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THE INVIOLABILITY OF DIPLOMATIC AND CONSULAR PREMISES IN INTERNATIONAL LAW

by

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DEDICATION

To three Cameroonian lawyers, who were and are still my teachers:

Dr. F. KISOB

Dr. John N. MONIE

Dr. Peter Y. NTAMARK

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ABSTRACT

Diplomatic and consular staff normally discharge their functions without unnecessary interference, because diplomatic and consular premises enjoy inviolability within the receiving state. The principle of the inviolability of those premises in international law is laid down in Article 22 of the Vienna Convention on Diplomatic Relations (1961) and in Article 31 of the Vienna Convention on Consular Relations (1963). The receiving state is under a special duty, to take all steps to protect diplomatic and consular premises against any intrusion, or damage and to prevent any disturbance of the peace or any impairment of the dignity of such premises. The premises of a diplomatic mission, their furnishings and any other property enjoy absolute immunity from search, requisition, attachment or execution. Consular premises, their furnishings and other property of the consular post enjoy immunity, except in specific cases, such as when expropriation is necessary.

The main purpose of this research is to examine the present state of the inviolability of diplomatic and consular premises in international law. During the past two decades embassies or consular posts have been taken over, violently attacked or entered by unauthorized individuals or agents of the local authorities. For instance, between 1971 and 1980, more than forty-eight embassies were taken over. However, only the take-over of the United States Embassy and Consulates in Iran resulted

in proceedings before the International Court of Justice. It is important to determine how states and the international community have reacted to the increasing violations of diplomatic and consular premises. Rising terrorism and frequent attacks on diplomatic and consular premises have caused states and the United Nations Organization to re-examine the protection, security and safety of diplomatic missions and consular posts. It is also important to examine the relevance of international treaties in the struggle to protect the inviolability of mission and consular premises.

Relations between states are conducted through embassies, consular posts and special missions. The strict distinction between diplomatic and consular functions is gradually fading away in practice. Consulates discharge more diplomatic duties and embassies discharge more consular functions than ever before. Economic functions are hardly distinguishable from purely political functions.

Diplomatic and consular premises enjoy different degrees of inviolability. Personal service of legal process at such premises is problematic, because it tends to be an affront to the dignity of the premises or staff. Mail service of process is a legally harmless practice. Picketing or demonstrations at diplomatic or consular premises remain a legally-protected form of expression. However, picketing or demonstrations, if carried beyond certain limits, would interfere with the functioning of the embassy or consular post, jeopardize the dignity of the premises and violate international law. A receiving state should prevent demonstrators from making it difficult for embassies and consular posts to function.

In spite of the increase in the delicate functions of honorary consulates, their premises enjoy only minimal protection in international law. This minimal protection of honorary consulates is one of the lacunae of the Vienna Convention on Consular Relations (1963). Some states neither receive nor appoint honorary consuls. Even though the institution of honorary consulates has received only scant attention, evidence suggests that those consulates should enjoy a higher degree of inviolability and protection, in order to assume their ever-increasing economic and political responsibilities.

Asylum in diplomatic or consular premises is not expressly dealt with by the two Vienna Conventions on Diplomatic (1961) and Consular (1963) Relations. In spite of that omission, diplomatic asylum directly owes its survival to the inviolability of mission and consular premises. Diplomatic asylum is not recognized as a right in international law, but when sending states grant it, receiving states tolerate the practice. Generally, receiving states respect the inviolability of diplomatic and consular premises, even when there is an asylee in those premises. In the Colombian-Peruvian Asylum Case (1950) Peruvian authorities did not forcibly enter the Colombian Embassy in Lima, to take hold of Mr. Haya de la Torre.

There are some limitations to the principle of the inviolability of diplomatic and consular premises. Sometimes fires break out, or crimes are committed at such premises. Evidence suggests that a receiving state might have its agents forcibly enter an embassy, if that is in the interest of the security of that state. The reasons for the forcible entry must be so overwhelming that the entry can be justified ex post facto. There might also be an entry, without the authorization of the sending state, if the embassy and its staff have been seized by terrorists, who threaten to kill the staff. In certain cases consent to enter consular premises is presumed.

Diplomatic and consular staff are required to respect the laws of the receiving state: Missions and consular posts must not interfere in the internal affairs of the receiving state. The fulfillment of those obligations is often necessary, so that the receiving state may respect and protect the inviolability of mission and consular premises.

The receiving state has to exercise due diligence in giving special protection to embassies and consular posts. Due diligence is a standard. It is not a definition. The nature of the protection to be given depends on the risk or threat involved. On 12 March 1985, Canadian authorities exercised due diligence, when the Turkish Embassy in Ottawa was attacked by three terrorists. When diplomatic or consular premises have been violated, the receiving state must re-establish the inviolability of those premises. The receiving state is also obliged to either prosecute or extradite the violators of the premises.

There are diplomatic, political, economic and pecuniary remedies available to the sending state for the violation of its premises within a receiving state. Third party settlement of such disputes is also a possibility. On 4 and 5 November 1979, Iranian militants overran the United States Embassy in Tehran and two Consulates in Tabriz and Shiraz. The United Nations Security Council and the International Court of Justice played different, political and judicial, roles in their search for a solution to that hostage crisis. The actions and decisions of the Security Council and the Court failed to completely resolve the crisis. However, the positions taken by the two organs of the United Nations underscored the need for civilized behaviour, in the conduct of diplomatic and consular relations between modern nations. In the <u>American Hostages Case</u> (1980) the Court reaffirmed the principle of the inviolability of diplomatic and consular premises. That inviolability is crucial to the conduct of fruitful relations between states.

It is proposed that an international treaty should be concluded, making it possible for the premises of honorary consulates to enjoy greater inviolability. Such a treaty would benefit the international community. It is also submitted that the members of the United Nations should adopt a treaty regulating diplomatic asylum. The provisions of such a treaty could be similar to those of the Caracas Convention on Diplomatic

Asylum (1954). Finally, it is the conclusion of this thesis that, despite the frequent violations of foreign missions and the difficulties associated with the enforcement of international law, the inviolability of diplomatic and consular premises remains a cardinal principle of diplomatic and consular law.

INTRODUCTION

Diplomatic law regulates diplomatic intercourse between nations. Consular law governs consular relations between nations. Diplomatic or consular premises are the places where embassies or consular posts perform their functions within the receiving state. Article 22(2) of the Vienna Convention on Diplomatic Relations (1961) and Article 31(3) of the Vienna Convention on Consular Relations (1963)[1] both provide that the receiving state is under a "special duty" to take steps to protect diplomatic and consular premises against any intrusion, or damage and to prevent any disturbance of the peace, or any impairment of the dignity of such premises. Diplomatic premises, their furnishings and any other property enjoy absolute immunity from search, requisition, attachment or execution. Consular premises, their furnishings and any other property of the consular post enjoy immunity, except in specific cases, such as when expropriation is necessary.

Today consulates discharge more diplomatic duties and embassies discharge more consular duties than ever before. Relations between nations have increased and have become more complex. Instances of the violation of diplomatic and consular premises have increased enormously. There has been a tremendous rise in international terrorism and the take-over of diplomatic premises. Some countries have supported terrorists.[2] Between 1971 and 1980, more than forty-eight embassies were taken over[3], but only the Iranian take-over of the United States Embassy in Tehran resulted in proceedings before the International Court of Justice,[4] because both Iran and the United States had signed the Optional Clauses appended to the Vienna Convention on Diplomatic Relations (1961) and to the Vienna Convention on Consular Relations (1963)[5] accepting the compulsory jurisdiction of the Court.[6] Both Iran and the United States of America had signed the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[7] In the American Hostages Case (1980) the Court held that Iran had failed in its "special duty" to afford protection to the United Embassy and its staff.[8] Iran neither complied with the resolutions of the United Nations Security Council, nor did it carry out the decision of the International Court of Justice in the American Hostages Case (1980).[9]

It must, therefore, be determined what the inviolability of diplomatic and consular premises consists of. It is necessary to determine what diplomatic or consular law provides on the rights and obligations of sending and receiving states. When and how do receiving states protect the inviolability of consular or diplomatic premises? Are there exceptions to the general rule of inviolability? The premises of honorary consulates are minimally protected. What are the reasons for the minimal protection? Is it necessary to give honorary consulates greater protection in international law? The inviolability of diplomatic or consular premises has for a long time made those premises ideal places for persons seeking refuge, in order to flee illegal prosecution or avoid persecution by individuals or by governments. The two Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) do not deal with diplomatic asylum. Would a receiving state be exercising its legitimate right, if it forcibly entered diplomatic or consular premises, in order to arrest a common criminal or a political offender? Linked to this is the problem of states unilaterally qualifying offences as political or common crimes.[10] The qualification of offences was discussed in the Asylum Case (1950). Latin-American States have attempted to regulate diplomatic asylum.[11] Is a universal convention on diplomatic asylum a necessity?

Another related issue is that of the limitations on the inviolability of diplomatic and consular premises. When a fire breaks out or when there is a serious crime of violence within those inviolable premises, the principle of inviolability raises delicate questions. Are local authorities allowed to enter diplomatic and consular premises, without the consent of the sending state, when there is an emergency?

Sending states also have obligations. Diplomatic and consular staff have to respect local laws and also refrain from interfering in the internal affairs of the receiving state. What remedies are available to the receiving state, if diplomatic or consular staff violate local laws?

Receiving states in giving special protection to embassies and consular posts are required to exercise due diligence. What is due diligence? What remedies are available to the sending state, if its diplomatic or consular premises are violated? How practical are those remedies?

In Part I it is proposed to examine the characteristics of the inviolability of mission and consular premises. The five chapters in this Part will be devoted to: the general background of diplomatic and consular law; the inviolability of diplomatic and consular premises; the institution of honorary consulates and their protection; asylum in diplomatic and consular premises; and the limitations on the inviolability of embassies and consulates.

Part II will examine the duties and responsibilities relating to the inviolability of embassies and consulates. More specifically it will study: the question of the fulfillment of obligations by sending states; the special protection of diplomatic and consular premises; and the remedies available to the sending state, if its premises in the receiving state are violated. Finally, Part II will attempt to determine what roles the United Nations Security Council and the International Court of Justice played, when Iranian militants took over United States diplomatic and consular premises in Iran in 1979.

The main thrust of this inquiry is to examine the present status of the inviolability of diplomatic and consular premises in international law. During the past two decades embassies or consular posts have been taken over, violently attacked, or entered by unauthorized individuals or agents of the local authorities. Those incidents have raised serious questions concerning the protection, safety and security of embassies, consular posts and their staff. The governments of sending and receiving states aim at providing a conducive atmosphere in which diplomatic and consular agents should function effectively. Throughout this thesis state practice will be examined particularly through national and international decisions.

PART I:

CHARACTERISTICS OF THE INVIOLABILITY OF DIPLOMATIC AND CONSULAR PREMISES

CHAPTER I

GENERAL BACKGROUND OF DIPLOMATIC AND CONSULAR LAW

In this introductory chapter it is proposed to have a brief examination of sources of diplomatic and consular law; the functions of embassies and consular posts; and the privileges and immunities, which facilitate those functions.

A. SOURCES OF DIPLOMATIC AND CONSULAR LAW

Diplomatic intercourse between villages, tribes, states and nations has been used for numerous centuries and centuries, to promote peace between human groupings.[12] The main modern sources of diplomatic and consular law are custom, treaties, municipal law, and case law. Doctrine may constitute evidence of what the law is.

1. Custom

Custom is "an established practiced or habit".[13] In the Asylum Case (1950), the International Court of Justice described custom as a constant and uniform usage accepted as law.[14] The Statute of the International Court of Justice at Article 38(1) cites custom as one of the sources of international law, and defines it as "a general practice accepted as law". The practices of states, if widely accepted, become law and can govern diplomatic and consular practices.

2. Treaties

Treaties are also a source of diplomatic and consular law. The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations are the main examples. The two conventions are the fruit of delicate compromises made by states, in order to achieve harmony and widely-accepted principles.[15]

3. Municipal Laws -

National legislatures may make laws affecting the nation's relations with other countries. For instance, law makers of some nations incorporate international treaties as an integral part of the national laws. The traffic laws passed by a city council, such as that of Ottawa, could have repercussions on consular or diplomatic law.

4. Case Law

The decisions ~~of~~ national and international courts also create, and give substance to certain rules, which affect consular and diplomatic law. Decisions in cases such as the Asylum Case (1950) and the American Hostages Case (1980) are the primary examples.

5. Doctrine

The works of writers may constitute evidence of diplomatic and consular law. Courts and legal advisers, in their daily decisions, may take into consideration the views of prominent authors.

Other sources of law may include the general principles of law recognized in the main legal systems of the world.

B. FUNCTIONS OF EMBASSIES

Article 3 of the Vienna Convention on Diplomatic Relations (1961) enumerates the main functions of embassies: representation, negotiation, observation, information, protection, promotion and the discharge of any other duties, which are not forbidden by the sending states, for instance, by participating in activities in the receiving state.[16] Embassies negotiate agreements with the local authorities and with other diplomatic missions within the receiving state. Negotiation includes the discussing of mutual interests, even where the conclusion of a treaty is not foreseen.[17] An embassy observes what happens in the receiving state, and eventually informs the sending state. Legal avenues for collecting information include newspapers, journals, radio, television, and pieces of information gathered from conversations with private persons and public officials, during public or private pursuits.[18] Illegal means of collecting information are often tantamount to espionage, especially where such collection is accompanied by clandestine activities.[19] The protection of the interests of the sending state and its nationals is one of the functions of a diplomatic mission. However, that protection which extends to physical and moral persons of the sending state, must be "within the limits permitted by international law".[20] The promotion of friendly relations, between the sending and receiving states, is a crucial function of embassies. Friendly relations are an essential ingredient of economic development and cooperation between North and South.[21] Such cooperation, which results from friendly relations, could also help advance the search for an agreement on the arms race between East and West.

In addition to these traditional functions, diplomatic missions also perform miscellaneous and notarial functions, which usually are a part of consular duties.[22] These miscellaneous functions include: the registration of births and marriages, authentication of documents, registration of citizens of the sending state, service of summons, and the issue of passports and visas.

C. FUNCTIONS OF CONSULAR POSTS

Article 5 of the 1963 Vienna Convention on Consular Relations spells out consular functions. The principle consular functions include: the protection of the interests of the sending state and its nationals; assistance to nationals of the sending state;[23] development of economic, cultural and scientific relations between the two states; various administrative functions; registration of births and deaths; solemnization of marriages; notarial and judicial functions; assistance to and control of navigation and aviation.

Consular functions are so broad that consular officers are "precariously straddled between the commercial world and the world of diplomatic relations."[24] Consular posts today deal with more and more diplomatic questions; diplomatic missions handle more and more consular problems. The traditional idea, that consuls handle commercial issues and ambassadors deal with political issues, seems to be fading away in practice.[25] This would indicate that diplomatic and consular practices are growing beyond the confines of the two Vienna Conventions on Diplomatic and Consular Relations.

D. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

Conventional law seeks to lay down clear-cut standards, against which the treatment of diplomatic and consular personnel may be measured.[26] A state exercises its sovereignty over persons on its territory. Diplomatic or consular privileges and immunities exist, so that diplomatic and consular personnel may be able to carry out their duties diligently, within the receiving state. What are the bases of these privileges and immunities?

1. Theories of Privileges and Immunities

The main theories include sovereign representation, exterritoriality and functional necessity.

a) Theory of Sovereign Representation

According to this theory, the diplomatic or consular agent personifies the ruler or sovereign of the sending state and, therefore, must be respected in the receiving state. Even the Greek city-states conceived diplomatic agents as being the personal representatives of the head of the sending state.[27]

This theory is too broad because it puts the sovereign and his agent completely above the law of the receiving state.[28] Secondly, in modern regimes, sovereignty has been transferred from a single king or prince to systems, where power is shared by the executive, legislative and judicial branches. Thirdly, this theory may offer a basis for privileges as regards official acts, but fails to provide adequate grounds for the extension of immunities, for purely personal acts of diplomatic or consular personnel.

In spite of these criticisms, the theory of sovereign representation is hardly forgotten in the daily conduct of diplomacy. It underlines intercourse, between individual states and individual missions and consular posts, whether or not authors acknowledge it.

b) Theory of Exterritoriality

In the 16th century permanent missions became outposts of the territory of the sending state in the receiving state. The diplomat was supposed to exercise his functions, within the receiving state, while legally remaining in his own state. The consular or diplomatic agent was physically present in the receiving state, but legally absent from that same state.[29] This theory is of little or no use today because, embassies and consular posts are present on the territories of the receiving states.[30] Embassy and consular personnel live and travel in the states, where they serve and do confront the laws of those states.

c) Theory of Functional Necessity

According to this theory, the diplomatic or consular agent should be given freedom to communicate or to travel around; he should have immunity from local jurisdiction so that international intercourse is peaceful and dignified.[31] Such an agent will, therefore, have only the privileges and immunities, which he needs in order to function properly. Experts at the Harvard Law School and the United Nations accepted the functional theory.[32] This theory surpasses sovereign representation and exterritoriality. The theory of functional necessity attempts to explain, why the family of a consular or diplomatic agent should enjoy certain privileges. A consular agent or diplomatic agent will be unable to perform his functions efficiently, if his family is not comfortable and secure.

2. Importance of Functional Theory

There are three main factors that have made this theory gain importance.[33] First, there are growing numbers of people serving in embassies and consulates. Modern states, by applying the functional theory, can accommodate the demands of hundreds of diplomatic and consular personnel. Secondly, special or *ad hoc* missions, commissions and even specialized representation, such as military, economic, and press services have increased. Thirdly, the number of international organizations has increased. All these increases in personnel and organizations have created opportunities for granting immunities more than ever before, and under the functional theory, privileges are fashioned according to the needs of the diplomatic or consular agent.

However, even the functional theory does not explain everything. Privileges, such as exemption from the payment of custom duties and taxes could be withdrawn without making it impossible for a diplomat to function efficiently. Article 34 of the Vienna Convention on Diplomatic Relations (1961) exempts diplomatic agents from certain dues and taxes. Some privileges are granted on the basis of reciprocity, between the receiving and the sending states. Through reciprocity, states can grant to their agents mutually-accepted advantages, in addition to those provided for in the Vienna Convention on Diplomatic Relations. Article 47 of this Convention is explicit on that practice. It does not amount to discrimination as between states.

3. Inviolability, Jurisdictional Immunity and Fiscal Privileges

a) Diplomatic or Consular Inviolability

The inviolability of diplomatic or consular premises prevents local authorities, from entering into such premises to perform any official acts, without the consent of the sending state.[34] This inviolability extends to archives, property and correspondence of the mission or consular post.[35]

There is also the inviolability of the members of a consular post or embassy. The persons of such officers are inviolable. These officers may not be arrested or detained except in clearly defined circumstances.[36] The receiving state is under an obligation to protect the persons and the premises of missions or consular posts. That protection is a precondition for the efficient functioning of diplomatic and consular staff.

b) Jurisdictional Immunity

This is immunity from criminal and civil jurisdiction; it foresees cases, where diplomatic and consular staff are not subject to the courts of the receiving state.[37] Immunity from prosecution is different from immunity from execution. Immunity from jurisdiction shields premises and officers of consular posts and embassies from prosecution or execution.

c) Fiscal Privileges

These privileges include exemption from tax and custom duties.[38] Article 34 of the Vienna Convention on Diplomatic Relations (1961), apart from clearly-defined exceptions, exempts diplomatic agents from "dues and taxes personal, or real, national, regional or municipal." Article 49 of the Vienna Convention on Consular Relations (1963), in similar language, exempts consular officers, consular employees and members of their families from dues and taxes.

There are problems inherent to immunities and privileges. Staff working in missions and consular posts do not enjoy the same advantages. There are differences in the nature and degree of advantages, because of the rank or nationality of the staff concerned. These differences cause friction within missions and consulates.

E. SPECIAL MISSIONS

Article 1(a) of the United Nations Convention on Special Missions (1969)[39] provides that a "special mission" is a temporary mission sent by one state to another state, with the consent of the latter, to deal with a specific question or handle a particular task. A special mission is therefore temporary. It ends when the task is completed, or if one of the states decides to terminate it.[40] The United Nations Convention of Special Missions (1969) completes and brings valuable additions to the Vienna Conventions on Diplomatic Relations (1961) and Consular Relations (1963).

Article 22 of the Convention on Special Missions (1969) stipulates, that the receiving state shall grant to the special mission such facilities as are needed by the mission for the performance of its duties.[41] Thus, the premises of special missions, their archives, correspondence, and diplomatic staff enjoy inviolability. The staff also enjoy jurisdictional immunity and fiscal privileges. We will presume that special missions, for practical purposes, are assimilated to the diplomatic missions.

Today, diplomatic and consular privileges are dynamic. They are linked to all political and legal evolutions in the world.[42] The functional theory makes it possible for changes to occur, by allowing for adjustments, according to the circumstances of place and time. The exigencies of national security may oblige a receiving state, to temporarily set aside immunities and privileges accorded to missions and consular posts. In 1973, Pakistani authorities forcibly entered the Iraqi mission premises in Islamabad, and found a cache of explosives in those premises.[43]

Private acts of terrorism and state-supported terrorism, like the 1984 murder of British Constable Yvonne Fletcher in London, England,[44] have raised unanswered questions. These upheavals might make diplomatic or consular privileges and immunities appear fragile. That apparent fragility is, at best, different from reality. International law in this regard is still respected. Consular and mission premises still enjoy inviolability and protection.

In the chapters that follow there will be an examination of the nature of the principle of inviolability, the obligations of states and the remedies available to countries whose consular or diplomatic premises have been violated. An examination of the problem of diplomatic asylum will show how states handle an institution that has no universally-accepted rules. The roles played by the United Nations Security Council and the International Court of Justice will show how those organs of the United Nations are prepared to defend the principle of the inviolability of diplomatic and consular premises.

CHAPTER II

WHAT CONSTITUTES INVIOLABILITY OF DIPLOMATIC AND CONSULAR PREMISES?

In order to study what constitutes inviolability of premises, the following topics will be discussed: types of premises; degrees of inviolability; expropriation and requisition of premises; search, attachment or seizure; and, the service of legal process.

A. DIFFERENT TYPES OF PREMISES

1. Definition of Premises

Diplomatic and Consular law defines the premises of missions and consular posts. Apart from these premises, properly-so-called, there are other premises, which are assimilated to such premises. Definitions distinguish diplomatic premises from consular premises.

a) Diplomatic Premises

The Diplomatic Convention (1961) defines the premises of a diplomatic mission as being, "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."[45] This definition is broad enough to include "all buildings, appurtenances, garden and the car park."[46] Ownership of the premises is irrelevant. The sending state may be a tenant, or the premises might have been put at the disposal of the embassy by the receiving state, or by some physical or moral person.

The residence of the head of mission is treated as a part of the premises of the mission. In other words, the residence of the ambassador, wherever it might be, is legally co-opted into the premises of the mission. Under customary international law, the residence of the head of mission was always inviolable. The Diplomatic Convention (1961) merely codified existing international law.[47]

The agents of the receiving state are not allowed to enter mission premises, without the consent of the head of mission. This principle of inviolability is laid down in Article 22 of the Diplomatic Convention (1961). It is reasonable to suppose that in the absence of the head of mission, entry into mission premises could be permitted by the chargé d'affaires or other designee. In general, when the head of mission is going to be absent, he sends out a note to the receiving state and diplomatic missions stating the name of the person, who will act in his place, while he is away.[48]

b) Consular Premises

Consular premises are defined as "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post."[49] To rank as consular premises, the buildings or parts of the buildings and the land ancillary thereto, must be used exclusively for consular purposes. In the definition the word "exclusively" is used to emphasize that, if the premises are used otherwise, like is often the case with honorary consular posts, such premises will not enjoy full immunities and privileges.[50] In the definition of mission premises, the word "exclusively" is not used.[51] In practice, there is a presumption that consular premises are used exclusively for consular purposes. That is, however, a rebuttable presumption. Article 1 (j) of the Consular Convention (1963) does not, in defining consular premises, say anything about the residence of the head of the consular post. Article 32(1) of the same convention makes a clear distinction between "consular premises and the residence of the career head of consular post."

