. Only after the due permission of the head of the embassy one can enter its territory. Entering the premises of the embassy could not be even justified as it is considered to be an act of intrusion, which is mentioned in the Article 22 of the Vienna Convention on Diplomatic Relations³⁹.

Such actions could not be justified even in the cases in which the asylum was illegally granted. However, if Assange would like to leave the territory of Great Britain he could be arrested at any moment of his trip outside the embassy. As discussed above, the granting of diplomatic asylum by various countries has no legal grounds. Therefore, it seems that such states should restrict the practice of granting such kind of asylum. On the other hand, it could be allowed in cases of explicit humanitarian help. Despite the lack of relevant legal regulations, countries are still granting diplomatic asylum.

³⁹ Alina Malinowska, 'The Institution of Diplomatic Asylum as the Possibility of Protecting Human Rights' Marie Curie-Sklodowska University in Lublin, Poland, available on line at www.culturaldiplomacy.org/.../Alina_Malinowska_-_The_institution_of.. (last visited on 12 February 2017).

Extraterritorial Asylum as Humanitarian Exception to State Sovereignty

From the above discussion the implication could be drawn that extraterritorial asylum or diplomatic asylum is about reconciling the principle of territorial sovereignty with the claims of humanitarianism. It could be endorsed that, if there is a conflict between humanitarianism and state sovereignty, exceptional circumstances may make diplomatic asylum legitimate for diplomatic mission to refuse surrender. In Oppenheim's International Law, it is clearly stated that the 'compelling reasons of humanity may justify the grant of asylum'. The judgment laid down in the Asylum Case clearly states as under:

'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.'⁴⁰

Although generally addressed in the context of refuge in the diplomatic missions, the problematic issue is the reconciliation of humanitarian claims with the principle of territorial sovereignty in all types of territorial asylum. There are numerous cases as already discussed where the state asserted a right to grant protection on humanitarian grounds undermines from the view that such right has established itself in the customary international law; it appears that political considerations have many times clearly outlined humanitarian principles which further guide the practice of giving diplomatic asylum. Some time it is also proved that granting the

⁴⁰*Asylum Case (Colombia v Peru)*, I.C.J. Reports 1950,p.274

extraterritorial asylum by way of humanitarian exception in opposition to the demands of the territorial state has a weak legal basis. Such grants must be considered a derogation of the territorial sovereignty of the host state and therefore requires specific entitlement under international law. In the absence of the provisions of international treaty law or a rule of international customary law that recognizes a right to grant extraterritorial asylum on exceptional humanitarian grounds, one way for supporting its legality would be to construct the right in accordance with the provisions of the larger doctrine on humanitarian intervention in international law, within which progressive attempts are made to formulate the conditions and circumstances permitting the intervention in the domestic affairs of another state⁴¹. Moreover, modern discourse on humanitarian intervention may be deemed to be of only modest importance for the specific question related to extraterritorial asylum, because the granting of extraterritorial asylum will not normally involve the use of force nor involve action that are specifically undertaken with a view to interfere in the domestic affairs of the other state. A second possibility for creating the legal basis of a humanitarian exception could be the duty to respect the territorial sovereignty of the host state that consists of accommodating the rule of non-intervention with specific human rights obligations which a sending state may incur regarding an individual requesting the protection in the host state. In theory, human rights obligations of the sending state concerning an individual may supplement the duties that the sending state owes vis-à-vis the host state.

Although usually being addressed with regard to the refuge in diplomatic missions, the problem of reconciling humanitarian claims with the principle of territorial sovereignty has

⁴¹W.M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law* (1990) p. 872-873.