Thus, mission premises retain their status, even if they are not used exclusively for diplomatic purposes. On the contrary, to be classified as consular premises, such premises must be used exclusively for consular purposes.

2. Assimilated Premises

The two Vienna Conventions define "premises of the mission"[52] and "consular premises."[53] The two definitions may be said to state, what diplomatic or consular premises properly-so-called are. There are other premises, places or things which are assimilated to either consular or diplomatic premises, in order that they may have certain privileges and immunities.

a) Diplomatic Premises

The Diplomatic Convention at Article 1 (i) includes the residence of the head of mission in the definition of mission premises. Assimilated to the premises of the mission, at least for the application of the principle of inviolability are: the carriages, motor cars, boats, and airplanes of the mission, provided these means of transport are "used for diplomatic purposes or for the use of the envoy."[54]

There is also the question of foreign embassy buildings that are not located at, or are not very close to the operative capital of the local sovereign. This issue is similar to the case of buildings used by the chief of diplomatic mission or by his staff for recuperative or recreational or similar purposes. It is obvious that the good health of the ambassador and that of his staff facilitates the discharge of their diplomatic duties. But that is not all. In Tietz et al. v. People's Republic of Bulgaria (1959)[55] the Supreme Restitution Court for Berlin on 10 July 1959, stated that in order to enjoy immunity embassy buildings should be used for the day to day conduct of diplomacy between the sending and receiving states.[56] The immunities accorded to envoys and to diplomatic premises are today based on functional necessity. Only buildings which function to facilitate the day to day conduct of relations between the sending and receiving states should enjoy immunities. In practice most foreign embassy buildings are located at or close to the local capital, where ambassadors conduct their business through their embassy staff. Immunities will normally not extend to buildings

> not used for the function of transacting diplomatic business with the local sovereign, and cannot so be used either because they are substantially and unreasonably remote from the local capital, or for any other reason.[57]

Article 12 of the Diplomatic Convention (1961) provides that a sending state requires the prior express consent of the receiving state, in order to establish offices, which are a part of the mission, in localities other than the ones in which the mission itself is situated. It makes diplomatic business run smoothly when the mission is located in the capital, which is the seat of the executive, legislative and judicial powers in the receiving state.

The inviolability of premises primarily exists to facilitate the conduct of diplomatic intercourse between sovereigns. To extend the application of the principle of inviolability to every residence, which the ambassador and his staff use for recuperative or recreational purposes, would greatly increase the opportunities for abuse by embassies. The extension of the application of inviolability to any premises is a question of fact, to be determined in each specific case. Any residence or hotel room, used temporarily for diplomatic purposes could; in certain cases, enjoy inviolability.

The residence of the diplomatic agent is assimilated to mission premises, under Article 30 of the Diplomatic Convention (1961). The residence of the agent enjoys the protection and inviolability accorded to the mission premises.[58] His documents and correspondence enjoy inviolability; his property also, except in respect of actions to private, immovable property, exercised by the diplomatic agent in the receiving state.[59] The diplomat's carriage, airplane, boat, motor car or other means of transport, will enjoy inviolability, provided that they are used for diplomatic purposes or are used by the diplomat or his family. Finally, these immunities and facilities are akin to those of the head of mission.

b) Consular Premises

The residence of the head of the consular post, his means of transport and the residences of consular agents, should be assimilated to consular premises. There is a distinction between consular premises and "the living quarters of consuls situated in the same building as the consular offices."[60] In some cases, it is possible that the living quarters of consuls have been assimilated to or treated the same way as consular offices, even though Article 1(j) of Consular Convention (1963) deliberately excludes the residence of the head of consular post, from the definition of consular premises.

There is a growing tendency for the residences of consular officers to enjoy the same inviolability as do consular offices. Two reasons account, at least in part, for this growing tendency. First, consular posts deal with more purely political questions than ever before.[61] Consular posts and officers are assuming more importance, than they have had for a long time. Secondly, a consular convention may provide for the inviolability of the residences of consular officers. The United Kingdom-China Consular Agreement of 17 April 1984 at Article 3 states, that the residences of consular officers are inviolable.[62] The same

Article foresees, that each country's consular premises will enjoy the type of protection and inviolability enjoyed by diplomatic premises. It is important to note that under Article 3(3) of the United Kingdom-China Consular Agreement, the residences of consular officers are inviolable, but they do not enjoy the protection, which consular premises enjoy under the same agreement.

The United Kingdom-China Consular Agreement departs from the traditionally-limited inviolability under Article 31 of the Vienna Convention on Consular Relations (1963). Through the practice of reciprocity, states can amplify or strengthen the provisions of a treaty. That amplification or strengthening does not violate international law, because Article 72 of the Consular Convention (1963) and Article 47 of the Diplomatic Convention (1961) authorize the practice.

National laws may also provide for the inviolability of the residences of consular officers. Honduras law, under Article 36 of Act No. 109 of 14 March 1906, provides that both the consular premises and the residence of the consul are inviolable.[63] Article 36 further stipulates that the Consul has no right "to give asylum to persons or property with the object of removing them from the jurisdiction of the authorities."

It can be argued that the inviolability of the consular officer extends by assimilation, to the means of transport of the consular agent, if that means of transport is used for consular purposes, by him or his family. In diplomatic and consular circles, personnel often end up enjoying more privileges and immunities than the law grants them.

B. DEGREES OF INVIOLABILITY OF PREMISES

There are degrees of inviolability of consular and diplomatic premises. The principle of inviolability does not apply in all circumstances. In other cases, the inviolability of premises is absolute or relative.

1. No Inviolability

It is rare to find any case where diplomatic premises enjoy no inviolability at all. Italy traditionally maintained that consular premises enjoyed no inviolability.[64] However, Italy softened its position, by adopting the International Law Commission Draft, which foresaw absolute immunity for consular premises.[65] That draft became the working document at the 1963 Vienna Conference, which produced the final draft of the Vienna Consular Convention (1963).

In the case, Heirs of the Late Moshe Shavaco v. Roger Hylan (1953)[66], the president of the Executive Office of Jerusalem decided that local police were, in the absence of a treaty, allowed to enter the Belgian Consulate General, to arrest a chauffeur in execution of a judgment against him, for reckless driving causing death.

It appears that the fact of death, as a result of recklessness, hung over the mind of the judicial authorities. The reckless driving thus became a serious offence. It is probable that in the case of an extremely minor offence, the judicial authorities might have not gone as far as they did. It is obvious that where premises enjoy no inviolability at all, the conduct of international relations becomes too precarious to be smooth. The civilized world continues to choose either relative or absolute inviolability.

2. Absolute Inviolability

Absolute inviolability attains the most complete degree of inviolability. Article 22 of the Diplomatic Convention (1961) grants absolute inviolability to the premises of the mission, and to the residence of the head of mission. Under Article 30 of the same convention, the private residence of the diplomatic agent enjoys the same protection, as the mission premises. The agent's papers, correspondence and property (due regard had to the exceptions under Article 33(3)), also enjoy absolute inviolability.

The Consular Convention (1963) does not provide absolute inviolability, for consular offices or for the residence of the head of consular post.[67] A particular convention, such as the United Kingdom-China Consular Agreement (1984) at Article 3(1) and (2) provides that each country's consular premises will enjoy the protection and absolute inviolability of Article 22 of the Diplomatic Convention (1961).[68] The Sino-Soviet Consular Convention of 1959[69] at Article 13(2) provides absolute inviolability, based on reciprocity.

There appears to be a tendency for socialist countries to readily grant absolute inviolability. One of the reasons for this might be that those countries have fewer consular posts in the West. The western countries have by far more consulates, and run the risk of having more problems arising from consular posts, if those posts had absolute inviolability.

The political responsibilities of consular posts have continued to grow. The reasons, that militated in favour of absolute inviolability being granted to consular posts, still exist. The civilized world ought to grant, by a multilateral treaty, absolute inviolability to consular posts and to the residences of consular officers. That type of treaty will give official recognition to a growing de facto situation, which seems to take on greater dimensions under different forms.

3. Relative Inviolability

Relative inviolability of premises is midway, between the total absence of inviolability and absolute inviolability of consular and diplomatic premises. The inviolability of consular premises is relative, because there is a proviso that, in order to enjoy that inviolability, the said premises must be used exclusively for consular purposes. Even if local authorities enter those premises, they may in no circumstances "search such premises or examine or detain papers or other articles found therein."[70] The inviolability of consular premises may be set aside sometimes.

The Consular Convention between the Kingdom of Hungary and the Republic of Poland (1936)[71] stipulates that the official premises of consulates and the premises used for keeping consular archives shall be inviolable. There is an exception to the rule. Article 7(1) states further that local authorities may enter consular premises:

> ... for the purpose of arresting a person charged in Hungary, with an offence graded as a crime or delict, and, in Poland, with an offence punishable with a penalty involving loss of liberty the maximum form of which is at least one year, or some more serious penalty.[72]

However, the local authorities may in no case search the consular premises they may have entered to arrest a person, or examine or detain papers or other articles found in the premises. Article 7(2) of the Hungarian-Polish Consular Convention (1936) forbids the use of consular premises as places of asylum. That Consular Convention allows the entry of local authorities into consular premises only for the arrest of an offender, who has committed a serious offence.[73] Even though Hungary and Poland foresee entry into consular premises in certain cases, the drafting of Article 7 of the Hungarian-Polish Consular Convention (1936) limits the cases in which the entry of local authorities is allowed. It would be hard to imagine local authorities entering consular premises often. The restrictions limit the instances when unauthorized entries can be justified.

The Kasenkina Case (1948)[74] attracted attention and raised some problems. Mrs. Oksans Atepanova Kasenkina was a Soviet citizen, who taught Soviet children of the members of the Soviet delegation to the United Nations. After her passage by steamship had been booked, she sought to remain in the U.S.A., instead of returning to the Soviet Union. She went to Reed Farm, New York, where there was a White Russian Welfare Organization, led by one Countess Alexandra Tolstoy. From there she was taken, probably without her consent, by the Soviet Consul General, Y.M. Lomakin, into the Soviet Consulate General in New York, to await to be repatriated to the Soviet Union. From there she jumped out of a window, either to escape or to commit suicide. The New York police entered the Soviet Consulate General, to investigate her apparent suicide attempt.[75] The United States insisted that the entry was made with the consent of the Soviet Consul General. The Soviet Embassy in a note to the U.S. State Department rejected that allegation.[76] There was a dilemma for the U.S.A. The U.S.A. wished to deny any violation of international law, caused by the entry of the police. On the other hand, it appeared that such a denial might serve as a precedent for officials of other states, to arbitrarily invade American missions and consulates abroad. The problem was laid to rest by resorting to the fiction of exterritoriality of consular premises, without making it impossible for authorities to act in questionable cases.[77]

In the Kasenkina Case (1948), the United States argued, that no foreign government has a right to exercise police power, within the U.S.A.[78] The exercise of such a power is incompatible with the sovereign rights of the receiving state. Police powers, just like the power to prescribe rules of conduct for those within its territory, belong to the receiving state. The receiving state's prescriptive jurisdiction is unaffected by diplomatic privileges and immunities. However, the receiving state's enforcement jurisdiction is affected, because diplomatic immunity sometimes shields diplomatic missions and consular posts, from the receiving state's legal process.

The U.S.A., in the Kasenkina Case (1948), also argued, that it had a right to revoke the exequatur of a foreign consul for improper conduct.[79] That right is not questioned. The receiving state may, without giving specific reasons, revoke the exequatur of a foreign consul. The power of the receiving state to decide in that respect is unlimited. The only guidelines in this area are comity and mutual respect, which should exist between the receiving and sending states.

C. EXPROPRIATION AND REQUISITION OF PREMISES

Expropriation is the "deprivation of a person of his property, particularly by public authority, as by compulsory purchase."[80] Requisition is "a demand in writing, or formal request or requirement; the taking or seizure of property by government."[81] Both expropriation and requisition of diplomatic or consular premises could have tremendous repercussions, on the ability of the embassy and consular staff to function, within the receiving state.

1. Diplomatic Premises

Article 22(3) of the Diplomatic Convention (1961) stipulates inter alia that diplomatic premises, their furnishings or other property on the premises and their means of transport, shall be immune from requisition. Mr. Francois, speaking as a member of the International Law Commission, made a proposal that inviolability of diplomatic premises should not "prevent expropriation in the public interest by the receiving state."[82] That proposal was and is still of great significance, because absolute inviolability of premises, if driven to extremes, could make it difficult and even impossible for the local authorities to execute public works, or other essential projects of a public interest. Cases were cited, where public works had not been executed, because of the refusal of sending states to move their premises to a different place.[83] In spite of that, the U.S.A. have maintained that international law did not categorically exclude the requisitioning of diplomatic property, nor is taking "by exercise of the right of eminent domain"[84] forbidden expressly. Eminent domain, which is the power of the state to expropriate private land for public use, is still one of the fundamental prerogatives of the modern state.[85] That power is so linked to the sovereignty of states, that international law cannot over-turn it.

The practice today is that, where the receiving state wishes that an embassy moves into different premises in the interest of public works, both the sending and receiving states should negotiate a solution to the problem. The receiving state has no right to override a refusal, by the sending state, to give up mission premises or diplomatic residences.[86] For good diplomatic intercourse between states, the sending and receiving states will usually sort out the problem, prudently avoiding unnecessary friction. It is hard to imagine cases in which a foreign mission will occupy premises, against the express will of the receiving state. The risks of that type of persistence, or outright stubbornness are incalculable to the sending state, whatever the foreseeable advantages might be. If a receiving state requisitions or expropriates diplomatic property, prompt compensation should follow, and the local authorities should also assist the mission to find and occupy other premises.[87]

A recent British example is illustrative. In 1966, the Foreign Office in London asked for the consent of some diplomatic missions to the construction of the Fleet Line underground railway beneath their mission premises. None of the missions objected to the construction of the railway, but some asked for assurance that compensation would be paid promptly, if there were resulting damages to their premises.[88]

2. Consular Premises

Article 31(4) of the Consular Convention (1963) stipulates *inter alia* that the

> consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility.

Where expropriation is necessary for purposes of national defence or public utility, two conditions must be fulfilled.[89] First, the local authorities must avoid creating an impediment to the smooth functioning of the consular services. Secondly, the receiving state must make adequate, prompt and affective compensation available to the sending state. Some states exempt consuls from obligatory military requisitions, contributions or billeting as concerns consular premises, property and the private residences, household articles and the means of transport of the consul.[90]

Article II(6) and (7) of the United States-Costa Rican Consular Convention (1948)[91] allowed expropriation or the seizure of consular premises or residences, if that was necessary in the interest of national defence or public utility; on condition only that adequate compensation was made, and due care taken to avoid an interruption of the performance of consular functions. During a national emergency, property may be temporarily requisitioned with the intention of returning it to the legal owner in future. For purposes of national defence or public utility, the receiving state may permanently expropriate property, thus permanently depriving the legal owner of the property. The position today is that, whereas consular property and premises are immune from requisition, they are not immune from expropriation.

In spite of this generally accepted position, it is submitted that in cases of extreme national emergency, where the sovereignty or the security of the receiving state is at stake, the local authorities may requisition consular property or premises. For instance, during a war or when there is a natural calamity of immense dimension that could happen. A grave national emergency could fundamentally alter the circumstances, which existed at the time the Vienna Convention on Consular Relations (1963) was concluded.

D. SEARCH, ATTACHMENT OR SEIZURE

1. Diplomatic Premises

Article 22(3) of the Diplomatic Convention (1961) stipulates inter alia, that mission premises, their furnishings and other property thereon and their means of transport, are immune from search, attachment or execution. This immunity is absolute.

Even though the grant of diplomatic asylum became more frequent in the seventeenth century, there were rare cases, in which local authorities resorted to forcible entry and seizure on embassy premises.[92] In some cases, inviolability of mission premises was abusively extended to include not only embassy buildings, but also the surrounding parts of the city. For some time in Rome, Venice, Madrid, and Frankfurt-on-Main, franchise du quartier was often claimed, in order to exempt an entire, surrounding suburb, from paying custom duties on provisions imported for consumption and also, in order to prevent the visits of law enforcement officers.[93]

The police or executive authorities of the receiving state shall not seize any articles belonging to the mission,[94] provided that the articles are within mission premises, and local courts should not pass orders for the attachment or seizure of the mission premises or property, such as a motor car or furnishings thereon.[95] If the local courts were free to have mission premises or property seized or attached, that would make it hard for embassies to function.

2. Consular Premises

The Consular Convention (1963) at Article 31 adopted relative immunity for consular premises and property. Only diplomatic premises and property enjoy absolute immunity from search, attachment or execution. The Consular Convention (1963) provides, inter alia, that under certain circumstances, the authorities of the receiving state could enter consular premises, without the consent of the sending state.[96] Normally, the right of entry presumes the right of search. It would be hard to prevent a search, if you have allowed entry into consular premises or property. Thus consular premises do not enjoy absolute immunity from search. While immunities are necessary, because they help facilitate the work of consular offices, it should never be forgotten that the economic and legal repercussions of immunities, within the receiving state could have disastrous effects on innocent citizens. There should always be a delicate equilibrium established, between the interests of the sending state, and those of the receiving state and its citizens. The position today is that with respect to search, attachment or seizure, diplomatic premises and property enjoy absolute inviolability. On the contrary, consular premises and property enjoy only relative inviolability.

There are other issues which have continued to attract more attention in recent years. Some of them are car-towing, archives and documents, wireless installations, intruders and picketing.

3. Towing Away Automobiles

The means of transport of the mission is also a subject of legal discussion. Article 22(3) of the Diplomatic Convention (1961) does not specifically forbid the towing away of diplomatic vehicles, even though that towing away is frowned upon by embassies.

Section 3 of the General Convention on the Privileges and Immunities of the United Nations stipulates, that the property and assets of the United Nations, wherever they may be, and whosoever may be holding them, are "immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action."[97] Towing away a United Nations vehicle would violate international law. The same Section 3 also provides that the premises of the United Nations are inviolable.

In spite of the lacuna in Article 22(3) of the Diplomatic Convention (1961), towing away diplomatic vehicles is rare. In London, England, that would happen only if it has been impossible to move the vehicle to a nearby, safe position.[98] The embassy staff claiming the vehicle will take it, without being obliged to pay the removal charge, the excess parking charge or the fixed penalty. In Ottawa diplomatic missions have been put under pressure to pay fines for traffic offences such as parking in the wrong place or failing to put enough money into the parking metres. For more than a year the Protocol Service of the Department of External Affairs has written to Embassies urging them to pay fines for traffic offences.[99] It would therefore be logical to conclude that even without towing away the cars of diplomatic missions, pressure can be successfully brought on the embassy to pay fines for wrongful parking. It is also submitted that if a diplomatic car were parked at a place where it jeopardizes the security of other road users, local authorities would tow away the car so as to end the danger the car must have created. Towing away the car, it appears, would be an ultimate measure, when no other solution is reasonably feasible.

It is probable that the same rules, which are applied in practice to diplomatic cars, will be applied to consular cars. This is plausible, especially as diplomatic and consular conventional laws are silent on the issue of towing away cars.

4. Archives and Documents

Article 24 of the Diplomatic Convention (1961) provides, that the archives and documents of the mission are inviolable, all the time and in all places. Article 33 of the Consular Convention (1963) says the same thing, in respect of the archives and documents of consular posts. Thus, if local authorities enter diplomatic or consular premises, archives and documents found there should not "be searched, seized, or required to be produced in court."[100]

It would be logical to presume, that a diplomatic bag found in the premises of an embassy or consular post, should not be opened, searched, seized, or required to be produced in court. There is, however, a new problem, which grows with rising urban terrorism. Electronic scanners are used today to inspect even diplomatic bags at airports. Diplomatic bags may contain documents and correspondence. Electronic scanners have come to be tolerated. They are preferable to the danger of having a terrorist's bomb on the plane. Scanners do not violate the letter of the law. It is submitted that scanners violate the spirit or general purpose of the Diplomatic (1961) and Consular (1963) Conventions.

5. Wireless Installations

Usually, diplomatic or consular missions have to obtain the authorization of the local authorities, in order to install and operate wireless or telecommunications systems on their premises. In Canada a diplomatic mission must apply for a licence to install and operate wireless transmitters on its mission premises.[101] The grant of such a licence is discretionary. The grant is usually based on reciprocity and on conformity with the Canada Radio Act and other regulations.[102]

At the time of the conclusion of the Diplomatic (1961) and Consular (1963) Conventions, telecommunications systems were not as perfected as they are today. Sophisticated, electronic espionage has drawn more attention to telecommunications systems.

Without physically breaking into an embassy or consular post, local authorities or their agents could jam, and even render inoperative the wireless installations of a foreign mission. That involves no apparent interference with the premises of the mission or consular post. However, that would probably amount to a constructive violation of those premises. The obstruction of the wireless installations will hamper the normal functioning of the mission or consular post.

6. Seizure of premises by Intruders

Sometimes intruders take the law into their hands, by seizing diplomatic or consular premises. Such intrusions are violations of premises, which should enjoy the special protection of the receiving state. The American Hostages Case (1980) which will be discussed in detail in Chapter IX is illustrative.[103] On 4 November 1979, Iranian militants forcibly took possession of the United States Embassy in Tehran, and took hostage Americans found there. On 5 November 1979, other militants also used force to take possession of the United States Consulates in the Iranian cities of Tabriz and Shiraz. The militants overran the embassy and the two consulates easily, because there was no resistance from the Iranian security forces. The Iranian government failed to expel the militants, and have the control of the embassy and consulates restored to the United States government. The Iranian government also failed to obtain the release of the hostages, who were illegally deprived of their liberty. Further, the Iranian authorities publicly praised the actions of the militants.

The International Court of Justice decided that Iran had failed to fulfill its obligations under conventional international law and in general international law.[104] The Court also called for the immediate release of the hostages; the evacuation of the embassy compound and consulates; the punishment of the persons responsible; and the payment of reparation. The Court, at an earlier date, had taken provisional measures, calling for the vacation of the embassy and other premises; the release of the hostages; and the restoration of full diplomatic protection to the hostages and premises.[105] Professor Cherif Bassiouni has suggested that the actions of Iranian militants were in violation of both conventional international law and Islamic international law.[106]

In the United Kingdom, the police will, at the request of the head of mission or consular post, eject intruders from the seized premises. However, the police are not allowed to expel persons, who have a right to be in the premises.

In Agbor V. Metropolitan Police Commissioner (1969),[107] the Court of Appeal (Civil Division) in London, England, had to decide, whether the executive had a right to evict a person, who claimed to be in possession of premises as of right. The facts of the case were linked to the civil war in Nigeria.[108] The government of the Eastern Region of Nigeria had bought a house at 35, Woodstock Road, London, in 1965. Through arrangements, an official of the Federal Nigerian government later occupied the ground floor of the said house. In 1966 a federal military government was set up in Nigeria. When the civil war broke out, the Eastern Region seceded and called itself the Republic of Biafra. The house at 35, Woodstock Road remained occupied as before: the federal Nigerian Officer, Mr. Mohammed, on the ground floor, and the Biafra Officer, Mr. Onuma, on the first floor. When Mr. Mohammed left the ground floor, taking with him all his belongings, Mr. Onuma, who considered himself an employee of Biafra, got Mrs. Margaret Agbor, her husband and six children to occupy the ground floor, vacated by Mohammed, the federal Nigerian officer. After some time, Mr. Agbor travelled home to Biafra. The Nigerian High Commissioner, unable to get Mrs. Agbor to vacate the ground floor, sought the help of the police. Two men and two women police officers bundled out Mrs. Agbor and her children.

Mr. and Mrs. Agbor claimed that they had a right to be in that home. Even though they had entered the home by stealth, they had used a key, that had been left behind. The Biafran officer and some persons, had arranged to have the Agbor family enter possession of the ground floor. Thus, Mr. and Mrs. Agbor, had a claim to that home. Only due process of law could determine, whether or not the claim was groundless. The Court of Appeal stated that "an Englishman's house is his castle."[109] That principle extended to any person lawfully resident in England. Mrs. Agbor was legally in possession; her claim of right was made in good faith; and she had been turned out wrongfully.[110] Article 30 of the Vienna Convention on Diplomatic

Relations (1961) enables the police to defend, and protect private residences of diplomatic agents against intruders. Lord Denning stated that Article 30 of the Diplomatic Convention (1961) did not enable the police to turn out of private diplomatic residences any "people who are in possession and claim as of right to be there."[111] In practice, the police will easily recognize intruders. It is usually a question of fact.

An intruder will not be expelled from a private diplomatic residence, if he establishes that he has a serious claim to be at such premises. That will be the situation, until it is determined, through judicial proceedings, that the occupation of the premises is effectively intrusion. Unauthorized presence in diplomatic premises does not always imply intrusion. The Court of Appeal in the case of Agbor V. Metropolitan Police Commissioner (1969),[112] was probably influenced by the fact that Biafrans abroad were practically stateless people. The good faith of Mr. and Mrs. Agbor and their six children is likely to have influenced the judges in the case. The judges frowned at the idea of having a family of eight on the streets of London. The Nigerian government was still the power representing Nigerians, including the so-called Biafrans, who were still only aspiring to become an independent republic. The Nigerian High Commissioner, in London, was the proper person to decide, who had a right to occupy any homes, owned by the Nigerian government in England. Using the police to get a Nigerian family, (so-called Biafran family), out of a house belonging to the Nigerian government, cast doubt on the good intentions of the High Commissioner.

7. Picketing

Sometimes, persons have picketed diplomatic or consular premises, as a method of showing dissatisfaction over the actions or omissions or the sending state. Picketing could become dangerous, if the mob turns violent, invades or even destroys the diplomatic or consular premises. Lawrence Preuss wondered, if such picketing could occasion the international responsibility of the United States.[113]

S. Sutton explains that in the U.S.A. it is a crime to display a flag or placard "intended to intimidate or ridicule foreign diplomatic representatives."[114] Congregating within 500 feet of the premises of a mission is also a crime.

In Great Britain, the House of Commons Foreign Affairs Committee, in its 1984-1985 session, expressed the view that even though the receiving state has a duty to protect the peace of the diplomatic mission, no interpretation of that obligation should insulate the mission from expressions of public opinion; those expressions are simply an exercise of the freedom of expression.[115] That Committee expressed the view that there is no violation of diplomatic premises, if picketing allows work at the mission to continue normally; if people can go in and out of the premises; and if those within the mission premises are not afraid, that the mission might be destroyed or its staff assaulted. Thus, if picketing respects those limits, then the requirements of Article 22 of the Diplomatic Convention (1961) are met, because that kind of picketing does not violate the principle of inviolability of premises.

The delicate distinction, which the House of Commons sought to establish, between picketing that violates and picketing that does not, could lead to problems in practice. First, any group that pickets premises has a potential to become touchy and violent, putting both the premises and staff in danger.
Secondly, it is difficult to ascertain, when the staff of a mission, or consular post become afraid of picketing taking place in front of their premises. When there is picketing, persons going in and out of mission or consular premises may have misgivings, which are hardly distinguishable from fear. Those misgivings could make staff and visitors uncomfortable and consequently unable to function well. If left, uncontrolled, picketing might jeopardize the dignity and the peace of missions and consular posts. However, it would be unnecessary and even ill-advised, for local authorities to severely curtail the freedom of expression, a fundamental right, in order to please foreign missions. A receiving state has a special duty to protect embassies, consular posts and their staff; that state also has a constitutional responsibility to protect the fundamental rights of its citizens. A receiving state, by reasonably using its forces of law and order, can provide both types of protection.

E. SERVICE OF LEGAL PROCESS AT DIPLOMATIC AND CONSULAR PREMISES

Personal service of process at the mission or consular premises presents particular problems. Service of process by post has come to be accepted in certain cases.

1. Personal Service of Legal Process at Premises

a) Diplomatic Premises

Article 22 (2) of the Diplomatic Convention (1961) provides, *inter alia*, that the receiving state is under a duty "to prevent any disturbance of the peace of the mission or impairment of its dignity." Personal service of legal process, whether it occurs at the door of the mission or on the premises of the mission, would put in danger or even destroy the dignity of the mission. Personal service, which is usually done by the authorities or the agents or the receiving state, is prohibited.

b) Consular Premises

Article 40 of the Consular Convention (1963) stipulates, that the receiving state shall prevent any attack on the person, freedom or dignity of consular officers. Article 31(3) of this same convention also provides, that the receiving state has a duty "to protect the consular premises against intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity." Personal service of legal process on consular premises could be incompatible with the dignity of such premises. However, personal service is not prohibited. It is submitted that personal service is allowed, if it does not jeopardize the dignity of the consular post or that of the consular staff. From the articles,[116] which deal with the respect due to consular and diplomatic premises or staff, it is clear that the common yardstick laid down by the two Vienna Conventions of 1961 and 1963 is respect for the person, freedom or dignity of staff or premises. The test to be applied is to find out, if the service of process or any other act lacks the respect owed to diplomatic or consular premises. For some time the United States government took the position that for a United States marshall to enter consular premises peacefully to serve process would violate no laws.[117] That position was partly based on the argument that consular personnel were not immune from legal process generally. The position today is that unless agreed to, the entry of a United States marshall on consular premises to serve summons "would be impermissible under the Consular Convention (1963)."[118] In fact, the present position of the United States government is that service of process at consular or diplomatic premises is forbidden;[119] service of process in violation of that prohibition would be invalid.

2. Mail Service of Process

In order to determine the legality of the mail service of legal process, certain questions should be asked. Does mail service of process, violate the respect owed by the receiving state to the premises of missions or consular posts? Does mail service harm the dignity of the persons, who are served process in that manner? The mere receipt of a registered letter normally should not reduce the respect owed to a foreign mission.

The United States, in order to buttress the legality of service of process by post on embassy or consular staff, has made a distinction between a summons and judicial process. In 1965 the Office of the Legal Adviser of the State Department found authority to conclude, that a summons is an invitation to appear and not judicial process itself.[120] Service of process is totally different from judicial process. Service of process, which is a simple invitation to appear, gives the person served an opportunity to lay claim to his right to immunity from court proceedings and clearly demonstrate, that the courts of the receiving state cannot have jurisdiction over the matter, or that he is immune from all judicial proceedings.

In Renchard v. Humphreys and Harding, Inc. (1973),[121] an action for damages was brought against the Federal Republic of Brazil. The plaintiff complained, that his home had suffered damage resulting from the construction of the Brazilian Embassy. The District Court for the District of Columbia held that service on Brazil's attorney by registered mail on the Brazilian Embassy in Washington D.C. was legally valid. Service by mail is not prohibited.

In Caravel Office Building Co. v. Peruvian Air Attaché (1975)[122] service by certified mail on the Peruvian Air Attaché was held to be lawful. The court in this case concluded that unlike the case of a federal marshall attempting service upon an ambassador personally, delivering a letter at a mission does not affront the dignity of the head of the mission;[123] mail service also does not cause an ambassador to restrict his movement, in order to avoid being served with process. Furthermore, service by post does not restrain persons or property and, therefore, is a method of service, which the law allows.

If service by mail were to be set aside as being illegal, then it would be impossible to serve process on mission or consular personnel. That would surely lead to an intolerable abuse of immunity. It would make of consular and diplomatic personnel outlaws in civilized society. Mail service, for example, the service of traffic tickets by post is growing. Three main factors have led receiving states to attempt to curb the abuse of immunities.

First, there has been a rapid expansion of diplomatic and consular relations all over the world. Secondly, the domestic law of immunity has developed rapidly. Thirdly, there has been a new trend for each nation to harmonize diplomatic or consular immunities, with the application of the local laws of the receiving state.[124] If service by post were not legal, it would create unsolvable problems; for instance, in connection with land-lord-tenant disputes, debtor-creditor disputes, automobile accidents and traffic offences.

Service of legal process, by mail on missions and consular posts, is neither expressly prohibited by the Consular Convention (1963) nor by the Diplomatic Convention (1961). Judging from the decision in Renchard v. Humphreys and Harding, Inc. (1973),[125] mail service on a diplomatic or consular agent is not only legal, but is a reasonable method of solving a problem, which would otherwise be unsolvable. Service by mail satisfies the exigencies of dignity and respect for the foreign mission. It also allows the victims of the actions or omissions of diplomatic and consular staff or services to seek justice, within the receiving state.

The characteristics of inviolability in many cases do not have a standard definition. That makes it necessary for diplomats and consular officers to learn what differences exist in the national interpretations of the Vienna Conventions on Diplomatic Relations (1961) and Consular Relations (1963). National or municipal laws sometimes make it difficult to give clear definitions or descriptions of what constitutes inviolability. States quickly learn that any definition they give to words or concepts are given back to them, as other states reciprocate. That is an indication that states will try to be good generally.

After the characteristics of inviolability as regards the premises of embassies and consular posts headed by career consuls, it will be appropriate to see how the principle of inviolability of premises applies to honorary consulates.

CHAPTER III

HONORARY CONSULATES: THEIR MINIMAL PROTECTION IN INTERNATIONAL LAW

A state may have in another state an embassy, a legation, a consular post headed by a career consul or an honorary consulate. Of all these the honorary consulate is entitled to the least number of privileges and immunities. The premises of the honorary consulate are given protection, but they do not enjoy inviolability in the receiving state.

There are difficulties associated with the use of honorary consulates. Their use has some advantages. It is possible that the role of honorary consulates will increase in future.

A. DIFFICULTIES ASSOCIATED WITH THE USE OF HONORARY CONSULS

Some of the main objections to the use of honorary consuls include: the creation of dual allegiances; unfair trade advantages; lack of knowledge about the appointing state; and the minimal protection of honorary consulates.[126]

1. Creation of Dual Allegiances

The problem of dual allegiances arises, when there is a serious clash, between the interests of the appointing state and the interests of the home state of the honorary consul. First, the honorary consul is likely to be a national of the receiving state, where he was exercising gainful activity, before he became the representative of the appointing state. Secondly, to serve well as honorary consul, he should be able to defend religiously the causes of his foreign master, the appointing state. It is also obvious, that the honorary consul cannot afford to be completely indifferent to the causes of his local master, the home state.

In the case of Rex v. Ahlers (1915),[127] there was a clash of allegiances. Ahlers, who was born a German citizen, lived in England for thirty years and in 1905 he became a naturalized British national. The same year, Ahlers began to serve as honorary consul of Germany in Sunderland.[128] After Germany declared war against Russia on 1 August 1914, Ahlers started helping German nationals in England to travel to Germany, to serve in their national army. On 4 August 1914, England announced, that there was war between it and Germany. Even though Ahlers knew of the state of war between England and Germany, he continued, until 6 August 1914, to help German nationals return to Germany to fight in the war. Ahlers was tried and convicted of treason, because by helping German nationals return, after 4 August 1914, he was assisting and aiding the enemies of the English King, to whom he owed allegiance. The judgment was quashed on appeal, because a defective instruction was given to the jury.

Once in a while, citizens commit different types of crimes against their nation. Those crimes are not always committed by honorary consuls. Any person could owe dual allegiances at any moment, and commit treason or some other felony. Any objection to the use of honorary consuls, on the ground that such officers owe dual allegiances, is a weak and an unrealistic objection.

2. Unfair Trade Advantages

Honorary consuls take advantage of their access to business information on the appointing state. That is especially the case of an honorary consul, who plans to do business with the appointing state. Some people see that advantage as undue or unfair. In favour of the honorary consul, it can be submitted, that he is, usually, not paid for his services to the appointing state. That access to information is a kind of remuneration for what the consul does, that is working for the appointing state. It can also be argued that, that access to business information is authorized by the appointing state.

3. Lack of Knowledge about the Appointing State

It has been said, that at the moment of their appointment, honorary consuls often know little or nothing about the history, geography, economics, culture, and even the political situation of the appointing state.[129] Some writers lay much emphasis on this lack of knowledge.[130] Wendell Blancke states, that private citizens often make financial contributions, in order to head honorary consulates.[131] John Ardagh says that Germans love holding titles. Honorary consular titles help Germans move up the social and diplomatic ladder.[132] Those titles give a lot of privileges, even if they do not bring specific diplomatic privileges.

The lack of knowledge by honorary consuls can be remedied. Many ambassadors get appointed to countries, about which they know little or nothing. Honorary consuls can learn just like ambassadors. Lack of knowledge is a temporary handicap. The examples cited by Blancke and Ardagh are too limited to lead to any valid generalizations about the competency of all honorary consuls.

4. Distinguishing Career Consuls from Honorary Consuls

Even though that distinction is not always clear-cut, a few features are generally used, in order to distinguish career consuls from honorary consuls.[133] Career consuls receive fixed salaries, but honorary consuls rarely receive salaries. There usually exists, between the career consul and the sending state, a contract of service, whereas the honorary consul is only under a moral duty to carry out his delicate functions.[134] Whereas career consuls accede to their posts by professional examinations, honorary consuls are selected on the basis of their reputation in society. The professional consul is, more often than not, a national of the appointing state. On the contrary, the honorary consul is often a national of the receiving state, even though in some cases, he may be a national of a third state. Professional consuls are not allowed to have other gainful activities, but honorary consuls, almost always, have private gainful activities. The honorary consuls have few privileges, but the career consuls have a wide range of immunities and privileges. Career consuls often carry out diplomatic functions, especially if their home state has no diplomatic officer in the same region.[135] R. Venneman gives an example, which shows how a consulate could discharge the functions of an embassy in certain circumstances. In Zaire (the former Belgian Congo) Belgium had a Consul General in the city of Elisabethville. During serious political upheavals in Zaire, the province of Katanga declared itself an independent and sovereign state.[136] There were a lot of Belgian citizens in Katanga. For the duration of the secession of Katanga, the Belgian Consul General, a career head of consulate, discharged all the diplomatic functions, as if he were the Belgian Ambassador to the State of Katanga. It is not likely that an honorary consulate would spontaneously assume such important, diplomatic responsibilities. Most honorary consuls carry out only limited functions. Some countries refuse to let honorary consuls hold the rank of consul general, letting only nationals hold that rank.[137]

The weakness of the distinction is that none of the descriptions above is so exact, as to fit each case. It would also appear from the distinction, that honorary consuls are completely relegated to the background, receive little attention and merit little consideration. How an honorary consul is treated largely depends on the country, in which he functions as a consul. In some states, he receives greater respect than in others. However, he is minimally protected.

5. The Minimal Protection of Honorary Consulates

The main advantages to which the honorary consul is entitled are found under Articles 63, 64, 65, 66 and 67 of the Consular Convention (1963).

a) Protection of Premises

The premises of consular posts headed by career consuls enjoy relative immunity. On the contrary, the honorary consulate enjoys only "protection against any intrusion or damage."[138] Furthermore, the receiving state shall prevent any disturbance of the peace, or impairment of the dignity of the premises of the honorary consulate.

Even the inviolability of archives and documents of the honorary consulate is seriously restricted. To enjoy inviolability, the archives and documents of the honorary consulate must be separated, especially from the private and business correspondence of the honorary consul.[139] If that condition is fulfilled, the archives and documents become inviolable, wherever they are found and at all times.

b) Fiscal Advantages

The honorary consulate may obtain exemption from customs duty, as provided for by the receiving state. That exemption is granted to articles such as the coat-of-arms, flags, signboards, seals and stamps, books, official printed matter, office equipment, office furniture and similar meant for official use of the honorary consulate.[140]

c) Personal Immunities

The honorary consul does not enjoy any personal inviolability. Article 63 of the Consular Convention (1963) simple states that, if criminal proceedings are instituted against an honorary consul, he should appear before the competent authorities. Under this article the only allusion to any privilege is that the proceedings against the honorary consul, shall be carried out "with the respect due to him by reason of his official position and, except when he is under arrest or detention, in a manner which will hamper the exercise of consular functions as little as possible."[141]

It would be farfetched to assert that the honorary consul is treated with the same respect, that is due to any person, who is the subject of criminal proceedings in any civilized society, where due process of law is well established. The honorary consul's protection in this specific respect is minimal or even non-existent.

Article 58 of the Consular Convention lays down an exclusion clause. Paragraph 3 of that article provides that the privileges and immunities of honorary consuls are neither accorded to their families, nor to employees of the honorary consulate. The first comment is that this leaves the families and employees of honorary consuls exposed to all sorts of risks, as compared to most employees of diplomatic missions and ordinary consular posts. Staff of diplomatic missions or ordinary consulates and their families enjoy a wide range of immunities and privileges.

The rule that the employees of honorary consulates enjoy no privileges and immunities remains valid, even if the employee spends his working hours conducting consular business exclusively. In a case like that one, there is no cause to believe that the risks he runs are essentially different, from those of an employee of a consular post headed by a career consul.

The second comment is that the Consular Convention (1963) is silent on what would be the position, if the employee of an honorary consulate were a national of the sending state. What if such an employee came in from the sending state to handle consular affairs exclusively? If his dignity suffers or his activities are impaired by the authorities of the receiving state, friendly relations between the receiving and sending state are likely to suffer.

Where the honorary consul is a national or resident of the receiving state, he will benefit only from "immunity from jurisdiction and personal inviolability,"[142] as pertains to official acts done in the exercise of his duties. He is exempted from giving testimony on matters arising from his duties, from producing official correspondence and documents, or from serving as an expert witness with regard to the law of the sending state. An honorary consul, in the event of his arrest, detention or prosecution, has a right to have the fact promptly notified by the receiving state to the head of the ordinary consular post.[143] If the ordinary consul himself is arrested, detained or prosecuted, the information should be sent to the concerned diplomatic mission in the receiving state.

The position today is that honorary consuls have few privileges and immunities, as compared to heads of consular posts headed by career consuls. The employees and families of honorary consulates cannot claim any of the few privileges and immunities, except as provided for by the law of the receiving state.[144] This means that those immunities depend wholly on what municipal law says.

B. ADVANTAGES OF HONORARY CONSULATES

The optional character of honorary consulates gives each nation the right to decide, whether or not it wishes to receive or appoint honorary consuls. There are financial and political advantages to be gained from the use of honorary consulates.

1. Financial Advantages

For the past two decades the world economy seems to go from one difficulty to another. In the early 1960s, scores of young nations in the Third World became independent.[145] Each of the independent states had to initiate and maintain relations with other states, in other parts of the world. Each of the young states is obliged, at least for its economic survival, to have relations with industrialized nations of the North.[146] Some of the financial advantages of honorary consulates are remarkable.

a) No Salary Paid to Honorary Consul

In most cases no salary is paid to the honorary consul, as he often exercises private, lucrative activities.[147] This is a great advantage for the appointing state, especially in hard, economic times. It is possible that an appointing state might secretly make, financial strength and business relations, essential elements of the qualification of the would-be honorary consul.

b) Miscellaneous Expenditure by Honorary Consul

The appointing state generally has not got to bother itself about buying cars, renting offices and residences, buying office equipment and other essential material for the functioning of the honorary consulate. Those expenses are paid for by the honorary consul. An honorary consul at the moment he accepts to become head of an honorary consulate, knows that he will or should be able to handle most, if not all, the expenditures of his post. The appointing state is, therefore, in a position to enjoy services, for which it does not pay. This is not a negligeable advantage, especially as concerns young, poor nations of the Third World.

2. Political Advantages

a) Knowledge of the Receiving State

The honorary consul, even when he does not know much about the appointing state, usually knows much of the political and business climate in the receiving state. This is probable, especially if he is a national or permanent resident of the receiving state.[148] This is a political advantage. The appointing state can rely on the honorary consul, to paint a true picture of what obtains in the receiving state. That type of information could enable the appointing state to assess the situation, and properly define its objectives in dealing with the receiving state.[149] The honorary consul, who gathers, processes and disseminates information on the country, where he serves, will do invaluable work for the appointing state.

b) Building Confidence

Honorary consuls, by their mere presence in a given region, will cause people there to know that the appointing state exists. This sounds unnecessary, but it is pertinent. Today there are so many states that a good number of small, poor states have not been heard of by most human beings.[150] The presence of the honorary consulate of a given state, as portrayed by its flag and other insignia, is a source of propaganda for the appointing state. That could cause businessmen and political figures in the receiving state to get information on the appointing state, and even end up wanting to do business or visit that appointing state as tourists.

C. ROLE OF HONORARY CONSULATES IN THE FUTURE

1. Present Practice of States

Article 68 of the Vienna Consular Convention stipulates that appointing or receiving honorary consular officers is optional. The Consular Convention between the Rumanian People's Republic and the Federal People's Republic of Yugoslavia (1962) at Article

3(3) provides: "The contracting parties shall not appoint or accept honorary consuls."[151] Thus Yugoslavia and Rumania neither appoint nor receive honorary consuls. The Consular Convention between the Rumanian People's Republic and the Hungarian People's Republic (1959) at Article 3(2) provides: "The contracting parties shall not appoint or accept honorary consuls."[152] Hungary, like Rumania and Yugoslavia, does not send and does not receive honorary consuls. The Soviet Union maintains that its consular treaties, signed since the end of World War II, include a provision prohibiting the sending or receiving of honorary consuls.[153] This Soviet position is different from that of the Tsarist government, which permitted the appointment of honorary consuls.[154]

The United States, Australia, and New Zealand accept, but do not send honorary consuls.[155] Canada receives and appoints honorary consuls.[156] Ireland, Pakistan, and South Africa receive and send honorary consuls, but rely, for the most part, on career consuls.[157] Thus, the practice of states is so diverse, that it is necessary to see each consular agreement, in order to know what the attitude of a given state is. Even states, which have a well-defined general policy, might exceptionally give up that policy, in order to accommodate a friendly state, for the sake of reciprocity.

2. Honorary Consulates in Future

The honorary consulate will seemingly play a greater role in future. The advantages of such consulates are incalculable, especially the economic and political gains. The countries, which use honorary consulates, are likely to continue to do so. Young, small nations are resorting, more and more, to the use of such consulates. The international community should recognize the growing use of honorary consuls and regulate it adequately.

a) <u>Lacuna in the Consular Convention (1963)</u>

The Japanese delegation to the Vienna Conference on Consular Relations (1963) queried Chapter III (Consular Convention) comprising of twelve separate articles, which deal with the honorary consul's privileges and immunities. The Japanese delegation proposed only one article to replace the twelve articles which were in the International Law Commission Draft.[158] The Norwegian delegate, who was opposed to having only one article, stressed that instead, there was need to correct omissions in the privileges and immunities of the honorary consul in areas such as the "inviolability of consular premises, attendance at court, registration of aliens, work permits and permission for subordinates to import articles, free of duty on first installation."[159] The Consular Convention (1963) deals with the honorary consuls and honorary consulates in Articles 58-68. Those articles and the Consular Convention (1963) in general left the problem of the inviolability of honorary consulates unsolved and today those consulates enjoy only limited protection.

b) Reconsideration of the Inviolability of Honorary Consular Premises

In order to let honorary consuls assume the prominence and the growing importance of their functions, it will be necessary to reconsider the inviolability of the premises in which they work. It might be difficult to convince many countries that honorary consulates should enjoy a minimum of inviolability, because protection is insufficient.