been a central issue for all forms of extraterritorial asylums. The legal principles applicable to the institution of extraterritorial asylum, apply to all, whether the asylum is granted in an embassy, consulate, military base or other facilities are provided. They are equally binding for contemporary practices of pre-border migration control, where the sending state is confronted with the asylum claims in a foreign territory. The main difference between diplomatic asylum and other grants of extraterritorial asylum is that the law on diplomatic immunities applies in case of former and not necessarily to the latter. Thus it means that although normally the territorial state has every right to put an end to illegal grants of asylum on its territory, asylum-seekers in the diplomatic premises or other privileged facilities may remain immune from incursions by the territorial state. But here the issue of concern is that to what extent the law relating to diplomatic and consular relations facilitates extraterritorial grants of asylum. Historical preview reveal that the bond between diplomatic asylum and the privileged position of diplomatic envoys was stronger in the past than it is in present scenario. Grotius, the early legal jurists explained the legality of diplomatic asylum from the fiction of exterritoriality stating that the ambassador's premises are inviolable as they are outside the territory of the host state and considered to be placed in that of the sending state.⁴² This theory of Grotius was first rejected by Van Bynkershoek, in speculating that the ambassador's immunities are functional and therefore the ambassador's premises must not be used to offer refuge to criminals.⁴³ Although no longer the theory given by Grotius is seen as valid, the fiction of exterritoriality has on occasion resurfaced in defending the legality of diplomatic asylum. Dissenting in the Asylum Case, Judge Alvarez stated that the fiction of exterritoriality is the basis for diplomatic asylum in Latin

⁴²Maarteen den Heijer, *Europe and Extraterritorial Asylum* (Bloomsbury Publishing, 2012),at 115.

⁴³C. van Bynkershoek, *De Foro Legatorum Liber Singularis*, 1744 (translated by G.J. Laing. Oxford: Clarendon Press, 1946), Chapter XVI, p. 79-80.

America and that accordingly, asylum is considered not to intervene in the sovereign rights of the host State in the leading *Asylum Case*⁴⁴. This view is difficult to reconcile with the fact that even in Latin America, diplomatic asylum is considered legitimate in limited circumstances only. Other writers have reflected the practice of diplomatic asylum as having a legal basis in the diplomatic function or in the privileges of diplomatic missions. This argument has also been opposed, under the reason that diplomatic privileges and immunities serve freedom and security in discharging diplomatic functions and that granting asylum is not the part of these functions, but on the contrary, it may jeopardize relations between the sending and receiving state.⁴⁵ The Vienna Conventions on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963, do not categorize asylum as one of the recognized function of diplomatic or consular missions. The topic of asylum was explicitly omitted from both the treaties, as it was under consideration of the UN General Assembly at that time. In both Conventions, a provision on asylum was proposed which would prevent the states to offer shelter to persons who are charged with an offense under local law. Both were not accepted under the reasoning that the subject of asylum was not intended to be covered.⁴⁶ Therefore it leaves a somewhat unclear legal status of the institution of diplomatic asylum under diplomatic and consular international law. However an inferred reference to asylum has been given in Article 41 (3) of Vienna Convention on Diplomatic Relations (VCDR), which includes it as recognized functions of the mission that are laid down in special agreements that are concluded between the sending and receiving state. This clause was precisely inserted to accommodate for conventions on diplomatic asylum in force in Latin America. Although the clause was not expressly incorporated in the Vienna

⁴⁴*Asylum Case (Colombia v Peru)*, I.C.J. Reports 1950,p. 292

⁴⁵ S. Prakash Sinha, *Asylum And International Law* (MartinusNijhoff Publishers, 1971),at p. 22.

⁴⁶ E. Denza, *Diplomatic Law: Commentary On The Vienna Convention On Diplomatic Relations*, (Oxford University Press ,2008),at p. 141

Convention on Consular Relations(VCCR), relatively it was compensated by Article 5 (m), which lists as residual category of consular functions, those functions ‘entrusted to a consular post by the sending state which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State’. Hence in a way this provision may be considered as not only letting for the conclusion of agreements on consular asylum, but also identifying asylum as a consular function if it is not in conflict with local laws or is not disapproved by the receiving state and also subject to the condition that asylum is granted with the consent of the competent authorities of the sending state.

In the absence of any special agreements, the question of asylum in both conventions depends, on one hand, the duties not interfere with domestic affairs and not use diplomatic and consular premises in any manner which is incompatible with recognized diplomatic or consular functions,⁴⁷ and, on the other hand, on the inviolability of consular and diplomatic premises.⁴⁸ It can be clearly concluded that offering shelter to persons seeking to evade justice is a clear violation of the duty not to interfere with the local laws. While diplomatic and consular asylum in opposition to demands of the local State may thus be considered an abuse of privileges and immunities, the inviolability of diplomatic premises remains an effective tool for sending states to refuse to answer calls for surrender. The prohibition to enter diplomatic premises as laid down in Article 22 (1) of Vienna Convention on Diplomatic Relations does not allow for exception, inferring that once an embassy has granted asylum, the territorial state is effectually debarred from terminating the grant of refuge. It is due to the inviolability of

⁴⁷Articles 41, VCDR and Articles 55, VCCR.