For instance, a modification of the Consular Convention (1963) could make it compulsory for honorary consulates to have their premises, in places other than those, which house a private or public business. In that way, the premises would be exclusively devoted to official consular affairs, and the employees there should work exclusively for the honorary consulate, when they are in the premises.

This proposal is based on the increase in honorary consulates. Honorary consuls will not be efficient, until they work in premises which have dignity and prestige. The sensitivity of the problems treated in honorary consulates is growing. Secrecy, as a rule, should be recognized. Any consular service, be it an ordinary consulate or an honorary consulate, serves a foreign state. Secrecy is essential to all operations.

In order to accord some degree of inviolability to the premises of the honorary consulate, it is essential that those premises be separated, set aside, and given the respect they are due. As long as the premises and the archives or documents of the consulate are mixed up, with whatever private business the honorary consul has, it will be hard, if not impossible, to apply the principle of inviolability, so essential to any useful consular intercourse between nations. It is submitted that if the premises of an honorary consulate are completely separated, set aside and exclusively used for the business of the honorary consulate, such premises ought to enjoy the qualified and limited inviolability accorded to consular premises under Article 31 of the Consular Convention (1963). Thus the inviolability enjoyed by honorary consulates would be the same as the inviolability accorded to ordinary consular posts, but would be less extensive than that enjoyed by diplomatic premises under Article 22 of the Diplomatic Convention (1961). By granting qualified and limited inviolability to honorary consulates, the international community would let those consulates enjoy greater immunities and privileges and function better. Civilized societies would benefit accordingly.

CHAPTER IV

ASYLUM IN DIPLOMATIC AND CONSULAR PREMISES

Asylum in diplomatic and consular premises is related to the problem of inviolability of such premises. There have been cases where a person, sought by the authorities of the receiving state, takes refuge in diplomatic or consular premises. The main question is whether or not the authorities of the receiving state have a right to enter such premises, in order to take hold of the refugee. Can the authorities of the receiving state act that way, without the consent of the sending state? What law governs asylum? Is the practice of asylum justified? Are there limitations to that practice?

A. DIPLOMATIC ASYLUM AND ASSOCIATED PROBLEMS

According to Peter Porcino, "diplomatic asylum is a grant of refuge by a foreign state in its legation within the territory of the refugee's home state."[160] A legation normally includes the buildings, which house the diplomatic mission and also the residence of the chief of mission; in cases where there are a lot of asylees, some countries allow the legation to be extended to include other protected places.[161] Consular asylum is asylum granted within consular premises.[162] There is some general acceptance in the international community, on where and to whom asylum may be granted. When and for how long asylum may be granted are still a source of discord.

Diplomatic Asylum is not usually granted to common criminals, but "to persons accused of committing political crimes or persecuted for religious, racial or ethnic reasons."[163] Diplomatic asylum should not be promised for the future. It can, therefore, not be negotiated beforehand. It may be granted when the need arises. For instance, if the person seeking refuge is in imminent danger. The qualification of the crime or the motives for the persecution for which the asylee is a victim, is determined by the state granting asylum. According to the current practice, many states give full recognition to diplomatic asylum. Some countries give only partial recognition, while others do not at all recognize the practice. Thus, the practice has not been uniform, because groups of states refuse or accept diplomatic asylum for different reasons. Neale Ronning points out, that there is a difference between temporary asylum and definitive asylum.[164] Temporary asylum is granted to a refugee, when there is mob action and general lawlessness. In that case, the refugee is handed back on the demand of the officers of the government in power in the receiving state. This is a less controversial grant of asylum. Definitive asylum is a permanent withdrawal of the refugee from the authority of the receiving state; the state of refuge does not surrender the refugee to the receiving state.

Asylum on warships is assimilated to territorial asylum, because a warship is fictionally a part of the national territory.[165] Asylum on merchant ships is not recognized, because merchant vessels are not exempted from local jurisdiction. While such ships are in foreign ports, they are liable to be searched by local authorities, and local subjects may be arrested for criminal offences.[166]

Diplomatic asylum under both customary and conventional law has fallen victim to some unresolved problems.

1. Under Customary International Law

Whenever we deal with custom of any sort, there is a significant question. When does a practice become a custom? Customary international law exists, when a given practice is supported by a conviction on the part of states, to the effect that the practice has become obligatory in international law.[167] Such a practice should be commonplace, within a geographical or sociological area.

Diplomatic asylum has not yet received world-wide acceptance. It is not therefore a custom of the whole international community. It is difficult to formulate a general position, which is adhered to by most civilized nations. In spite of all these uncertainties, there is one part of the world, where diplomatic asylum has gained extremely broad recognition among nations. Diplomatic asylum is widely accepted in Latin America.[168] In Latin America, the instability of governments has partly contributed to the practice. Often, when there is a change of government, political refugees seek asylum or temporary refuge in embassies or consulates.

Similar to diplomatic asylum was the customary practice of taking "bast" in Persia.[169] The practice of bast or sanctuary was carried out in three types of places.[170] It could be in sacred buildings, or mosques; in stables or at the tails of horses, which belonged to the sovereign or members of the Royal Family; or in the neighbourhood of artillery. Persians, once in a while, would take bast in the British legation in Tehran and in consular posts in places, such as Tabreez and Shiraz.[171] The British government ended up tolerating those who took bast, and the Persians recognized the right of the British to receive refugees in their legation and consular posts in Persia.

The problem of the grant of diplomatic asylum and customary international law was one of the issues raised in the Colombian-Peruvian Asylum Case (1950).[172] M. Victor Raul Haya de la Torre, leader of a political party, who had been accused of organizing a coup d'état in Peru, had taken refuge in the Colombian Embassy in Lima.[173] The Colombian government granted diplomatic asylum to the refugee. Colombia, the state granting asylum, argued that it was competent to qualify unilaterally and definitively the offence of Haya de la Torre.[174] Colombia asserted that its right to qualify that offence was backed by the Bolivarian Agreement on Extradition of 18 July, 1911, and the Havana Convention on Asylum of 20 February, 1928 and American international law in general.[175] Colombia also requested that Peru, as the territorial state, should give guarantees necessary for the departure of Haya de la Torre from Peru, with due regard to the inviolability of his person.[176] By invoking American international law in general, Colombia sought to rely on an alleged regional or local custom peculiar to Latin-American States.[177] The International Court of Justice in discussing the issue of custom, stated that the Party, which relies on a custom must prove that "the custom is established in such a manner that it has become binding on the other Party."[178] The Colombian government was, therefore, required to prove that there was a constant and uniform usage, which gave the state granting asylum the unilateral right to qualify the offence of the refugee. The Court found that Peru had constantly repudiated the alleged custom

> by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualifications of the offence in matters of diplomatic asylum.[179]

The Court concluded that Colombia had not proved the existence of such a custom between the two Parties.[180] The Court did not exclude the possibility that such a custom could exist between certain Latin-American States; only that such a custom could not be invoked against Peru in the Asylum Case (1950).[181] The Court concluded that Colombia, as the state granting diplomatic asylum was "not competent to qualify the offence by a unilateral and definitive decision, binding on Peru."[182]

The Court pointed out the difference between territorial asylum and diplomatic asylum.[183] Territorial asylum (extradition) implies only the normal exercise of the territorial sovereignty, because the refugee is within the territory of the state of refuge. A decision to grant diplomatic asylum implies a derogation from the sovereignty of the territorial state. Diplomatic asylum withdraws the refugee from the legal jurisdiction of the territorial state and necessarily involves an intervention in matters that are normally within the exclusive competence of that state. Because of the risks which diplomatic asylum creates, the Court stated clearly that such a derogation from territorial sovereignty would only be given legal recognition, in each case, if its legal basis is established.[184] The International Law Association stated in 1964 that there is no right of asylum in customary international law.[185] Today the right of asylum is not generally accepted as a rule of customary international law; however, it may have that character among certain Latin-American States.[186]

Judges Alvarez, Azevedo and Caicedo Castilla in their dissenting opinions discussed the issue of the customary international law applicable to Latin-American States.[187] Judge Alvarez said that the institution of asylum was a part of the Latin-American international law, because in spite of the changing attitudes of governments in that part of the world, there were specific practices or methods, which Latin-American States followed in applying asylum.[188] Judge Azevedo argued that the practice of asylum in Latin America was already antique, extensive, continuous and particular to the region.[189] Judge Azevedo said "that the Latin-American countries practise asylum extensively, whether actively or passively...",[190] and that the occasional denials of the practice by certain countries "constitute violations of an already established rule, for a State cannot oppose a custom previously accepted."[191] In Judge Azevedo's view,

> To destroy such a custom, a clear, coherent, unilinear attitude would be required, such as that of the United States for instance, which, while refusing to become in any way involved in the institution of asylum adopted by their sister-republics, have in practice shown toleration in some extreme cases, although with restricted effects.[192]

Judge Azevedo asserted that treaties often are simply the codification of customary rules. Such treaties have a declaratory effect.[193] In those circumstances, it would be dangerous for a state to proclaim that it is bound only by conventions, which it has signed and ratified.[194] According to that judge, customary rules would continue to apply, even if the state, which had recognized and respected a given custom, did not sign and ratify a treaty which codified that custom.

Judge Caicedo Castilla asserted that "diplomatic asylum is an international custom of Latin America."[195] Some of the reasons he advanced were that American Republics had been practising asylum, had accepted the unilateral qualification exercised by the state granting asylum and had granted the requests for the indispensable safe-conducts to enable the refugees to leave the territorial state.[196] Judge Caicedo Castilla argued that the custom of diplomatic asylum had been continuous, since it arose in the middle of the 1800s. By recognizing the practice, the American Republics accepted its obligatory nature.

In their dissenting opinions Judges Alvarez, Azevedo, and Caicedo Castilla argued that there was a customary international law of diplomatic asylum applicable to the Parties: Peru and Colombia. These dissenting opinions insist that there are customary international law rules, which apply to diplomatic asylum in some Latin-American States. There was insufficient evidence to establish that there was a rule of the unilateral and definitive qualifications of the offences of refugees.[197] The dissenting opinions do not establish that such a customary practice existed between the Parties, even if it existed between other states in the Latin-American region.

2. Under Conventional Law

Some conventions, dealing with diplomatic and consular premises, are completely silent on asylum in mission and consular premises. It is proposed to first look at the two Vienna Conventions on Diplomatic and Consular Relations; then turn to other conventions.

a) The Two Vienna Conventions on Diplomatic and Consular Relations

Article 55 of the Vienna Convention on Consular Relations (1963) and Article 41 of the Vienna Convention on Diplomatic Relations (1961) provided that consular and diplomatic premises may not be used for purposes, which are incompatible with the legal functions of such premises. This easily leads to the misconception that the two Vienna Conventions preclude the grant of diplomatic asylum in those premises.

Article 5(m) of the Consular Convention (1963) provides that a consular post may perform "any other functions entrusted" to it by the sending state, if such functions are not prohibited by the law of the receiving state. This is an indication that Article 5 of the Consular Convention does not give a complete list of the functions of consular posts.

Article 3(1) of the Diplomatic Convention (1961) stipulates that "the functions of a diplomatic mission consist inter alia in:". The two words inter alia show that the list under Article 3 is not complete, or at least, that the list is not exhaustive.

In its debates in 1975, the United Nations General Assembly expressed the view that the grant of diplomatic asylum may in particular conditions be regarded as a proper function of embassies and consular posts.[198] Mr. Fernandez Ballesteros of Uruguay, speaking during those debates, declared that his delegation considered that the institution of diplomatic asylum was an instrument for the necessary protection "of the human rights which had been so highly praised and, at the same time, so carelessly trampled in recent times."[199] The delegation of Uruguay further stated that the international community ought to improve the existing machinery of diplomatic asylum, while using the rules of international law both to prevent the lack of respect for human rights by governments and to prevent abuses which diplomatic agents commit in the exercise of diplomatic asylum.[200] The delegation of Uruguay underscored one of the difficulties. It is important to protect human rights through the practice of diplomatic asylum. It is also important to use international law to curb the abuses, which make diplomatic asylum pass for a serious interference in the internal affairs of territorial states.

Secondly, the Consular and Diplomatic Conventions, by providing for the inviolability of both mission and consular premises, strengthen the right of missions and consular posts to grant diplomatic asylum. In the result, diplomatic asylum will continue to be granted, even though the practice continues to cause much ink to flow. In unstable, political environments the practice still has a long life. In the very developed and industrialized countries, where political institutions are stable, and the judicial apparatus provides sure guarantees for the due process of law, diplomatic asylum does not seem a necessary solution to resort to frequently.

It can be concluded that the two Vienna Conventions on Diplomatic and Consular Relations neither expressly include nor exclude the right of states to grant diplomatic or consular asylum. However, a failure to mention a right expressly does not always mean that the right does not exist. Furthermore, both conventions, in their preambles, affirm that the rules of customary international law continue to govern matters not expressly covered by their provisions.

b) Conventions Regulating Diplomatic Asylum

Outside Latin America there is no treaty on diplomatic asylum.[201] In order to avoid certain abuses of the practice of asylum, some Latin American States regulated the Latin-American practice by multilateral treaties.[202] The available treaties are all multilateral.

i) <u>The Montevideo Treaty on Penal Law (1889)</u>[203]

The first multilateral agreement dealing with diplomatic asylum in Latin America was the Montevideo Treaty on International Penal Law of 23 January 1889. This treaty is in force among five countries, namely, Argentina, Paraguay, Bolivia, Peru and Uruguay which agreed to the treaty, signed and ratified it.[204] Article 17 of Title II of that treaty deals with diplomatic asylum. Under that Article, persons who are charged with non-political offences, if they 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.[205]

Article 17 further provides that 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 power to demand that the offender be sent away from the national territory in the shortest possible time. The head of the delegation 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.[206]

The last paragraph of Article 17 provides that the same rule shall apply to refugees on board a man-of-war anchored in the territorial waters of the territorial state.

The treaty of 1889 provides that diplomatic asylum is granted to political offenders, but not to persons charged with common crimes or non-political offences. The place of refuge is either a legation or a warship. The treaty leaves one crucial problem unsolved. It is silent on who qualifies the offence of the refugee. Article 17 also provides that the territorial State may request that the asylee leaves the country. The head of the delegation also has the right to require proper guarantees for the safe departure of the asylee. The territorial state, may, therefore, recognize the asylum granted to an asylee, but refuse to grant a request for the safe-conduct of that asylee. That could prolong the asylum in the legation unnecessarily.

ii) <u>The Havana Convention on Asylum</u> (1928)[207]

The Havana Convention on Asylum was signed on 20 February 1928, and it entered into force on 21 May 1929.[208] Twenty-one countries (including the United States) signed the treaty. The delegation of the United States of America, in signing the convention made an explicit reservation, placing on record that the United States did not recognize or subscribe to as part of international law, the so-called doctrine of asylum.[209] The Havana Convention (1928) was ratified by sixteen countries.[210] The Dominican Republic after having ratified this convention, did on 6 October 1954 denounce it.[211]

The first paragraph of Article 1 of the Havana Convention on Asylum (1928) provides:

> It is not permissible for States to grant asylum in legations, warships, military camps, or military aircraft to persons accused or condemned for common crimes, or to deserters from the army or navy.

Article 1 paragraph 2 of the Havana Convention on Asylum (1928) stipulates that persons accused of or condemned for common crimes shall be surrendered upon the request of the territorial State; if such persons had taken refuge in legations, warships, military camps or in military aircraft. That Convention forbids diplomatic asylum where the refugee is a common criminal.

Article 2 of the Havana Convention on Asylum (1928) provides that grants of asylum to political offenders in legations, warships, military camps or military aircraft are permissible

> ... 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 and in accordance with the following provisions.

Article 2 goes on to state the different provisions in six paragraphs. Asylum is granted in urgent cases and it is for the time necessary for the asylee to ensure his safety in some other way. Secondly, the diplomatic agent or the commander of a warship, military camp or aircraft shall immediately, upon granting asylum, make a report to the Minister of Foreign Relations of the territorial state or to the local administrative authority, if the asylum was granted to the asylee outside the capital. Thirdly, the territorial state may request that the refugee be sent out of the national territory as early as possible. The diplomatic agent of the state of refuge is at liberty to require guarantees for the safe departure of the refugee.

Article 2 also provides that refugees shall not be landed in any part of the territorial state or in any place too near to that state. While benefiting from asylum, asylees shall not be free to perform acts against the public peace. Finally, states are not obliged to pay expenses incurred by one granting asylum.

Under Article 2 diplomatic asylum is allowed strictly for political offenders. However, the Havana Convention on Asylum (1928) does not determine which state qualifies the offence. Is the qualification unilateral or joint? Is such a qualification unattackable? This Convention is also silent on the meaning of "urgent cases". These unanswered questions surfaced in the Asylum Case (1950). These issues will be discussed later on in this chapter.[212]

iii) The Montevideo Convention on Political Asylum (1933)[213]

The Montevideo Convention on Political Asylum was signed on 26 December 1933, by eighteen Latin-American States; it entered into force on 28 March 1935.[214] Fifteen countries ratified the convention, but the Dominican Republic which had also ratified it denounced it on 6 October 1954.[215] The United States of America did not sign the Montevideo Convention on Political Asylum (1933).[216]

Article 1 of the Montevideo Convention on Political Asylum (1933) replaces Article 1 of the Havana Convention on Asylum (1928). Article 1 of the Montevideo Convention on Political Asylum (1933) does not deal with the problem of the extradition of persons, who take refuge in foreign territory.

Article 2 of the Montevideo Convention on Political Asylum (1933) provides: "The judgment of political delinquency concerns the State which offers asylum." According to this article, it is the state granting asylum that qualifies the offence of the refugee. This is the right given to the state of refuge to unilaterally qualify the offence. In the Asylum Case (1950) the problem of the unilateral qualification of the offence of the refugee was discussed.[217] Peru's failure to ratify the Montevideo Convention on Political Asylum was one of the arguments, which Peru put forward in the Asylum Case (1950) to prove that the Peruvian government did not accept unilateral qualification in matters of diplomatic asylum.[218]

Article 3 of the Montevideo Convention on Political Asylum (1933) creates a right of states signatories to grant asylum. Political asylum, which is a humanitarian institution, is not subject to reciprocity. Article 3 also provides that even states, which do not recognize political asylum may practise it in foreign countries within the limits allowed by the said foreign countries. Any person may ask for political asylum whatever his nationality.

This Convention does not make asylum the right of a refugee under international law. Asylum is still the right of each state. A state may grant or refuse to grant asylum. Such a decision is sovereign and belongs solely to the state to which a refugee has made an application for asylum. The grant of asylum is one of the discretionary powers of a government.

iv) The Montevideo Treaty on Political Asylum and Refuge (1939)[219]

The Treaty on Political Asylum and Refuge was signed at Montevideo on 4 August 1939, at the Second American Congress on Private International Law by six countries: Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay.[220] The preamble of the treaty says that the Treaty on Political Asylum and Refuge (1939) elaborates Title II of the Treaty on International Penal Law signed at Montevideo on 23 January 1889.[221] Only two countries, Uruguay and Paraguay, ratified the Treaty on Political Asylum (1939).[222] Since only two countries ratified the Treaty, it could indicate the reluctance of the four other signatories to have the treaty enter into force.

The Montevideo Treaty on Political Asylum and Refuge (1939) at Article 1 provides:

> Asylum may be granted without distinction of nationality and without prejudice to the rights and obligations of protection appertaining to the State to which the refugees belong.[223]

This article states one of the doctrines of the institution of asylum in certain parts of Latin-America: that in the granting of asylum there should be no discrimination based on the nationality of refugees. An asylee does not lose his rights to protection as a citizen of a given state solely because another state has granted him asylum.

Article 2 of the Montevideo Treaty on Political Asylum and Refuge (1939) provides:

> Asylum may be granted only in embassies, legations, men-of-war, military camps or military airplanes, and exclusively to persons pursued for political reasons involving concurrent political offences, which do not legally permit extradition. The chiefs of missions may also receive refugees in their residences, in cases where the former do not live on the premises of the embassies or legations.[224]

Article 2 restricts the grant of asylum to political offenders, or persons pursued for political reasons, or to political offenders, who cannot be extradited for legal reasons.

For cases of diplomatic asylum Article 2 assimilates the residences of chiefs of missions to the premises of embassies and legations. Asylum will be regular, if the asylee takes refuge in the residence of an ambassador, in cases where the ambassador's residence is out of the premises of the embassy. The Vienna Convention on Diplomatic Relations (1961) at Article 30 assimilates the private residence of diplomatic agents to the premises of the mission. Such private residences and the premises of the mission enjoy the same inviolability and protection.

Article 3 of the Montevideo Treaty on Political Asylum and Refuge (1939) provides:

> Asylum shall not be granted to persons accused of political offences, who shall have been indicted or condemned previously for common offences, by the ordinary tribunals. The determination of the causes which induce the asylum appertains to the State which grants it.[225]

This article is similar to Article 1 of the Montevideo Convention on Political Asylum (1933),[226] because both articles forbid the granting of asylum to persons, who have been indicted or condemned for common offences prior to their request for asylum.

Article 3 of the Montevideo Treaty on Political Asylum and Refuge (1939) is also similar to Article 2 of the Convention on Political Asylum (1933).[227] Both articles stipulate that the qualification of the offence in matters of asylum is the right of the granting state. In the <u>Asylum Case</u> (1950) the Court could not apply the rule of unilateral qualification, because Peru had not ratified the Montevideo Treaty on Political Asylum and Refuge (1939).[228]

v) The Caracas Convention on Diplomatic Asylum (1954)[229]

The Caracas Convention on Diplomatic Asylum was signed on 28 March 1954.[230] Of the twenty states signatories of the convention, four of them, Guatemala, Uruguay, the Dominican Republic and Honduras, signed with reservations.[231] Eleven countries ratified the convention,[232] which entered into force on 29 December 1954.[233]

Article 1 of the Caracas Convention on Diplomatic Asylum (1954) provides that asylum granted in legations, war vessels, and military camps or aircraft to persons being sought for political crimes or for political reasons shall be respected by the territorial state. Paragraph 2 of Article 1 defines a legation. For the purposes of the convention a legation is the seat of a regular diplomatic mission, and the places set aside by them as dwelling places for asylees, when the number of asylees exceeds the capacity of the buildings. Paragraph 3 of Article 1 provides that war vessels or military aircraft, which are temporarily in shipyards, or in shops for repair are not a place of asylum.

Article 2 of the Caracas Convention on Diplomatic Asylum (1954) provides:

> Every State has the right to grant asylum; but it is not obligated to do so or to state reasons for refusing it.

Article 2 establishes the right of a state to grant diplomatic asylum, but a state shall not be obliged to grant asylum. A state that refuses to grant asylum is under no obligation to justify its refusal. The conclusion to be drawn from this article is that no individual right to demand and be granted asylum is created. The state retains its sovereign right to use its discretionary powers to grant or not to grant diplomatic asylum. If there were an individual right of asylum, persons who have been refused asylum would have free access to courts of law in matters of diplomatic asylum. That would create a difficult situation and rid states of their sovereignty in a delicate area.[234] It might also create an atmosphere of distrust between granting states and asylees.

Article 3 forbids the grant of diplomatic asylum to persons who have been indicted or are on trial for common offences or have been convicted by recognized courts of law. Similarly, asylum should not be granted to "deserters from land, sea, and air forces." Paragraph 1 of Article 3, provides that persons who enter a place that is not suitable for diplomatic asylum under Article 3(1), shall be invited to leave or shall be surrendered to the local authorities. The local authorities may not try such persons "for political offences committed prior to the time of the surrender."

Article 4 gives the state granting asylum the right to qualify the nature of the offence or the motives for persecution. However, this article is silent on whether the qualification is provisional, definitive or unattackable. This article is important, because it stipulates that the granting state has a right to unilaterally qualify the offence. The problem of the right to qualify unilaterally came up in the Asylum Case (1950).[235]

By 1950, the Montevideo Conventions of 1933 and 1939 were the only conventions, which first included a rule concerning the qualification of the offence in matters of diplomatic asylum. Peru had never ratified any of the two conventions. The International Court of Justice for that reason refused to invoke the provisions of those treaties against Peru.

Article 5 of the Caracas Convention on Diplomatic Asylum (1954) stipulates that asylum may not be granted except in urgent cases and for the time strictly necessary for the asylee to leave the territorial state with guarantees granted by that territorial state so that his life, liberty or personal integrity may be protected, "or that the asylee's safety is ensured in some other way." This article limits the circumstances in which asylum may be granted. One of the problems which arose in the Asylum Case (1950)[236] was what meaning should be given to "urgency". Was the diplomatic asylum granted to Haya de la Torre one that fulfilled the condition of urgency? Haya de la Torre was granted asylum by the Colombian Embassy on 3 January 1949, three months after the military rebellion. The Court concluded that such circumstances made "it difficult to speak of urgency."[237] The decision of the Court and some dissenting opinions on urgency will be examined below in this chapter. Article 7 of the Caracas Convention on Diplomatic Asylum (1954) provides that the "degree of urgency" in matters of the grant of diplomatic asylum shall be determined by the state granting asylum. This confers on the granting state a unilateral right to determine "urgency".

Article 6 or the Caracas Convention on Diplomatic Asylum (1954) gives examples of urgent cases. Urgent cases are:

> ... those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by 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.[238]

The list is not exhaustive and should serve simply as examples for the diplomatic agent, who determines "urgency". The expression "among others" leaves the door open for other kinds of urgent cases. It would appear that the aim is to give the granting state enough latitude to distinguish between what is urgent or not. Even where the conditions or urgency have been fulfilled, the granting state is under no obligation to grant diplomatic asylum. It would appear that the drafters of Article 6 meant that diplomatic asylum should be granted only in exceptionally grave situations. This appears to be the general trend in the international agreements, which regulate diplomatic asylum, probably because the grant of it is likely to create political frictions between states. The International Court of Justice in the <u>Asylum Case</u> (1950)[239] acknowledged the gravity of the practice, when it said that diplomatic asylum "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."[240]

Thus, the Court contrasted the gravity of diplomatic asylum with territorial asylum, which is not as grave, because the competence to grant territorial asylum "implies only the normal exercise of the territorial sovereignty,"[241] for the refugee is out of the territory of the state where the crime was committed, and any decision to grant territorial asylum is not derogatory to the sovereignty of that state.[242]

Article 9 of the Caracas Convention on Diplomatic Asylum (1954) obliges the diplomatic agent granting asylum to take into consideration, the information given to him by the territorial state, in deciding the nature of the offence or the existence of related common offences. The article further stipulates that the territorial government should provide the asylee safe passage from the country on the demand of the state granting asylum. The article also provides that the decision of the granting state to continue the asylum shall be respected. The right of safe conduct is recognized under this article. Article 17 provides that the territorial state after granting a request for safe conduct may eventually ask for the extradition of the asylee. The problem of safe conduct was discussed in the Asylum Case (1950).[243] The Court held that there was no legal obligation for a territorial state to grant a request for a safe conduct. The Caracas Convention on Diplomatic Asylum (1954) responded to some of the questions, which were raised in the Asylum Case (1950):

the right of unilateral qualification by the granting state, urgency, safe conduct and respect for a grant of diplomatic asylum or the maintenance of it.[244]

It is submitted that even though general (or universal), conventional law does not expressly regulate diplomatic asylum, regional, conventional law regulates that practice in some Latin-American countries. The Diplomatic Convention (1961) and the Consular Convention (1963) are silent on the question of the right of states to grant asylum in diplomatic and consular premises. However, the two conventions, in their preambles, affirm that the rules of customary international law continue to govern matters not expressly provided for. Furthermore, Article 5(m) of the Consular Convention (1963) provides that a consular post may perform any functions, which are not illegal within the receiving state. It is also important to realize that Article 3(1) of the Diplomatic Convention (1961) does not give an exhaustive list of the functions of diplomatic missions. It is logical to state that, in certain circumstances, the grant of asylum in diplomatic or consular premises may be regarded as a proper function of embassies and consular posts.

Some Latin-American countries have made significant contributions to the development of regional diplomatic law. The Montevideo Treaty on International Penal Law (1889), the Havana Convention on Asylum (1928), the Montevideo Convention on Political Asylum (1933), the Montevideo Treaty on Political Asylum and Refuge (1939) and the Caracas Convention on Diplomatic

Asylum (1954) are instruments, which govern important aspects of diplomatic asylum in some Latin-American countries. Unfortunately, no convention of universal application expressly regulates the practice of diplomatic asylum.

3. Difficulties of Diplomatic Asylum

The granting of asylum in mission and consular premises is fraught with difficulties and complications, which are not easily dissipated. First, diplomatic asylum interferes with national sovereignty, which is central to international intercourse between modern states.[245] Each state enviously seeks to maintain its independence and sovereignty at all moments, and often goes to war to preserve those attributes, which constitute a source of pride for each state in the concert of nations. Secondly, diplomatic asylum could encourage domestic unrest by offering to political offenders easy refuge.[246] Such offenders could act, as if the embassies were havens for the enemies of the government of the receiving state. Thirdly, it is difficult, if not impossible, to determine exactly what is a common crime and how it differs from a political crime.[247] This problem of definition is still intractable, because the concept of crime largely depends on the political philosophy of each society. For instance, in some young countries, where Third World dictatorships are almost the rule, political offenders are often given harsher punishment than would receive common criminals.[248]

Finally, diplomatic asylum may cause conflict between states, for example, between the sending and the receiving states.[249]

All these four difficulties hinge on the principle, that diplomatic asylum is an interference in the internal affairs of the receiving state. Diplomatic asylum is not usually one of the traditional functions of consular posts and embassies. The rule of thumb is that the grant of it requires extremely humane action; secondly, the state granting it should not interfere unduly in the internal affairs of another state.[250] The humanitarian motive behind the grant of asylum is of overriding importance to the whole international community, because of the human lives it can save.

B. JUSTIFICATION OF DIPLOMATIC ASYLUM UNDER INTERNATIONAL LAW

The practice of diplomatic asylum is simply tolerated, treaty-based or becomes a reality, because a refugee is in danger. Sometimes justifying diplomatic asylum is difficult. The easiest way to justify it is to argue that the practice has come to be accepted.

1. Where the Practice is Treaty-Based

Different Latin-American States tried to regulate the practice of diplomatic asylum by various multilateral treaties: the Montevideo Treaty on Penal Law (1889);[251] the Havana Convention on Asylum (1928);[252] the Montevideo Convention on Political Asylum (1933);[253] the Montevideo Treaty on Political

Asylum and Refuge (1939);[254] and the Caracas Convention on Diplomatic Asylum (1954).[255] The five treaties just enumerated entered into force at different times, except the Montevideo Treaty on Political Asylum and Refuge (1939), which was ratified by only two out of six signatures.[256]

The Montevideo Treaties of 1889 and 1939, the Havana Convention of 1928, and the Caracas Convention on Diplomatic Asylum of 1954 recognize the right of a state to grant asylum to an individual.[257] Asylum remains a privilege which a Latin-American state may grant to an individual, who requests asylum. However, asylum is not an individual's right; it is not a condition that is inherent in any individual.[258] Signatories to the different Latin-American treaties are often different. Not all countries have signed the same treaties. Ratifications are inconsistent. Some states ratify one convention but refuse to ratify the other. From the current list of ratifications fourteen countries respect a right of asylum. The countries are Argentina, Bolivia, Brazil, Costa Rica, Ecuador, El Salvador, Haiti, Mexico, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela.[259]

Under universal international law the grant of asylum remains a discretionary act of the state. No individual, who has been refused asylum, will have grounds to sue the state, which rejected his request for asylum. There might be a moral duty on the part of the state, which has received a request for asylum to grant it, but that duty is certainly not legal.

2. Where Practice is Merely Tolerated

Some states neither completely reject nor fully recognize diplomatic asylum. It is, therefore, hard to define the policy of those states. In such cases, the state concerned is extremely cautious and on some occasions grants asylum, but on others refuses to grant it.

The United States of America has a policy which is pertinent. According to that policy, the United States tolerates diplomatic asylum in extreme, specific cases. On 29 April 1980, Mr. W. T. Lake, the Deputy Legal Adviser of the Department of State, restated the United States position. He said that the policy was to decline requests for the grant of diplomatic asylum.[260] Mr. Lake further explained, that only temporary refuge was permitted for humanitarian reasons, when a person's life or safety was perceived to be in immediate and active danger, such as pursuit by a mob.[261] Each case will depend on the facts: on the circumstances of place and time. Before the embassy surrenders the person, who took refuge in the mission premises, it must be clear that the refugee no longer runs any risk and that the immediate and active danger, which he faced has ceased to exist.

Thus the United States has not adhered to any conventions on diplomatic asylum, and has refused to admit any right to give diplomatic asylum generally.[262] However, the United States has granted diplomatic asylum in exceptional cases on humanitarian grounds to persons in grave danger. For example, the United

States Embassy in Budapest, Hungary, gave asylum to Cardinal Mindszenty, Catholic Primate of Hungary.[263] Cardinal Mindszenty remained in that Embassy for nineteen years (1956-1975) till 1975 when he was allowed to leave the premises of the Embassy and fly to Rome.[264] In 1978 the United States Embassy in Moscow refused to eject Pentacostalists seeking emigration permits.[265] In 1977 the United States Special Interests Section of the Swiss Embassy at Havana granted temporary refuge to four hundred (400) persons threatened with attack.[266]

The position taken by Canada is that its consulates and diplomatic missions abroad may not grant asylum on their premises except in extra-ordinary circumstances.[267] Those circumstances include cases in which temporary refuge would be granted on humanitarian grounds to a person in imminent danger during political disturbances or riots.[268] Care should be taken so that the mission's grant of refuge is not misinterpreted. Canada has not signed or ratified any international treaty establishing a right of asylum.[269]

3. <u>Where Refugee is in Danger</u>

Humanitarian considerations have become crucial today. The need for diplomatic asylum has assumed new proportions, because the protection of life and liberty has become a great concern of modern nations. Diplomatic asylum has helped save thousands of lives, and for the moment, there is no other practical and effective system for protecting human rights.[270] It is also argued convincingly that diplomatic asylum will continue to be practised, as long as we continue to have violations of human rights.[271] In order to grant asylum, because a person is in danger, there must be a threat to life or liberty. The threat could come from insurgents, disorderly mobs, or from the agents of the territorial state, like it is in states, where the government sponsors openly, tolerates or encourages terrorist acts.

Sometimes refugees flee persecution or the fear of persecution. There are likely to be problems of interpretation such as defining persecution or the fear of it. Prosecution does not always result in persecution. The reasons for persecution could be race, religion, nationality, membership of a particular social group or political opinion.[272] Persecution has the same meaning in the U.S.A., United Kingdom and Canada.[273] For instance, In the Matter of McMullen (1980),[274] the Court of Appeals for the 9th Circuit in the United States held that persecution by the Irish Republican Army (I.R.A.) was sufficient, because the U.K. government was unable to control the I.R.A.[275] Other examples of persecution include forms of economic harassment, that prevent certain minorities from earning a living.[276] To prevent a person from earning a living is similar to imprisonment. For example, during the Ugandan-Asian crisis, President Idi Amin drove the Asians out of Uganda. That was persecution, a violation of human rights. However, persecuted persons do not include people fleeing a state, because of generally unfavorable economic conditions, such as the case of Haitians fleeing Haiti.[277]

The need to protect human life and liberty is so important, that states often forgo bits of their sovereignty, so as to allow the practice of diplomatic asylum to go on unimpaired. The extent or the imminence of the peril is not easily circumscribed. In 1914, there was a Mexican judge, who was afraid of danger from political upheavals. A British official, Lord Cowdray, asked the Foreign Office, if he could grant diplomatic asylum to the judge at the British legation in Mexico.[278] The Foreign Office told Lord Cowdray that there was no definite reply. The definite decision, as to the grant of diplomatic asylum, would depend on whether or not H. M.'s minister thought that the life of the judge was in imminent peril.

During the Spanish Revolution in 1936, the U.S. Ambassador in Madrid was instructed to grant refuge to persons, who were in danger from mobs or from hostilities, but not to protect people fleeing legal arrests for common crimes.[279]

C. LIMITATIONS ON GRANTING OF DIPLOMATIC ASYLUM

It is a settled matter that the grant of diplomatic asylum wholly depends on the discretion of the state granting it. Even that discretion is not left unfettered. There is no right of diplomatic asylum in international law. The sporadic grants of diplomatic asylum do not make diplomatic asylum a customary norm of general international law.

The receiving state's enforcement jurisdiction is the power of such a state to enforce its laws and regulations, within its territory through legal action. Diplomatic immunity shields persons, within diplomatic premises, from the legal process of the receiving state. The receiving state's prescriptive jurisdiction is that state's power to prescribe rules of conduct for those within its territory. This jurisdiction is unfettered by diplomatic immunity.

Each modern state desires to have its laws enforced. Diplomatic asylum encroaches on the receiving state's jurisdiction over persons, within that receiving state's territory.

1. <u>Where Refugee is Accused or Convicted for Common Crimes</u>

Diplomatic asylum may not be granted to persons accused or condemned for common crimes. If this restriction did not exist, thousands of people, accused or condemned for ordinary crimes, might take refuge in mission and consular premises daily. First, that would make a mockery of the criminal law of the receiving state; secondly, no embassy or consular post would have enough space to accommodate fugitives in such great numbers. The first paragraph of Article 1 of the Havana Convention on Asylum (1928) and Article 1 of the Montevideo Convention on Political Asylum (1933) both provide that grant of asylum in legations, warships, military camps and military aircraft, to persons accused of or convicted for common offences, is unlawful.[280]

There is a troublesome question. What if the accused or convicted person takes refuge in the embassy or consular premises, because there is lawlessness or a general breakdown of law and order? In the Asylum Case (1950) there was a rebellion, which was followed by social upheavals; Haya de la Torre as a result took refuge at the Colombian Embassy in Lima, Peru.[281] Sometimes there is a general insurrection, violent mobs in the streets or when there is an unconstitutional change of power such as a coup d'état, leading to the suspension of the country's constitution and even important political institutions. In such a case, the person, who is accused or condemned for common offences, should not be granted diplomatic asylum; he should be granted temporary refuge, and should be handed over to local authorities, as soon as the government is in control of the situation and the rule of law is re-established. One positive point, which makes the grant of asylum unnecessary, is that even when there is a coup d'état or some violent change of government, the new people in power have a tendency to leave the judicial and legal systems untouched. Thus total breakdowns of law and order are rare, even in countries where coups d'état are frequent.

2. Qualification of Political Offences: Sensitive Exercise

Diplomatic asylum may be granted to political offenders. Unfortunately, there is no universally-accepted definition of a 'political offence'. Each state coins its own definition. Each definition evolves with the political and legal philosophy of each country. This lack of a universal definition of political offences limits the ability of embassies or consular posts to grant asylum. For an embassy or a consular post, determining what is a political offence is like walking a tight rope. That determination often amounts to judging the political regime in the receiving state. That is not a lofty exercise for diplomatic or consular personnel. Very few embassies or consular posts enjoy being at loggerheads with the government of the receiving state. Thus missions or consulates endeavour to avoid tampering with the receiving state's definition of political offences.

There is a loose distinction between the purely political offence and the relative political offence. The delicate distinction shows how difficult it is to establish a fast definition of offence. In the Asylum Case (1950) the issue of the qualification of the refugee's offence was raised.[282]

a) The Purely Political Offence

This type of offence is an illegal act against the sovereign or a political subdivision of the sovereign, if such an act is "a subjective threat to a political, religious or racial ideology or its supporting structures or both without, however, having any of the elements of a common crime".[283] The interest being protected is the sovereign. Some purely political offences include treason, sedition and espionage directed against the state itself. Such crimes threaten the very existence, welfare or security of the state. When linked to a common crime, a purely political offence loses its character.[284] It becomes relative.

b) The Relative Political Offence

When a purely political offence is committed in conjunction with a common crime, that purely political crime becomes a relative political offence.[285] A relative political offence also exists, if the offender, when prompted by ideological motives, commits a common crime. Whereas a purely political offence only affects the public interest, causing only a public wrong, the relative political offence affects a private interest, and does constitute in part a private wrong, which has been done in furtherance of a political purpose.[286]

When purely political offences become relative political offences is often difficult to determine. Should the refugee be granted diplomatic asylum, if his offence is a relative political offence? The presence of a serious common crime could rid political crimes of their qualification as "political offences". Thus the refugee should be surrendered to the authorities of the receiving state, if apart from committing a series of political offences, he also commits a serious common crime. It might be the case if a political offender, also murdered a policeman for no just cause.

3. Procedural Limitations

Procedural problems also limit the granting of diplomatic asylum. First, the would-be refugee should not be promised diplomatic asylum beforehand. It is a rule that asylum may not be promised for a future date and it cannot be granted, when the refugee suffers from a simple suspicion or if the danger of which the refugee is afraid is yet inchoate.[287] Secondly, diplomatic asylum must not be offered, without the refugee requesting it. To make such an offer is tantamount to unnecessary interference in the internal affairs of the receiving state.[288] Thirdly, it is not clear, whether diplomatic asylum may be given in the private residences of the heads of missions or heads of consular posts.[289] Article 17 of the Montevideo Treaty on International Penal Law (1889), Article 1 of the Havana Convention on Asylum (1928), Article 1 of the Montevideo Convention on Political Asylum (1933), Article 2 of the Montevideo Treaty on Political Asylum and Refuge (1939) and Article 1 of the Caracas Convention on Diplomatic Asylum (1954) all provide in similar language that asylum may be granted in legations, war vessels, military camps or aircraft to persons being pursued for political crimes or for political reasons.[290] Article 2 of the Montevideo Treaty on Political Asylum and Refuge (1939) also permits chiefs of mission to receive refugees in their residences, in cases where the chiefs of mission live in a place different from the premises of the embassies or legations. No other convention has a similar provision. That provision makes it easier for refugees to find premises, which enjoy absolute inviolability, such as the residence of an ambassador. Even though it is controversial whether asylum may be given in the residences of ambassadors, there are some suggestions. Firstly, the Diplomatic Convention (1961) at Article 30 assimilates the private residences of ambassadors and diplomatic agents to mission premises. It is submitted that if a refugee, who is being pursued by a mob, enters such a private residence, it should be accepted that he could ask for asylum, while in such a residence. A second case could occur, if the refugee genuinely believes that such a private residence is an embassy of a consular post. It is further submitted that if it can be ascertained that the refugee genuinely believed and is thus mistaken, he should have the benefit of the doubt. He should be granted asylum, even if he took refuge in the private residence of a diplomatic agent.

D. THE COLOMBIAN-PERUVIAN ASYLUM CASE (1950)[291]

1. Facts of the Case

On 3 October, 1948, a military rebellion broke out in Peru, but was suppressed the same day.[292] On 4 October 1948, the President of Peru outlawed the American People's Revolutionary Alliance, a political party, and declared that the leaders of that Alliance would be tried for military rebellion.[293] After accusing the American People's Revolutionary Alliance of having organized the military rebellion, the judicial authorities issued a warrant of arrest, against Victor Raul Haya de la Torre, leader of the American People's Revolutionary Alliance.[294] The warrant of arrest could not be executed, because Haya de la Torre could not be found.[295] He had been accused of the "crime of military rebellion".[296] On 4 October 1948, a day after the military rebellion, a state of siege was declared, suspending certain constitutional rights.[297] On 3 January 1949, Haya de la Torre sought asylum in the Colombian Embassy in Lima, Peru.[298] The next day the Colombian Ambassador wrote to the Peruvian Minister for Foreign Affairs and Public Worship. In that note the Colombian Ambassador stated, that he had granted asylum to Haya de la Torre, in accordance with Article 2 paragraph 2 of the Convention on Asylum, signed by Peru and Colombia at Havana in 1928.[299] In that same note, he asked that the Peruvian Foreign Minister should give orders for the requisite safe-conduct to be issued, in order to enable Haya de la Torre, the asylee, leave Peru. In another note, on 14 January 1949, the Colombian Ambassador disclosed that he had qualified Haya de la Torre as a political refugee.[300] Had Colombia the right to unilaterally qualify the asylee's crime as a political offence? Peru said that Colombia did not have such a right. Was Peru bound to give guarantees necessary for the departure of Haya de la Torre from Peru, "with due regard to the inviolability of his person"?[301] Peru and Colombia did not agree on these points. The case came before the International Court of Justice. In its judgment of 20 November 1950, the Court held that Colombia, the country granting asylum, had no right to qualify the nature of the offence by a unilateral and definitive decision, binding on Peru.[302] The Court also found that the grant of asylum by the Colombian government to Haya de la Torre was not made in conformity with Article 2, paragraph 2 ("First") of the Convention on Asylum signed at Havana in 1928.[303] Peru was under no legal obligation to guarantee safe-conduct, so as to enable the refugee to leave ~~Peru. International law does no impose such an obligation.~~

The three main issues before the International Court of Justice in the Asylum Case (1950) were: the unilateral right to qualify offences definitively; the obligation to grant safe-conduct; and the meaning of urgency. The Court also dealt briefly with customary international law and the nature of Haya de la Torre's offence.

2. Unilateral Right to Qualify Offence Definitively

Colombia argued that it had the right to unilaterally and definitively qualify the offence of Haya de la Torre. Colombia backed that claim by citing the provisions of three treaties: the Bolivarian Agreement on Extradition of 18 July 1911, the Havana Convention on Asylum of 20 February 1928, and the Montevideo Convention on Political Asylum of 26 December 1933; Colombia also invoked the "American international law in general."[304] Peru in a counter-claim requested the Court to declare that the grant of asylum to Haya de la Torre was illegal, for it had been granted in violation of certain provisions of the Havana Convention (1928).[305]

To buttress its claim, Colombia referred to the Bolivarian Agreement of 1911, Article 18 which provides:

> Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law.[306]

The Court said that the argument was weak because the principles of international law, did not "recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum."[307] The Colombian argument could have been valid, if there were a universal international law of diplomatic asylum. Universal international law has never developed any rules, which govern the right of states granting asylum to unilaterally and definitively qualify the offences of asylees. The absence of such rules rendered ineffective that Colombian argument.