⁴⁸Articles 22, VCDR and Article 31, VCCR.

diplomatic premises that territorial states that are opposing refuge have often seen no other option than to comply with the situation and, in order to prevent the protracted stays and the political frictions flowing from it, have been willing to grant safe conducts out of the country, also in situations where criminal charges had been imposed on the fugitive offender. Apart from the refuge in diplomatic and consular premises, there are other conditions as well where the extraterritorial grants of asylum can benefit from immunities. The most current situation is refuge granted on board of warships or other public vessels. According to international maritime law, warships and government ships being operated for non-commercial purposes enjoy complete inviolability⁴⁹. In the case when the warships in the territorial sea of another state do not comply with the laws of that state, the only alternative for the coastal state is to call for the vessel to leave the territorial waters⁵⁰. The result of the absolute inviolability of warships is that the legal situation concerning asylum is similar to that of refuge granted on diplomatic premises, the main difference between the two being that the warship may sail away with the refugee on board. Because the problem of requesting a safe-conduct out of the country is not there, a grant of 'full-fledged' asylum is better possible. The immunities other than those of diplomatic and consular envoys or warships often depend on the details of bilateral or multilateral treaties, such as Status of Forces Agreements. The option of granting refuge in diplomatic premises is a distinctive form of extraterritorial asylum. If the asylum is granted in opposition to demands of the territorial state, it always remains problematic from a legal point of view, but its practical feasibility is quiet enhanced because of the inviolability of the diplomatic premises. It could be well argued that it is a system of diplomatic immunity and in-violability, rather than a legal right

⁴⁹Article 8(1) Convention on the High Seas, 29 April 1958, 6465 UNTS 450

⁵⁰Article 23 Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 UNTS 205

to grant diplomatic asylum, which has now a days made the practice of diplomatic asylum a disseminating phenomenon even outside Latin America. Inviolability creates a legal obstacle to redress illegal grants of asylum and hence gives rise to enticements on the part of the host state that is wishing to terminate a grant of asylum to find alternative way out. Thus with the humanitarian and often passive nature of grants of diplomatic asylum, may be taken as an explanation as to why diplomatic asylum, even if constituting an outrage to local laws, is often tolerated and only rarely spurs bilateral frictions between the two states.

Concluding remarks

Diplomatic asylum granted according to the provisions of Latin America Conventions, other regional Conventions or on the basis of humanitarian reasons, is accepted as a means to protect persons in the situation of imminent danger. The diplomatic asylum could be applied when no other alternative is possible for a person who is facing a risk of deprivation of life or safety. Still the issue of diplomatic asylum is a complicated one. Certainly, diplomatic asylum is an institution of regional international law. The necessary precondition for its application is an urgent situation which poses a threat to the life of an individual. The status of asylum seekers could be granted only to those who are suspected or accused of political crimes, not of common crimes. What is also important in this context is the place where the asylum is given which is the diplomatic mission, although the relevant conventions allow other places also. Definitely, it is an institution which provides protection to the health and life of an individual, being prosecuted for political reasons. The doctrine does not have a hesitation as for the humanitarian usage of diplomatic asylum. Nevertheless, referring to other principles such as the principle of extraterritoriality, the inviolability of the diplomatic missions and the agreement of a receiving

country can be the ground of some doubts. Although, it is unknown whether there is a sense or possibility to regulate the institution of diplomatic asylum. The experience of many countries has shown that they granted diplomatic asylum even when they were not connected by any treaties. There could be two possible solutions to such problems. The first could concern for not granting asylum in the countries that not connected by any norms of this regulation. However, a many of them practice it even without legal justifications. The second option would be concluding an international convention on diplomatic asylum where all the interested States could appear. As for the possibility of comprehending such convention in the near future, it is important to know the positions of the States towards the institution of diplomatic asylum. Actually, the main difficulty is the negative attitude of various states. It threatens the sovereignty of smaller States. For the above mentioned reasons the possibility of concluding such regulations in the near future is very bleak. Therefore Diplomatic Asylum will remain as the discretionary zone of the states and somehow accepted as the necessary evil in the protection of human rights.