Colombia further relied on Article 4 of the Bolivarian Agreement (1911). Article 4 dealt with the extradition of a criminal refugee from the territory of the state of refuge.[308] The Court explained that territorial asylum (extradition) did not involve a derogation from the sovereignty of the state, where the refugee was. However, diplomatic asylum involved a derogation from the sovereignty of the territorial state. Because diplomatic asylum implies a challenge to the sovereignty of the territorial state by intervening in matters within the competence of such a state, it is necessary that each derogation from territorial sovereignty be specifically justified.[309] The court states that it was impossible to deduce from rules governing extradition any valuable conclusion, that could apply to the unilateral and definitive qualification of the offence of Haya de la Torre.[310]

Colombia further argued that the Havana Convention (1928), which lays down rules relating to diplomatic asylum, by implication gives the right of unilateral and definitive qualification to the state granting asylum.[311] The Court replied that the Havana Convention (1928) "does not contain any provision conferring on the state granting asylum a unilateral competence to qualify with definitive and binding force for the territorial state."[312] The right to qualify unilaterally and definitively could not be implied, because an important derogation from the equal rights of qualification should be backed by an evident and clear rule.[313] The Court further explained that the right to unilaterally and definitively qualify offences worsened the derogation from territorial sovereignty, which was already brought about by the exercise of diplomatic asylum.[314] The right to unilaterally and definitively qualify could not be implied from the Havana Convention (1928), because such a right was "not essential to the exercise of asylum."[315] The practice of asylum might be more effective, if the states concerned applied a rule of unilateral and definitive qualification, but it would be erroneous to conceive that the institution of asylum would not exist, in the absence of that rule.[316] The Court also explained that the mischief sought to be avoided by the Havana Convention (1928) was the abuse of the exercise of asylum.[317] It was, therefore, necessary to limit the grant of asylum to the gravest cases.

Colombia referred to Article 2 paragraph 1 of the Havana Convention (1928) and argued that the usages, laws and conventions of Colombia, with respect to the qualification of the offence, could be invoked against Peru.[318] The Court rejected that interpretation, and stated that Article 2 paragraph 1 of the Havana Convention (1928) means that a granting state shall not exercise asylum to a greater extent than is authorized by its own usages, laws or conventions and that asylum, if granted, will be respected by the territorial state, only where asylum would be authorized by the usages, conventions or laws of the granting state.[319] Thus Article 2 paragraph 1 did not have any provision on unilateral and definitive qualification. The Havana Convention (1928) left the problem of the qualification of offences unsolved.[320]

Colombia further argued that Article 2 of the Montevideo Convention on Political Asylum (1933) interpreted the Havana Convention (1928) by providing that "the judgment of political delinquency concerns the State which offers asylum."[321] Article 2 of the Montevideo Convention on Political Asylum (1933) means that the state granting asylum has a unilateral right to qualify the offence. However, the Court replied that Peru had not ratified the Montevideo Convention on Political Asylum (1933) and that convention could not be invoked against a territorial state, Peru, that had not ratified it.[322] The Montevideo Convention on Political Asylum (1933) is not merely an interpretation of the Havana Convention (1928). In fact, the preamble of the

Montevideo Convention (1933) states that it modifies the Havana Convention (1928).[323] The Court indicated that the provision on the right of unilateral qualification was a completely new solution, which did not exist in the Havana Convention (1928).[324]

Colombia also invoked "American international law in general" asserting that by virtue of a regional or local custom peculiar to Latin-American countries, there was a rule that the state granting asylum had a unilateral and definitive right to qualify the offence.[325] The Court indicated that the party which relies on a custom should prove that the customary rule was a constant and uniform usage among the states concerned, and that the usage was accepted as a right appertaining to the granting state and that it was "a duty incumbent on the territorial State."[326] The Court further indicated, that Article 38 of the Statute of the International Court of Justice refers to international custom "as evidence of a general practice accepted as law."[327] Colombia cited the Montevideo Convention (1933) and insisted that the convention simply codified principles, which were already a part of recognized Latin-American custom; the Colombian counsel then drew the conclusion that the Montevideo Convention (1933) was proof of customary law valid against Peru, even though Peru had not ratified the said convention.[328] The implication of the Colombian counsel's argument was that Peru's failure to ratify the Montevideo Convention (1933) was not valid proof that Peru no longer subscribed to the custom that existed before 1933. The Court dismissed that argument as being weak, pointing out that the Montevideo Convention (1933) had been ratified by only eleven countries.[329] The Colombian argument was also destroyed by the Montevideo Convention (1933), which in its preamble states that it modifies the Havana Convention (1928).[330]

Judge Caicedo Castilla, in his dissenting opinion, asserts that Latin-American States recognized diplomatic asylum, practised it and exercised the right to unilaterally and definitively qualify the offences of refugees.[331] Judge Azevedo argues, in his dissenting opinion, that Latin-American States practised asylum actively or passively and that the sporadic reactions or occasional denials of established customary rules constitute violations of accepted practice, because "a State cannot oppose a custom previously accepted."[332] Judge Alvarez asserts that the expression "American international law" designates an international law that is specific to the New World and consists of "the complex of principles, conventions, customs, practices, institutions, and doctrines which are peculiar to the Republics of the New World."[333] Mr. Alvarez argues that a legal principle, doctrine or custom, in order to become a part of the American international law, does not have to be accepted by all states of the New World, just like a legal rule does not have to be accepted by all states in the world, in order for it to be considered as part of universal international law.[334] The arguments of Judge Caicedo, Azevedo and Alvarez remain general and fail to show clearly that there was a customary right for Colombia to qualify the offence of Haya de la Torre by a unilateral and definitive decision binding on Peru. The Colombian government referred to a large number of cases where diplomatic asylum was granted and effectively respected. However, Colombia was unable to demonstrate that the alleged right of unilateral and definitive qualification by the granting state was

> apart, from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency.[335]

On the contrary, the cases put before the Court showed evidence of uncertainty, contradiction, fluctuation, and discrepancy in the practice of diplomatic asylum.[336] Even the different conventions on asylum were ratified by certain states and rejected by many others, and a lot of cases of diplomatic asylum were prompted by political expediency. The Court concluded that it was impossible to establish the existence of a constant and uniform usage, recognized as law, "with regard to the alleged rule of unilateral and definitive qualification of the offence."[337] The Court also refused to attach decisive significance to official communiques published by the Peruvian Ministry of Foreign Affairs on the 13 and 26 October 1948 and to a Report of the Advisory Committee of the Ministry of Foreign Affairs of Colombia dated 2 September 1937.[338] The views in those documents were contrary to those being expressed by the two governments before the Court. The Court held that Colombia, the granting state was "not competent to qualify the offence by a unilateral and definitive decision, binding on Peru."[339]

The Court pointed out that the burden of proving that Haya de la Torre "had been accused or condemned for common crimes before the grant of asylum rested upon Peru."[340] The Court concluded that Peru had not proved that the acts of which the refugee was accused before 3/4 January 1949 constituted common crimes.[341] The Court further stated that according to the Havana Convention (1928) only the terms of the accusation, as formulated by legal authorities, before the grant of asylum, were to be considered.[342] From the recital of the facts, the sole accusation against the refugee was that of military rebellion and the Peruvian government did not establish that military rebellion in itself constituted a common crime.[343] Thus the Court held that Haya de la Torre had committed a political offence or an offence that was not in itself a common crime.[344]

Judge Alvarez points out that it is practical that the state granting asylum should qualify the offence of the refugee.[345] Mr. Alvarez further says that thêre should be no assumption that the unilateral qualification of the refugee's offence by the granting state is "definitive and irrevocable."[346] The unilateral qualification can, therefore, be questioned and challenged by the territorial state. In the absence of an agreement between the territorial and granting states, the case may be submitted to arbitration or to any other peaceful means of settlement, such as the International Court of Justice.[347]

Judge Caicedo Castilla argues that the granting state must have the right to unilaterally and definitively qualify the refugee's offence, because conventional law, the very nature of the Latin-American institution of asylum, and the obligations resulting from the international custom existing in the Latin-American continent, all make unilateral qualification inherent in the very nature of asylum and that unilateral qualification is necessary for the continuity of the practice, as it exists in Latin America.[348] Mr. Caicedo Castilla contends that no text provides for two qualifications, one provisional and one final; nor is there any written rule that the right to qualify has to be exercised by both the granting and territorial states.[349]

Judge Azevedo stresses that the "clause of unilateral qualification is self-evident and even constitutes the only means of settling such a difficult problem."[350] However, Mr. Azevedo stresses that the granting state's unilateral, definitive and stable qualification is not *res judicata*, because that qualification is attackable, in the case where there has been a "manifest violation of international law."[351] Judges Alvarez, Caicedo Castilla and Azevedo do not, in their different opinions, show clearly why Colombia's unilateral qualification of Haya de la Torre's crime should bind Peru.

It would appear that the Court's difficulty was how to pinpoint an undisputed custom that was law between Peru and Colombia with regard to the unilateral and definitive qualification of offences. The International Court of Justice, like any other court in a civilized society, had to base its decision on evidence adduced during the hearing of the case. In order to reach a fair decision, which would not result in a miscarriage of justice, the Court relied a great deal on documentary evidence and on a strict interpretation of the treaties Peru and Colombia had signed. To do otherwise could have been difficult, because one of the sure ways to determine the position of a state, on an international issue, is to study the treaties that state has signed and ratified. It is from those treaties that courts ascertain the intentions of a state. The practice of a state might be momentary or sporadic, but its intentions as laid down in a treaty assume a high degree of certainty and permanence.

In 1964, Mr. Greenburgh, a member of the International Law Association, explained that in Latin America Papal representatives in their grant of asylum, asserted their right of unilateral and definitive qualification of offences.[352] The Vatican Secretariat explained that its attitude was based on the religious origin and the long practice of asylum. It was pointed out that because of the prominence of Catholicism in Latin America, the Vatican could do certain things, because in many Catholic countries, Papal representatives are in a special position.[353]

If Latin-American States give Papal representatives, Vatican diplomatic agents, the right to unilaterally and definitively qualify the offences of asylees, then other diplomatic agents, who represent states other than the Vatican, would have reason to also claim the right to unilaterally and definitively qualify offences. Diplomatic asylum is essentially for the benefit of the asylee. It, therefore, should not lead to any organized system of discrimination, where asylum requested at a nunciature should be granted promptly, because the nuncio, the Pope's representative, has a right to qualify the offence unilaterally. It would be absurd, if a refugee who requests asylum at the Embassy of another state cannot have it granted promptly, because the Ambassador, who is not a nuncio, is not allowed to unilaterally qualify the offence. Such double standards would be unfair to the refugee seeking asylum. It is submitted that if a territorial state allows the Papal representative to unilaterally and definitively qualify offences, that state normally, at least for humanitarian reasons, should extend that right of unilateral and definitive qualification to all other diplomatic missions.

Article 4 of the Caracas Convention on Diplomatic Asylum (1954) provides that the state granting asylum has the right "to determine the nature of the offence or the motives for the persecution." That convention, therefore, stipulates the right of the state granting asylum to unilaterally and definitively qualify the offence of the refugee. Peru ratified the Caracas Convention on Diplomatic Asylum (1954).[354]

3. The Meaning of Urgency

In its counter-claim Peru argued that in granting asylum to Haya de la Torre, Colombia acted in violation of Article 1, paragraph 1, and Article 2, paragraph 2 of the Havana Convention (1928).[355]

One of the issues discussed in the Asylum Case (1950) is urgency. What is an urgent case? The Havana Convention on Asylum (1928) at Article 2 paragraph 2 provides as follows:

> Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.[356]

The Court stated that for the Asylum Case (1950) the only relevant agreement was the Havana Convention (1928) which, because of abuses in the practice of asylum, fixed strict rules to be observed by signatory states in the grant of asylum.[357]

Following both the proclamation of the state of siege and the outlawing by decree of the American People's Revolutionary Alliance on 4 October 1948, Haya de la Torre, head of that outlawed party, remained in hiding for three months; that is until 3 January 1949, the day he asked for refuge at the Colombian Embassy in Lima, Peru.[358] There were other important facts: the acting Examining Magistrate for the Navy on 13 November 1948, issued an Order requiring defaulters to be cited by public summons; and on 4 November 1948, was issued a decree providing for Courts-Martial to summarily judge, with the option of increasing penalties and without a right of appeal, the authors, accomplices and other persons "responsible for the offences of rebellion, sedition and mutiny."[359]

The Court stated that in the Havana Convention (1928), the expression "urgent cases" could not be conceived as including

> the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring to "the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety", the Convention envisaged protection from the operation of regular legal proceedings.[360]

The Court stated clearly that asylum could not be opposed to the operation of justice, except where "arbitrary action is substituted for the rule of law."[361] "Safety", as used in Article 2 paragraph 2 of the Havana Convention (1928), determines the effect of asylum granted to political offenders; that word "safety", means that the refugee is protected against the illegal actions of the state and that he is guaranteed the due process of law. "Safety" cannot mean protection, which allows the diplomatic agent to obstruct the application of the laws of the receiving state, for the diplomatic agent has a duty to respect such laws.[362] The Court rejected the argument that the Havana Convention (1928) was meant to provide a general protection of asylum to any person prosecuted for political crimes, because the assumption would lead to foreign interference in the domestic affairs of receiving states.[363] Territorial states generally recognize asylum for convenience or simple political expediency, without feeling that the recognition is a legal obligation.[364] The Court held that on 3/4 January 1949, there was no "danger constituting a case of urgency within the meaning of Article 2, paragraph 2, of the Havana Convention."[365]

Judge Alvarez contends that the Colombian diplomatic agent acted in an urgent case; the fact that several foreign embassies in Peru granted diplomatic asylum to various persons, who had participated in the same revolution as Haya de la Torre, confirms the urgency, which surrounded the grant of asylum to that refugee.[366] Judge Badawi Pasha maintains that judging from the practice of South-American States, be they signatories or not, before and after the Havana Convention (1928), cases of revolution or rebellion are qualified in Article 2 of that Convention as urgent cases.[367] Mr Badawi Pasha further maintains that the state of disturbance still existed on 3 January 1949, because the Military Junta on 2 January 1949 renewed the state of siege, implying that exceptional measures could be taken.[368] Judge Caicedo Castilla argues that there was urgency because Haya de la Torre's life and liberty were threatened, as he was being prosecuted for political reasons, at a time when Peru was going through serious political changes, as is shown by the renewal of the state of siege by the decree of 2 January 1949.[369]

The Court's interpretation of urgency is very limited. There is the time factor and an environmental factor. The three months, which Haya de la Torre spent in hiding, do not change the fact that the period of disturbance had not ceased, even on the 3 January 1949, when he asked for asylum at the Colombian embassy. One possibility is that for three months Haya de la Torre had watched problems of peace and order in Peru. The several renewals of the state of siege probably indicated to him that his life and liberty were still threatened by the Junta. The period of three months that elapsed, before Haya de la Torre took refuge is not alone sufficient, as a basis for a conclusion in the interpretation of "urgency". The general atmosphere in Peru, as characterized by the primacy of the military and the continuous state of siege, created an environment in which Haya de la Torre's request for diplomatic asylum was a reasonable move for a person, who was being pursued for political reasons. The fact that Haya de la Torre was the leader of a political party, which had just been outlawed on 4 October 1948, made him the political opponent, if not an enemy, of the Junta. In a state of siege it is not obvious that a political opponent would receive justice from the hands of a Military Junta that had the power to make laws, modify the composition of the courts and even replace ordinary procedure with summary procedure for serious offences. The Court decided that the Havana Convention (1928) should not be construed so as to allow "the danger of regular prosecution"[370] to pass for an "urgent case". It is submitted, that if the circumstances in a country, taken in their entirety, create the serious risk of a miscarriage of justice, as it was likely to be in Haya de la Torre's case, the protection of the human rights of the refugee ought to take precedence over the respect of the Court for legal proceedings within the territorial state.

Article 7 of the Caracas Convention on Diplomatic Asylum (1954) provides that the state granting asylum "determines the degree of urgency of the case." The same convention at Article 6 gives examples of situations which should be taken as "urgent cases."[371] The state granting asylum can, therefore, unilaterally and definitively determine urgency. The urgent cases given in Article 6 are indicative of the types of circumstances that create urgency. Urgency is better defined today than it was at the time the Asylum Case (1950) came before the International Court of Justice.

4. The Obligation to Grant a Safe-Conduct

In its second submission the Colombian government asked the Court to adjudge and declare that the Republic of Peru was bound to give guarantees necessary for the departure of Haya de la Torre from Peru.[372] The Court stated that from the first two articles of the Havana Convention (1928), it followed that even if the granting state's unilateral right to qualify was not admitted, "the Colombian government is entitled to request a safe-conduct under certain conditions."[373] The first condition is that asylum must have been granted and maintained. Valid asylum is granted only to political offenders, who are not accused or convicted for common offences and only in urgent cases and for the time indispensable for the safety of the refugee.[374] The Court stated that the second condition, which is found in Article 2 of the Havana Convention (1928), is that the territorial state request that the refugee be sent out of the national territory within the shortest time; and that the diplomatic agent of the country that has granted asylum may require guarantees for the departure of the refugee from the country.[375] The Court's interpretation of that provision is that the territorial state has the option to ask for the departure of the refugee, and that the territorial state is obliged "to grant a safe-conduct, only if it has exercised this option."[376]

The Court acknowledged the existence of the practice, whereby a granting state immediately requested a safe-conduct, without having had a request from the territorial state for the departure of the refugee.[377] The Court explained that that happened when the diplomatic agent, who granted asylum was desirous to end the presence of the asylee in the mission premises; and the territorial state was eager to have the asylee, its political opponent, leave the country.[378] However, the Court concludes that practice did not and could not mean that the territorial state was obliged to grant the request for safe-conduct.[379] In the Asylum Case (1950) the Peruvian government had not requested that Haya de la Torre should leave Peru; on the contrary, Peru had contested the legality of the asylum granted Haya de la Torre and had refused to deliver a safe-conduct.[380] The Court held that Colombia was not entitled to claim that the Peruvian government should grant a safe-conduct for the departure of Haya de la Torre.[381]

Judge Caicedo Castilla in his dissenting opinion does not accept the Court's position that according to Article 2, "Third", of the Havana Convention (1928), the state granting asylum may only ask for the grant of a safe-conduct, after the territorial state has demanded that the refugee should leave the national territory.[382] Mr. Caicedo Castilla contends that the Havana

Convention (1928) recognizes two rights.[383] Firstly, there is the right of the territorial state to ask that the refugee should leave the territorial state rapidly, as asylum is a temporary situation. The state granting asylum is obliged to respect that request, because the asylee cannot be kept on the national territory against the wishes of the territorial state. Secondly, there is the right of the state granting asylum to require that the refugee should leave the territory with the required guarantees. This right is a consequence of asylum. Judge Caicedo Castilla concludes that in past cases of asylum, the diplomatic agent asked for and was granted a safe-conduct, without waiting for the territorial government to take the initiative.[384]

The position of the Court could lead to an impasse. If the territorial state requests the departure of the asylee from the country, that would be a solution for both the territorial and granting states. If the territorial state refuses to grant a safe-conduct and asks for the surrender of the asylee, there is a risk that the granting state might stubbornly refuse to surrender the asylee. Because of the principle of inviolability, the territorial state will probably not have its agents enter the mission premises forcibly, in order to take hold of the refugee. The result is that the asylee will not leave the country, but will not be surrendered to the local authorities. That could create an impasse and considerable embarrassment for both states. An impasse could distract the attention of both states from their important day-to-day conduct of useful diplomatic relations. It is unfortunate that the Havana Convention (1928) did not avoid this problem by providing that a political offender should be granted a safe-conduct once any state has granted asylum to such an offender. A safe-conduct and the departure of the asylee usually brought to an agreeable end most grants of asylum in Latin America.[385] In the long run Haya de la Torre left Peru after Peru and Colombia reached a negotiated agreement.[386]

Article 9 of the Caracas Convention on Diplomatic Asylum (1954) provides that the decision of the state of refuge "to continue the asylum or to demand a safe-conduct for the asylee shall be respected." The state granting asylum can ask for a safe-conduct for the asylee, without waiting until the territorial state has asked for the departure of the asylee. The decision of the state of refuge to continue the asylum shall be respected. Article 14 of the Caracas Convention on Diplomatic Asylum (1954) stipulates that the state granting asylum may prolong asylum, provided that the prolongation is necessary for that state to obtain information required to determine whether or not the said asylum is proper, or whether there are circumstances that might jeopardize the safety of the asylee during the journey to a foreign state.

Article 12 of the Caracas Convention on Diplomatic Asylum (1954) provides that if the granting state requests that the asylee be allowed to depart for a foreign country, the territorial state is obliged to grant that request immediately, except in a case of force majeure. The state granting asylum has the right, under Article 13 of the same convention, to transfer the asylee out of the country; in that connection, the territorial state may point out the preferable route for the asylee's departure.

Article 11 of the Caracas Convention on Diplomatic Asylum (1954) gives the territorial state the right to request that the asylee be withdrawn from the country. In that case the territorial state shall grant a safe-conduct and the guarantees necessary for the protection of the life, liberty or personal integrity of the asylee, or the territorial state may ensure that the asylee's safety is taken care of in any other way.

A recent event shows that the grant of a safe-conduct is still an obligation. A Canadian newspaper, Le Devoir,[386a] relates how the Haitian government on Saturday, 31 December 1988 granted a safe-conduct upon the request of the Dominican Republic. The decision of the Haitian government made possible the departure of Franck Romain, former mayor of Port-au-Prince (Haiti), who had been granted asylum in the embassy of the Dominican Republic on 17 September 1988, during military and political upheavals. The grant of the safe-conduct does not, according to a government communiqué in Port-au-Prince, affect the criminal proceedings instituted against Franck Romain, who is accused of being one of the persons responsible for murders committed on 11 September and on 29 November 1987. Those murders partly caused the military take-over, which toppled General Henry

Namphy and brought General Prosper Avril to power on 17 September 1987. Le Devoir further quotes part of the Haitian government communiqué, which states that the grant of a safe-conduct in favour of Franck Romain is in application of the inter-American conventional obligations with respect to asylum: Haiti signed and ratified the Caracas Convention on Diplomatic Asylum (1954), which entered into force on 29 December 1954.[386b] The Dominican Republic signed the convention with reservations. Article 9 of the convention stipulates that the territorial state shall respect the granting state's request for the grant of a safe-conduct.

It is settled, at least among the countries which ratified the Caracas Convention on Diplomatic Asylum (1954) that the granting state has a right to ask for a safe-conduct for the asylee, without waiting to have the territorial state ask for the departure of the asylee. This stipulation in Article 9 of the convention is different from the decision of the Court with respect to safe-conduct in the Asylum Case (1950). Asylum may be maintained provided that such a prolongation can be justified under Article 14 of the convention. Thus the time for which asylum is granted largely depends on a number of other factors to be determined. The territorial state is obliged to respect the prolongation of asylum, except where the granting state has already determined all the factors under Article 14.

E. CONCLUDING COMMENTS ON DIPLOMATIC AND CONSULAR ASYLUM

In the Asylum Case (1950), the International Court of Justice held that there was no right of asylum under international law.[387] The International Law Association drew the same conclusion in 1964.[388] The Diplomatic Convention (1961) and the Consular Convention (1963) neither create a right of asylum, nor do they forbid its practice.[389] The International Law Commission had nothing against diplomatic asylum, if it was practiced where conventional law or customary rules allowed it.[390] There is no law of diplomatic asylum under universal international law.

However, diplomatic asylum has been practiced in different parts of the world, sometimes as an exceptional humanitarian measure, in order to help a person in danger. The Caracas Convention on Diplomatic Asylum (1954) recognizes diplomatic asylum among some Latin American States.[391] That convention is the last in a series of Latin-American treaties. The Caracas Convention on Diplomatic Asylum (1954) gives states, parties to it, the right to grant diplomatic asylum in the territories of the other parties. Diplomatic asylum is also practised, even though it is not regulated, in other regions of the world. The inviolability, which the premises of embassies and of consular posts enjoy, has enhanced the practice of asylum. Refugees know that within those premises, they are sheltered from arrests or from prosecution by the authorities of the territorial state. The premises of embassies and consular posts will continue to be places of asylum, especially in those parts of the world where political systems are fragile and often know upheavals. Examples in this respect include the countries of the Third World and states which have totalitarian regimes. The decision of the International Court of Justice in the American Hostages Case (1980)[392] strengthens the principle of the inviolability of diplomatic and consular premises in international law. Such a decision indirectly enhances the institution of asylum in certain parts of the world.

Out of the Latin-American region, the practice of asylum is not regulated by any international instrument. The unfortunate result is that when a refugee takes refuge in diplomatic premises, both the state of refuge and the territorial state hardly know what rules to apply, in order to resolve the problem one way or the other. The inviolability of diplomatic premises being unconditional, the local authorities are not allowed to forcibly enter the premises and take out the refugee. Apparently, the only way to lay hands on the refugee is to break diplomatic relations and cause the members of the diplomatic mission to leave the premises, except the refugee. Severing diplomatic relations is too painful to be used for the solution of a relatively minor problem. The only probable solution left is to negotiate. The negotiation between the territorial state and the state of refuge usually takes weeks, months or even years. It is often a long and arduous process.

There is a need for an international treaty which regulates diplomatic asylum under universal international law. The international community should recognize the practice, and regulate it, so as to enhance its good aspects and limit its abuses. An international instrument would strengthen the institution of diplomatic asylum and make that institution more vibrant in those countries, where human rights and the due process of law are violated by unruly citizens or by dictators, who have no respect for their political opponents. It is submitted that the Caracas Convention on Diplomatic Asylum (1954) puts the state granting asylum in a stronger position than it was the case before the Asylum Case (1950). Under Article 2 of that convention, every state has a right to grant asylum. Before the Caracas Convention on Diplomatic Asylum (1954) the territorial state could easily negate the grant of asylum to one of its citizens. First of all, the territorial state was not under an obligation to respect the granting state's unilateral qualification of the refugee's offence. Secondly, the territorial state was not obliged to accept the granting state's appreciation of urgency. Thirdly, the territorial state could reject the granting state's request for safe-conduct, without any scruple. Finally, the territorial state could contest the maintenance of asylum, without taking into consideration the circumstances that had caused such maintenance. The Caracas Convention on Diplomatic Asylum (1954) has given the granting state the right to unilaterally and definitively qualify the offence of the refugee. Under that convention, the granting state's determination of urgency, its request for a safe-conduct and its prolongation of asylum shall be respected. The Caracas Convention on Diplomatic Asylum (1954) is an example of a useful regional treaty regulating the regional practice of diplomatic asylum. A similar treaty of universal application would fill an unfortunate gap.

CHAPTER. V

LIMITATIONS ON THE INVIOLABILITY OF DIPLOMATIC AND CONSULAR PREMISES

The inviolability of premises, enjoyed in varying degrees by diplomatic and consular premises, is necessary for the effective functioning of embassies and consular posts. Experience shows that, if no limits to inviolability are set, the resulting abuses could be devastating. The inviolability of diplomatic and consular premises must be conceived, taking into consideration the receiving state's right to self-defence.[393] Limits to the inviolability of premises also become apparent, if the local population is seriously threatened or if there is serious danger to human life. Inviolability of premises also ceases in certain circumstances. For instance, when diplomatic or consular relations between the sending and receiving states have come to an end.

It is proposed to examine the problems of limitations as they relate to diplomatic premises, consular premises, and to the duration of the inviolability of premises.

A. DIPLOMATIC PREMISES

Diplomatic premises are inviolable. However, there are cases, where the authorities or the agents of the receiving state may have access to such premises, without necessarily obtaining the consent of the sending state. In practice, it means that the agents of the receiving state may have access to diplomatic premises, after obtaining the consent of the authorities or agents of the sending state. It would be appropriate to presume that any head of a diplomatic mission, who knows that his diplomatic premises are in danger, would call the fire department or the police department of the receiving state, to ask for their prompt intervention. A problem would arise, where the authorities of the receiving state have not been called in. There would also be a problem, if the receiving state has been unable to obtain the consent of the sending state.

1. Fire or Epidemic within the Premises

The Vienna Convention on Diplomatic Relations (1961) does not provide, that if fire breaks out or if there is an epidemic in diplomatic premises, agents of the receiving state may enter such premises, without the consent of the sending state.[394] According to Article 22 of the Vienna Convention on Diplomatic Relations (1961), there should be no intervention, even if a skyscraper housing diplomatic premises were on fire. It is obvious that failure to intervene in such cases could lead to irreparable loss.

On New Year's Day 1956, a fire broke out at the Soviet Embassy in Ottawa. Firemen were trying to put out the fire, but embassy personnel interfered with the firemen.[395] At that time the Diplomatic Convention (1961) did not exist, but because of the absolute inviolability of diplomatic premises, the Soviet

Embassy personnel interfered with the firemen. After that incident, the City of Ottawa made representations to the Canadian government that such interference by embassy officials should not occur again.[396] Because that fire could spread to neighbouring buildings, it endangered life, public safety and property.[397] On 3 August 1956, the Canadian Department of External Affairs sent Circular Note No. A-16 to chiefs of diplomatic missions in Ottawa.[398] Paragraph 7 of that Circular Note provides:

> The Secretary of State for External Affairs wishes to state that, in the event of a fire breaking out in a mission, the Canadian Government expects that the Fire Department would be summoned promptly and he expresses the hope that the Fire Department would be allowed immediate access to the premises for the purpose of fighting the fire. He would also assume that in the event of a fire or other disaster requiring the use of fire fighting equipment that there would be no objection to the Fire Department entering upon the premises of a Mission for the purpose of dealing with the emergency without prior reference to the Chief of Mission or his representative.

According to paragraph 6 of that Circular Note, the Fire Department determines whether or not a fire is "likely to endanger human life and the public safety or property other than that owned by the mission concerned." Furthermore, paragraph 6 provides that if that danger is a likelihood the Fire Department would be justified to take all measures necessary to control the fire, whether or not the chief of mission consents to such measures. However, the Secretary of State for External Affairs stressed, at paragraph 6, that in all cases the Fire Department should "respect the confidential character of those areas of the mission where confidential material was customarily used or kept" if the firemen knew such areas. The point is that when there is case of emergency such as a fire, there is the need for local officials to enter diplomatic premises, in order to save human life or property. During an emergency immediate action has to be taken, and if the envoy cannot be contacted early, irreparable loss of property or human life could be suffered.

The International Law Commission also discussed the entry of local officials, such as firemen, into diplomatic premises, during a serious emergency, without the consent of the sending state.[399] The International Law Commission was agreed that the failure, to deal promptly with a fire or some other emergency, was better than harming diplomatic relations between states by not respecting the inviolability of mission premises. Article 22 of the Diplomatic Convention (1961) maintains the absolute nature of the inviolability of diplomatic premises.

The Department of External Affairs Ottawa, in 1984 laid down guidelines for fire safety at Canadian posts abroad. The document prescribes the rules and responsibilities, which are associated with the Department's Fire Safety Programme for Posts abroad.[400] The document provides <u>inter alia:</u>

> Any person seeing Fire or Smoke, or smelling Gas is to:
> ... (c) During building core working hours, notify the Floor Fire Emergency Officer of the situation.
> (d) Telephone the Municipal Fire Department from the nearest safe location.[401]

The Department of External Affairs document also provides that after ensuring notification of the Municipal Fire Department, embassy personnel should be dispatched

> to meet the responding Municipal Fire Department at their designated entrance and provide any keys and floor layout drawings which may be required.[402]

During the time firemen are trying to extinguish a fire, elevators shall "not be operated unless specifically authorized by the Municipal Fire Chief."[403] Instructions of the Municipal Fire Chief "are to be awaited before re-entry of the building is permitted."[404] The Department of External Affairs guidelines to posts abroad demonstrate the willingness of the Canadian government to have local authorities of the receiving state help bring under control any fire, which breaks out at any Canadian post abroad. Canada's guidelines are laudable.

Embassies are generally expected to operate their premises in a way that does not harm other persons. That is a rudimentary rule of good neighbourliness. Each state or municipality has fundamental rules such as fire codes, noise regulations, and similar rules. These regulations are so necessary for peace and order in the city or community that they are rules of general application. The rules could also apply to diplomatic and consular premises.[405] Missions and consular posts should observe the laws of the receiving state. The observation of those regulations should normally not interfere with the smooth functioning of the diplomatic or consular premises. It is submitted that diplomatic or consular personnel should obey the laws of the receiving state, except where obeying the laws would make it difficult for such personnel to discharge their duties.

2. Crime of Violence within the Premises

Article 22 of the Diplomatic Convention (1961) forbids access to embassy premises by agents of the receiving state, even if there is a grave crime of violence about to be committed upon such premises. In such circumstances, to wait for consent of the sending state would amount to inaction by the receiving state. The consent might be given after the crime has been committed. Thus, access to eliminate the danger to human life is forbidden. Inviolability is absolute.

3. Other Emergencies

Other emergencies might include a civil commotion or aerial bombardment or other calamity, which necessitates prompt intervention by the local authorities. In such cases, waiting for the permission of the diplomatic envoy would lead to serious damage or loss of human life. There is no well-known exception, in practice, which allows access by local authorities, to diplomatic premises, without the consent of the sending state.[406]

4. The Problem of the Consent of the Sending State

The premises of embassies enjoy absolute inviolability under Article 22 of the Diplomatic Convention (1961). The agents of the receiving state may not enter those premises except with the consent of the sending state. Neither Article 22 nor any other article of the Diplomatic Convention (1961) provides expressly for any circumstances when the entry, by the agents of the receiving state, into embassy premises may be presumed; not even if there is a fire break out or any other grave emergency at those premises. The lack of a provision for restricted cases when the consent of the sending state may be presumed is an unfortunate omission in the Diplomatic Convention (1961).

The United Nations Convention on Special Missions (1969) at Article 25 stipulates that the premises of special missions are inviolable. The agents of the receiving state may not enter the premises of a special mission without the consent of the sending state. However, Article 25 further provides that the consent of the sending state may be assumed in case of fire or other disaster which endangers public safety seriously. That consent will only be assumed, if it has been impossible to obtain the express consent of the head of the special mission or, where appropriate, the consent of the head of the permanent mission. Instances where consent would be assumed are restricted, so that abuses could be limited or eliminated as much as it is feasible in practice. The provision for assumed consent in the Convention on Special Missions (1969) ties in with modern reality.

There might be cases where the sending state refuses to allow the agents of the receiving state to enter diplomatic premises. For instance, on New Year's Day in 1956, Soviet officials interfered with firemen, who were trying to extinguish a fire at the Soviet Embassy, Ottawa.[407] The entry of local agents into diplomatic premises, without the consent of the sending state will depend on a number of factors. For instance, risks to human life, to property or to the security of the receiving state are essential elements, which have to be taken into consideration. Sometimes the ambassador or his staff may be unable to give the required consent, because terrorists have made them hostages.

a) <u>Danger to Human Life</u>

It is reasonable, that if anything causes serious danger to human life, within the premises of a mission, the local authorities would request the consent of the sending state, in order to enter such premises. If it is not possible to come in contact with the authorities of the sending state, or if such consent is refused, the local authorities, in extreme cases, might be obliged to enter the premises. First, the danger to human life should be so grave that no well-organized, receiving state would fail to enter the premises, in order to preserve human life in those circumstances. Secondly, events must be such that the danger to life is not a deliberate pretext, created by the local authorities, for the sole purpose of penetrating the premises.

If a treaty-based rule is broken by the receiving state for good reasons, then breaking of the rule might be tolerated by the international community. After the April, 1984, incidents at the Libyan People's Bureau in Saint James's Square, London, the British police questioned and searched all persons, including the Libyan diplomats, who were leaving the People's Bureau Building.[408] The search was done so as to avoid danger to the lives of the policemen and other persons. However, the British police searched the persons of all occupants leaving the building, but not the diplomatic bags of the Bureau. The search of the persons of the diplomats is not allowed under international law, but it was done on that occasion in the interest of the personal safety of the policemen. It appears that laws on the inviolability of diplomats or mission premises could be set aside, if there is need to prevent danger to or save human life.

Arthur J. Goldberg suggests that the Libyan People's Bureau in London should have been searched after the Libyans brutally murdered Constable Yvonne Fletcher and wounded other persons.[409] The murder was so brutal and so unwarranted, that it had nothing, whatsoever, to do with the normal functions of an embassy. It can be said that the Bureau had become an operational base for some criminals, who were using the principle of inviolability as a cloak to perpetrate criminal activities. In spite of that, the Bureau still enjoyed inviolability, probably because respect for diplomatic inviolability is one of the tenets of civilized behaviour. In the American Hostages Case (1980) the Court emphasized that inviolability remains a cardinal principle of international law.[410]

L. C. Green says that it is normal practice that local agents should not enter diplomatic premises without the consent of the head of mission.[411] However, the circumstances could be such that the head of mission is unable to give consent.[412] For instance, if the ambassador and his staff have been made hostages by terrorists, who threaten to kill their hostages or blow up the building. The local authorities may enter the embassy premises, in order to save the lives of the hostages and take hold of the terrorists. The entry would be justified, because the reasons which caused the local authorities to act were salutary. The justification for the unauthorized entry would be that human life was in sure and impending danger. The circumstances were such that the officials of the receiving state could not wait for that consent to come from the government of the sending state.

An example concerning the inviolability of diplomatic bags is illustrative. British government officials searched diplomatic bags and found Mr. Umaru Dikko, who was about to be flown to Nigeria in a box from the Nigerian High Commission, London.[413] Umaru Dikko had been accused of embezzling public funds before he left his country, Nigeria. A British government Report on the Review of the Vienna Convention on Diplomatic Relations and Reply to The Abuse of Diplomatic Immunities and Privileges, concluded, "that the inviolability of the diplomatic bag cannot take precedence over human life."[414] The British government pointed out that the search of the boxes was justified. The inviolability accorded those bags had been totally misused. It was a serious abuse of inviolability. It is certain that the inviolability of diplomatic premises is different from that of diplomatic bags. The important point is that immunity should not be used to cover criminal acts. It is submitted that no inviolability should be allowed to operate, in such a manner that it takes precedence over human life.

b) Danger to Property

Constantly, we talk of mission premises, as if they were in simple, small houses. It has been the case, and in Ottawa that is still a popular practice. However, more and more embassies have their premises in high-rise buildings. If there is an outbreak of fire, should the local authorities refuse to enter the embassy premises for lack of consent from the sending state? If the local authorities do not enter, the fire could devour a whole, high-rise building including the premises of the mission. The loss of property, and even of human life, might be so great that respecting the principle of absolute inviolability would be a literal interpretation of the Vienna Convention on Diplomatic Relations (1961). To stand idly and see a high-rise block burn down to ashes, because there is lack of consent from the sending state, would be unrealistic. Even the interpretation of a treaty should weave itself into the social reality, which sending and receiving states confront each day. Danger to property or human life, therefore, would lead to a situation, where to be realistic, the receiving state might have to ignore, at least momentarily, the treaty provision that inviolability of diplomatic premises is absolute.

c) Safeguard of the Security of the Receiving State

The safety of any state is central to the existence of that state. The instinct of self-preservation causes each modern state to go to any extent to preserve its existence. States today have sometimes been fragile and unable to stay united, if some event intervenes and makes it impossible for the government to function efficiently. Thus, few modern states will risk their fundamental security, even if it entails the violation of some treaty, such as the Vienna Convention on Diplomatic Relations (1961). There is a striking example. In 1973, the Pakistani Ministry of Foreign Affairs informed the Iraqi Ambassador to Pakistan, that there were arms stored at the Iraqi Embassy.[415] The Iraqi Ambassador refused to give consent for a search of the premises. However, the local armed police in the presence of the Iraqi Ambassador, searched the premises of the mission, found, and took away a large consignment of arms stored in crates. The forcible entry of the police can be justified ex post facto, because Iraq had breached the provision of Article 41 (3).[416] That article prohibits the use of diplomatic premises in a manner incompatible with diplomatic functions. Iraq had abusively used its embassy. It is obvious that mere suspicion of abuse by Iraq could not have given the forcible entry any legal backing. The storing of those arms was dangerous to the security of Pakistan. Iraq did not have the right to keep those arms.

Pakistan acted in self-defence. The necessity to enter the premises of the Iraqi mission was overwhelming, leaving no other choice that could adequately respond to the situation. The doctrine of self-defence in international law is restrictive. The right to self-defence arises "where there is a serious threat or actual danger, where there is no other means of averting it or bringing it to an end."[417] Action taken in self-defence has to be limited to what is necessary and proportionate.[418] Pakistani action was necessary and reasonable. It was called for by Iraqi, dangerous misuse of the premises. The storage of extremely dangerous arms at the embassy was a serious threat and an actual danger to Pakistan.

d) Picketing and Demonstrations at Premises

All over the world nations or societies have varying records on social policies, such as racial issues, human rights, economic organization or political regimes. Sometimes groups of persons picket diplomatic premises, in order to support or oppose the policies of a sending state. Picketing and demonstrations, when carried on close to or in the premises of a diplomatic mission, could demean the dignity of that diplomatic mission and also harm the reputation of the sending state. Some laws are silent on picketing and demonstrations at mission premises.[419] In the United States picketing within a certain number of metres from mission premises is an offence under the law.[420]

It has been argued that picketing and public demonstrations in a free society are simply an exercise of the freedom of expression, which is guaranteed and protected by the constitutions of most civilized nations in the western hemisphère. As a result, picketing and public demonstrations at diplomatic premises should be prevented only, where such public manifestations paralyse the functioning of the embassy or consular post.

In April 1985 the British Secretary of State for Foreign and Commonwealth Affairs agreed that demonstrations could disrupt the peace of embassies, impair their dignity or even lead to violent incidents.[421] The Secretary of State stated that the United Kingdom's duty to protect the peace of embassies, under Article 22 of the Diplomatic Convention (1961), could not be interpreted so widely that no demonstrations are allowed outside those premises. The British government agreed with the House of Commons Foreign Affairs Committee that

> the essential requirements are that the work of the mission should not be disrupted, that mission staff are not put in fear, and that there is free access for both staff and visitors. How each demonstration is policed in order to ensure that these requirements are met without undue infringement of freedom of speech is primarily a matter for the police.[422]

The government Report showed that there were some 350 demonstrations each year outside embassies in London.[423] The London police have wide powers and have been dealing with all sorts of demonstrations and marches outside mission premises. From the Report it is clear that the police in the British capital city strike a balance between preserving the peace and dignity of missions, on the one hand, and protecting the exercise of the freedom of speech, on the other hand.[424]

The Report leaves the impression that expressions of public opinion, as is the case when there is picketing or demonstrations, are a healthy element of a free democratic society. Expressions of public opinion do not necessarily violate international law, Article 22 of the Diplomatic Convention (1961), provided that a demonstration, for example, does not jeopardize access and egress, and that the persons within the mission are not afraid, that the mission might be damaged or its staff harmed.[425] The test to be applied is whether or not the picketing or demonstration impedes the peaceful continuance of work within the mission. Demonstrations or picketing which insult the sending state would be allowed when that test is used. Many demonstrations and picketing, which are demeaning to a mission, fall short of hindering the continuance of work at the mission. The test might be simple, but it is difficult to apply. It is not always easy to know if mission staff are afraid. Fear is a psychological reaction to a series of stimuli in given circumstances. Fear is not easy to determine or perceive. When demonstrators get angry, they can become unruly and attack the premises of the mission. Violent mobs easily undo police barricades.

B. CONSULAR PREMISES

The general principle of the inviolability of consular premises is recognized in many consular conventions. There are exceptions to this rule and there are also risks, where there are accepted cases of presumed consent.

1. Consent Presumed in Cases of Emergency

Out of courtesy or sheer practice, the local authorities will probably ask for the consent of the consular head of post or his representative, before entering the consular premises for one reason or another. It appears that the consular authorities will normally grant permission. However, there are cases, where the consent is presumed, namely, in the case of fire or some other disaster or where a crime is committed in the consular premises.[426]

Sometimes the presumption of consent does the work out well. On 15 January 1987, a fire broke out at the Soviet Consulate in Montreal, Canada. Soviet officials held the firemen at bay for 15 minutes, while the fire was spreading to other parts of the building.[427] The Soviets refused to let the firemen enter the premises of the consulate to put out the fire. The district fire chief finally ordered his firemen to fight the fire from the street, using four aerial platform trucks. In fact, the Fire Department was not called in by the consular staff, but by a neighbour who spotted the smoke. Some of the Soviets were trying to extinguish the blaze with garden hoses and buckets of snow.[428] The district fire chief suggested that his firemen be allowed to enter the consulate building, but that the Soviets could search the firemen, before allowing the firemen to leave the premises. The Soviet officials turned down the offer. The district fire chief recalled that some years back firemen had put out a fire at the Soviet Consulate in Montreal. The consular officials on that former occasion complained that files were missing after the firemen were gone.

In spite of Article 31 (2) of the Consular Convention (1963), local authorities could still be held at bay, while a fire burns and brings down a building. The important thing is that the presence of the firemen at the blazing Soviet Consulate proves that the receiving state acted diligently exercising due care, but the sending state deliberately prevented the firemen from putting out the fire, in order to avoid the destruction that followed. It would be logical to presume that the consequences of the fire should be the responsibility of the Soviet Union, the sending state. The consular officials acted on behalf of the Soviet Union. The argument could be pushed further. The Soviet Union should repair the damage, if any was caused to other persons.

Some consular conventions provide for absolute immunity of consular premises. The United States-Costa Rica Consular Convention (1948) provides for absolute immunity for such premises, just as if the aim were to raise the level of the inviolability of consular premises to that of mission premises.[429] The United Kingdom-China Consular Agreement at Article 3 paragraphs 1 and 2 states that the consular premises of each country will enjoy full inviolability and protection, as provided for diplomatic premises under the Vienna Convention on Diplomatic Relations (1961).[430] That position comes extremely close to that of the communist countries, which in theory and practice seek to narrow the diplomatic-consular gap.[431] One of the main reasons is that the arbitrary distinction between diplomatic (political) and consular (economic) functions and status are too refined, and of little significance for states, which mix up their politics and economics, and the import-export trade is all the business of the same government.[432]

The present position is that there is a right of entry into consular premises in certain exceptional cases. In spite of that, there is a general tendency to maintain the inviolability of consular premises. For instance, when a fire broke out at the Soviet Consulate in Montreal, the firemen stayed out of the consulate, because Soviet personnel refused to let the firemen enter the premises.[433]

2. Risks of Presumed Consent for the Sending State

Presumed consent for access into consular premises can give the receiving state an opportunity to forcibly enter consular premises. The presumed consent makes the immunity of consular premises fragile and unsure. In cases like that, the risk of abuses being committed by the local authorities remains permanent, whatever the circumstances.

Today more than ever before, consular posts handle consular problems, which are hardly distinguishable from diplomatic problems. It is to be urged that the growing tendency to let consular premises benefit from an increasing degree of inviolability is a healthy development, which should be encouraged.

C. DURATION OF INVIOLABILITY OF PREMISES

The inviolability of the premises of embassies or consular posts commences, may be suspended or may cease. The commencement, suspension, and termination are limits to the principle of the inviolability of the said premises. Inviolability, as usual, is linked to the existence of privileges and immunities accorded diplomatic or consular premises.

1. Commencement of the Inviolability of Premises

Inviolability of diplomatic and consular premises may begin, when the receiving state has received notice; when the premises are placed at the disposal of the sending state; or when the premises are effectively occupied.

a) Notification of the Receiving State

Article 3 of the Harvard Draft Convention foresaw, that inviolability of premises would commence on notification to the authorities of the receiving state of occupation, or use of such premises.[434] The Diplomatic Convention and the Consular Convention are not explicit on this point.[435] However, it would appear that notification must be backed by occupation, or use of the premises in order to give entitlement to inviolability and protection. Notification to the authorities of the receiving state, would in normal cases be dictated by practice. It is by such notification that the local authorities are informed of the exact address of the diplomatic or consular premises. That notification also makes it possible for the receiving state to organize the protection of the premises. Thus, notification of the receiving state, coupled with occupation or the use of the premises, will be the commencement of entitlement to inviolability.

b) When Premises are Placed at the Disposal of the Mission or Consular Post

In certain cases, the inviolability of premises begins, when the premises have been put at the disposal of the diplomatic mission or consular post.[436] Putting the premises at the disposal of a mission alone does not suffice. The sending state must have complied with local laws on housing. The sending state's intention to use the premises for the purposes of the mission must have been made clear. The intention may be made just after building and decorating have been finished. This is United Kingdom practice.[437] The mere fact that the premises have been put at the disposal of the consular post or diplomatic mission, will not alone give entitlement to inviolability. Before long there should be something more concrete, such as the effective occupation of the premises. If effective occupation does not follow, inviolability would be less certain. Entitlement to inviolability would be less obvious and more shaky.

c) Effective Occupation of Premises

Effective occupation of premises would serve as the greatest proof, that those premises are meant to be used for diplomatic or consular purposes. Mere purchase of premises would not give entitlement to inviolability.[438] A sending state may buy several buildings in a city, but use only one of the buildings as its mission or consular premises. In such a case, only the building used for the purposes of diplomatic or consular premises will enjoy inviolability. Thus a vague intention to use the premises is insufficient. Effective occupation is strong evidence of the intention of the sending state, to use the premises for specific purposes. In 1959, Latvia, Bulgaria and Hungary maintained no diplomatic relations with the Federal Republic of Germany; Japan maintained an embassy in Bonn.[439] In each of the four cases, property in West Berlin had been sold by Jewish emigrants to a foreign state, which had used it, as mission premises, till 1945.[440] The Supreme Restitution Court for Berlin held "that a remote intention on the part of a state to use property owned by it for mission premises is not sufficient to give rise to the privilege of inviolability and that there must be actual use for diplomatic purposes". In Tietz et al V. People's Republic of Bulgaria (1959)[441] it was held that diplomatic premises enjoy immunity, only when they "are in fact used for the intended diplomatic purposes".[442] The main question is whether the property is, in fact, set aside for diplomatic purposes. The mere purchase of premises for the use of the mission does not give rise to immunity. To enjoy inviolability the premises must be effectively used for the intended diplomatic purposes.

2. Suspension of the Inviolability of Premises

The question of the termination of inviolability of mission premises is not expressly dealt with in the two Vienna Conventions on Diplomatic and Consular Relations.[443] If there is suspension of the use of premises, due to war or a temporary break in consular or diplomatic relations, should there also be a suspension of the inviolability of premises? It might be argued, that where the suspension of relations between two countries is not for too long a time, that suspension of relations should not lead to the suspension of inviolability. If the premises are not used for diplomatic or consular purposes for a long time, the claim to inviolability would be groundless. In Tietz et al V. People's Republic of Bulgaria (1959)[444] the Bulgarian government argued, that property did not cease to be entitled to immunity, unless there was intentional termination of its use of embassy premises; that argument was rejected by the Supreme Restitution Court for Berlin.[445] Relations between the two states may have been originally suspended, because of war or a temporary break in relations. That suspension in relations, which led to suspension of inviolability would, before long, come to an end. That would also lead to an end in the suspension of inviolability. Inviolability would again become valid.

3. Termination of the Inviolability of Premises

The termination of the inviolability of consular or diplomatic premises could be the result of: the rupture in relations between receiving and sending states, the extinction of one of the states, the end of a special mission, the termination of relations between states by agreement, or the outbreak of war.

a) Rupture of Relations between the Receiving and Sending States

The rupture of relations, between the receiving and sending states, will normally lead to the closing down of the diplomatic mission or the consular post. When there has been such a rupture and the premises are vacated, inviolability of the premises should come to an end, after the lapse of a reasonable time. The landlord of the premises will again be free to enter the place, where the mission and consular post once existed.[446] The rupture of diplomatic relations is usually the result of the unilateral act of one of the states. One of the states decides that, for one reason or another, it will sever relations with the other state.[447] After that happens, the sending state will allow the mission or the consular post of the receiving state, to enjoy inviolability for a reasonable time. Even though the decision of one of the states to sever relations may be unilateral, that unilateral decision brings an end to relations between the two states. The United States severed diplomatic and consular relations with Iran during the American hostage crisis.[448]

The rupture of consular relations will occur, if the receiving state withdraws the exequatur of the consular chief of post. A withdrawal of exequatur often takes place after the head of a consular post has violated local laws, or has interfered in the internal affairs of the receiving state.[449] In 1973, the exequatur of the French Vice-Consul in Boston was withdrawn, because he used force to prevent the application of local laws.[450] Article 2 (3) of the Consular Convention (1963) provides that the severance of diplomatic relations does not ipso facto include the severance of consular relations. However, except where it has been stated otherwise, consent to establish diplomatic relations implies consent to establish consular relations.

b) Extinction of One of the States

When either the sending or receiving state disappears or ceases to exist, the diplomatic relations between the two states logically cease to exist also. As a normal consequence, the inviolability of their diplomatic premises is extinguished. One of the states may lose its identity by being conquered; by being merged with another or other states; or by becoming part of a union with another state or other states.[451]

A revolutionary change in the government of one of the states does not per se sever relations between the states. However, one of the states may use a violent coup d'état, as a reason to sever relations, between it and another state or other states. Some political revolutions are so radical, that the new regime has little or nothing to do with the former regime. For example, radical and fundamental changes occur, when a monarchy becomes a republic or when a republic is restored to a monarchy.[452]

If a new government is not recognized by the receiving state, the consular post continues to discharge its functions, while waiting for new instructions.[453] If a new government is immediately recognized, there is no break in relations between the states concerned.[454] Immediate recognition ensures continuity in relations. How immediate any recognition is, is a question of fact to be determined in each individual case.

In June 1979, Libya suddenly announced its abolition of all Libyan embassies and its diplomatic corps.[455] At the same time, Libya announced that in the place of each embassy, there would be a People's Bureau and its personnel to be called People's Committee of the People's Bureau. Was that change fundamental enough to change the form of relations between Libya and the states, where it had embassies and consular posts? To answer this question, it is necessary to find out if, apart from the change of name, there were any other significant changes. It appears that the People's Bureaux simply replaced the embassies. The Bureaux carried out the functions of embassies under the Vienna Convention on Diplomatic Relations (1961). The April 1984 incidents in Saint James's Square, in which gunfire from the Libyan People's Bureau in London killed police constable Yvonne Fletcher, is an isolated incident.[456]

c) <u>End of the Functions of a Special Mission</u>

Article 20 of the United Nations Convention on Special Missions (1969)[457] provides that the functions of a special mission shall terminate, <u>inter alia</u>, upon:

i) the agreement of the states concerned;

ii) the completion of the task for which the special mission was set up;

iii) the expiry of the duration for the special mission, except where the duration is expressly extended;

iv) notification by the sending state that it intends to terminate or recall the special mission;

v) notification by the receiving state that it considers the special mission to have ended.

The termination of a special mission may result from many other circumstances. The list under Article 20 of the Convention on Special Missions (1969) is only indicative. Article 20 also provides that the severance of diplomatic or consular relations between the sending state and the receiving state shall not of itself result in the termination of special missions, existing at the time when the diplomatic or consular relations were severed. This provision underscores the specificity of special missions in international law. Sending and receiving states could, even in the absence of diplomatic or consular relations, conduct official business through special missions.

When a special mission has come to an end in one of the ways provided for under Article 20 of the Convention on Special Missions (1969), the premises of the special mission should, within a reasonable time, cease to enjoy inviolability. Article 25 (2) of the Convention on Special Missions (1969) in language that is similar to that of Article 22 of the Diplomatic Convention (1961) provides that the premises where a special mission is established shall be inviolable.

d) Termination of Diplomatic Relations by Agreement

Relations between two states may be terminated by an agreement between the two states. In this case, the mission or consular post may be withdrawn for economic reasons.[458] In such cases the states may proceed, as between themselves, to use honorary consulates, and increase the use of other forms of contact, for example, special missions or meetings between state representatives in a third country. Also, representatives attending an international organization meeting, could find time to meet and negotiate purely bilateral issues.

Often it is the mission or consular post that ceases to exist, but relations between the states subsist. The two states may agree to have a third state represent the sending state. In other cases a representative of the sending state accredited to a different country, may take over the work of the mission, as it is happening in the growing number of multiple accreditations.[459]

In 1965, the United States government, for economic reasons, closed its consulates in Birmingham, Glasgow, and Southhampton, but kept open those of Edinburgh, Liverpool and Belfast.[460] The termination of diplomatic relations between states by agreement may also take place, because the mission is unnecessary, having regard to the smallness of the interest, which may require to be protected.[461]

e) Outbreak of War

Diplomatic relations cease, when there is a formal state of war. War normally begins with a declaration of war and ends with the conclusion of a peace treaty. There are conflicts between states, but such ordinary conflicts do not always bring about the severance of diplomatic or consular relations.[462] Between the years 1932 and 1941, China and Japan were engaged in armed conflicts.[463] However, those armed conflicts fell short of a state of war. War between China and Japan was not declared until 1941. In the interest of world peace, countries try to maintain diplomatic relations, for in the absence of those ties, there is no contact between states. A lack of good relations between states makes conflicts more probable. Mohammed Ahmad suggests that for consular relations to exist, there must be a state of peace between the states concerned.[464] In the absence of peace, consular or diplomatic relations come to an end. War is terrible, because it ends diplomatic and consular relations, between the states fighting.

Whenever diplomatic or consular relations come to an end, the probable result is that the premises of embassies or consular posts would be shut down. From the moment embassy or consular premises cease to be used for the functions of such services, inviolability of the premises should cease, within a reasonable time.

It comes out clearly that the limitations on the inviolability of diplomatic and consular premises are necessary. Those limitations water down the rigour of the outstanding principle of inviolability, which is essential to the normal conduct of relations between nations. The limitations do not, in any way, reduce the importance of the principle of inviolability.

PART II:

DUTIES AND RESPONSIBILITIES RELATING TO THE INVIOLABILITY OF DIPLOMATIC AND CONSULAR PREMISES

CHAPTER VI

FULFILLMENT OF OBLIGATIONS BY SENDING STATE: A PREREQUISITE FOR THE INVIOLABILITY OF PREMISES

The sending state has a right to privileges and immunities. Those advantages facilitate the functioning of the diplomatic and consular services of the sending state in the receiving state. If those are rights for the sending state, the rights are not without obligations attached to them. Obligations to be fulfilled by the sending state can be considered, as a corollary to the different advantages it enjoys.

Article 41 of the Diplomatic Convention (1961) provides that sending states have to respect the laws and regulations of the receiving state; avoid interference in the internal affairs of their state of residence; communicate with the receiving state through the Ministry for Foreign Affairs; and, use the mission premises only for the performance of the functions of the mission. Article 55 of the Consular Convention (1963) took, almost word for word, the provisions of Article 41 of the Diplomatic Convention (1961). The obligations of consular posts towards the receiving state are akin to those of diplomatic missions. Cooperation and friendly relations between sending and receiving states are important also. World peace and economic progress largely depend on the growing, friendly relations and the increasing political and economic cooperation between nations.

A. PROMOTION OF PEACEFUL RELATIONS AND COOPERATION BETWEEN THE RECEIVING AND SENDING STATES

1. The Diplomat as a Messenger of Peace

The diplomat, through the activities of his mission, has to promote peace and understanding between the governments and peoples of the sending and receiving states. That is often done by the envoy through his daily contacts, speeches and television or radio interviews. A diplomat has a duty to promote friendly relations between the sending and receiving states.[465] This duty of the diplomatic mission, for a long time, received only scant attention. And yet through that promotion of peace and understanding between states, the chances of future conflicts and wars could be minimised. Reducing tensions between states helps increase the chances of attaining and maintaining world peace, even among nations, which do not have official diplomatic or consular relations.

Today, more than ever before, consular posts accomplish tasks, which were originally diplomatic tasks.[466] Because of these relatively new functions of consular posts, consular agents also participate in bringing peace and understanding to receiving and sending states. Consular personnel, wherever they may be, should seek to promote friendly relations between states. The honorary consul is also in a position to play that role. Article 17 of the Consular Convention (1963) provides that consular agents may, in certain circumstances, perform the tasks of diplomatic agents.

2. Cooperation as the Essence of Relations Between States

The main traditional functions of diplomatic missions include reporting, negotiating and collecting information on developments in the receiving state. Today diplomatic missions have broadened their sphere to include economic affairs, especially trade and commerce.[467] Promotion and exportation, importation, investment, cultural and scientific cooperation have grown in importance. Developed and developing countries need each other. Economic cooperation helps mankind share the fruits of technological and cultural advancement, thereby ameliorating the human condition globally.

Consular posts spend a lot of time ironing out economic scientific and cultural relations between sending and receiving states.[468] Thus, both consular posts and diplomatic missions, through their search for international cooperation, are involved in helping nations to work towards the same goals: the advancement of mankind.

B. NON-INTERFERENCE IN THE INTERNAL AFFAIRS OF THE RECEIVING STATE

Article 41 of the Diplomatic Convention (1961), and Article 55 of the Consular Convention (1963) stipulate, that without any prejudice to their privileges and immunities, it is the duty of diplomatic and consular agents not to interfere in the internal affairs of the receiving state.

1. Internal Affairs Exclusively for the Receiving State

The diplomatic or consular agent has no right to meddle in the internal affairs of the receiving state. It may be argued that in order to discharge his duties, as an efficient representative of the sending state, the diplomatic or consular agent is likely to interfere often, in the internal affairs of the receiving state. There have sometimes been allegations that diplomats have helped overthrow governments or even helped radical political parties, if the policies of the receiving state were detrimental to the interests of the diplomats' home state or nationals.[469] If diplomatic or consular officers were allowed to indulge in the internal affairs of the receiving state, that would, more often than not, destroy the friendly relations between the states concerned. Each country should be free to pursue its own policies, as determined by its government and people. Internal affairs are directly linked to the sovereignty and political independence of each state, and such affairs should be left to that state alone.

2. Interaction of Internal Affairs and Foreign Policy

A diplomat has to spend time studying the internal policies of the receiving state, in order to report intelligently to his home government. It is obvious that, if the receiving state has internal or external policies, which are detrimental to the interests of the sending state, the ambassador of that sending state would not appreciate it. It is the responsibility of such an ambassador to explain to his government what is happening in the receiving state. The ambassador should also suggest to his government how he believes those policies could be changed or modified. Through diplomatic notes the sending and receiving states can explain their different positions and hopefully arrive at appropriate solutions. For instance, Canada's treatment of Cameroonian students could directly and negatively affect the relations between Cameroon and Canada. Through an exchange of views, the sending state (Cameroon) and the receiving state (Canada) could find amicable solutions to the problem. However, if the ambassador, in a case like that, approached students' unions, made public speeches or organized demonstrations to bring pressure to bear on Canadian authorities, that would amount to serious interference in the internal affairs of the receiving state. Rendering assistance to a political party, or helping a group of soldiers to conduct a coup d'état, would have the same effect. Assisting a political party does not violate the law, if done by a citizen of the receiving state. However, it is an interference in the internal affairs of the receiving state, when it is done by a diplomat or consular agent.[470]

Sometimes the internal policy of a receiving state may violate human rights and pose ethical problems to diplomatic missions. Where internal policy allows for, or even supports the violation of fundamental human rights, the diplomatic or consular agent is placed in a difficult situation. In Idi Amin's Uganda, political dissidents were either killed or imprisoned without a fair trial. Ugandan internal policy had violated the United Nations Declaration of Human Rights (1948) and related covenants. Even in those circumstances, diplomats would still be interfering in the internal affairs of the receiving state, if they make statements criticizing local policies. What foreign missions may do is to inform their governments and finally help may come, as it did in Uganda.[471] Foreign missions have a responsibility to report on serious, habitual abuses of human rights. However, those missions would be interfering in the internal affairs of the receiving state, if they openly criticize the local authorities, or contribute to any propaganda, that tarnishes the image of the government or people of the receiving state.

C. RESPECT OF THE LAWS OF THE RECEIVING STATE

The receiving state's power, to prescribe rules of conduct for those within its territory, is not limited by diplomatic or consular immunities. Diplomatic and consular agents are under the law of the state where they serve, but the receiving state may not sanction them, because of the immunities such personnel enjoy.

Diplomatic or consular services and their personnel have to obey local traffic rules, architectural regulations, labour regulations, insurance laws, and so forth.[472] If that were the contrary, the presence of foreign missions in a receiving state, would create unsolvable problems. For instance, traffic regulations are so fundamental that their violation creates incalculable risks for everybody.

1. Inviolability of Premises and the Violation of Local Laws

Diplomatic and consular laws provide for certain privileges and immunities. The diplomatic and consular agents, who enjoy those advantages, have a duty to obey the laws of the receiving state. Thus, there are rights and obligations, which go together.[473] In some countries, such as Canada, there are laws at federal, provincial and municipal levels. The diplomatic and consular corps have to obey all those laws.

Diplomatic and consular premises enjoy inviolability. However, even within those premises, the laws of the receiving state have to be obeyed. For instance, if the local laws forbid the making of explosives within homes or offices, there would be a violation of local laws, if explosives are made within diplomatic or consular premises. Thus, the inviolability enjoyed by a sending state should never be used, as an excuse for the commission of an offence forbidden by local laws. In Canada diplomatic and consular personnel, who wish to possess firearms must comply with the local laws governing the registration, possession, and carriage of firearms.[474] In practice, legality is determined by international or municipal laws. The advantages enjoyed by missions and consular posts are only allowed to the extent, that such advantages are used for the proper and legal functions of the embassy or consular post.[475]

2. Authorization of Wireless Transmitters

In practice, diplomatic or consular services require the authorization of the receiving state, in order to operate wireless transmitters.[476] This is an area, which attracts the close surveillance of the receiving state. Wireless transmitters are potentially dangerous, because the embassy or consular post could use those installations to intercept secret messages, being sent or received by the local authorities. In order to control the use of wireless transmitters, the receiving state regulates the use of frequencies by the operators of wireless transmitters. In some young countries obtaining authorization to operate those installations is so difficult, that a lot of potential applicants just never arrive at applying for authorizations. The obligation to have an authorization as a precondition, reduces the freedom of the sending state. It is a limitation on the sending state's freedom of action. In Canada the grant of a licence to install and operate a wireless radio transmitter on diplomatic premises is discretionary and is based on reciprocity and on conformity with the Radio Act (Canada) and corresponding local laws.[477] Electronic monitoring, listening to communications to, from, and within diplomatic premises, is generally tolerated.[478] Some receiving states do that as a form of fighting to cripple espionage activities.

3. Information Gathering and the Problem of Espionage

According to Article 3 (d) of the Diplomatic Convention (1961) and Article 5 (c) of the Consular Convention (1963), gathering information and informing the sending state are proper functions of diplomatic missions and consular posts. These articles which make gathering information legal also impose the conditions in which the practice must be undertaken. The techniques used for gathering, processing and disseminating information within the receiving state must be legal; they must not break the laws of the receiving state. Governments seek knowledge from reliable sources, so as to decide well. Leaders struggle to know what happens in different parts of the world. A political event in Canada could influence the political and economic posture of a young, developing nation.

Diplomatic or consular agents act legally, if they gather information from the radio, television, newspapers, books, or from any other sources, which are not forbidden by the local laws.[479] Gathering intelligence within diplomatic circles, through contacts, or discreet and socially-accepted diplomatic intercourse, is an unending process, which is ancillary to almost all contacts within diplomatic milieux. Today the means of gathering, processing and disseminating intelligence have attained great refinement. Extracting information on a person to person level is efficient and can hardly be controlled, especially in the liberal democracies. The gathering of information becomes an improper function of diplomatic and consular agents if illegal means or sources are used. That could amount to espionage.

a) Espionage: Definition

The definition of espionage or spying depends largely on the laws of each country. According to Webster's Dictionary espionage or spying "is the use of spies to obtain military, political, industrial etc. secrets."[480] <u>The Oxford Companion to Law</u> states that espionage or spying in international law is

> the art of a person who, during war, clandestinely or under false pretences seeks to obtain information concerning one belligerent in order to communicate it to the other.[481]

Espionage has also been defined as

> Gathering, transmitting, or losing information on national defense with the intent or with reason to believe that the information will be used to the injury of the Unites States or to the advantage of any foreign nation.[482]

Acts of espionage are subversive, undercover, hidden or are designed to get what is concealed. Such acts might involve eavesdropping, bugging devices or the recruitment of citizens of a nation to work against their country. Espionage generally has one or two essential ingredients: "disguise" or "false pretences".[483] A spy acts in disguise or under false pretences. The term "spy" is used to cover diplomats or other state agents, who illegally gather secret information.[484] The secret information might be military, political, industrial or scientific. One important point is that espionage or illegal gathering of information leads to information, which could possibly be used to undermine or harm the national defense or security apparatus of the receiving state. In our modern world military, political, industrial, cultural or scientific secrets could harm the defence posture or the national security of the receiving state. Espionage is not one of the lawful functions of diplomatic and consular agents. Spying is one of the abuses which diplomatic and consular staff commit. There seems to be a presumption that diplomatic or consular agents, who spy do so on behalf of the sending state. However, it is possible for an agent to spy for his personal benefit. There are cases in which diplomats or consular staff accused of spying have been harshly treated. Usually,receiving states would declare a diplomatic or consular agent accused of spying persona non grata or discreetly ask the sending state to recall such persons. A general definition of espionage nowadays is hard to find, because any definition depends on the political perception of each government.

b) State Practice

Spying activities have been discovered, from time to time in embassies in different parts of the world. Arun Chaturvedi explains that in 1985, India reacted with severity, when it was discovered that diplomatic missions, namely, the French and Polish missions, had been involved in spy operations, passing information to other governments, which had vested interests in Indian affairs.[485] Chaturvedi does not state exactly what the Indian government reaction was. It is interesting to note that the French and Polish embassies did not get the information principally for their respecting countries. The two embassies gathered the information in order to pass it to governments, which probably had a serious interest in receiving secret information on India.

In 1971 the British government requested the recall of 105 Soviet diplomatic agents hosted in London, out of a total of 550 of whom 280 enjoyed diplomatic status. The action of the United Kingdom was based on information given by a former KGB agent on the espionage activities of Soviet personnel at the embassy in London. The Soviet government reacted with a written protest and the expulsion of four British diplomats.[486]

Swiss authorities recorded 178 cases of espionage between 1948 and 1978. The cases involved 303 persons; 97 of them were diplomats and international civil servants.[487] This shows how diplomats have continued to indulge in espionage activities.

In January 1978, Canada declared 13 Soviet diplomats personae non gratae because of "inadmissible activities in violation of the Official Secrets Act, and of course of their status in Canada."[488] On that occasion the Soviets were said to have made a plot to penetrate the Royal Canadian Mounted Police's security service, by attempting to recruit a member as a double agent.[489] Using double agents is an efficient means of infiltrating the security or defence system of any nation.

In June 1988 the Canadian government expelled eight Soviet diplomats, for engaging in what Prime Minister Brian Mulroney called "improper and unacceptable behaviour."[490] Another nine Soviet diplomats, who had completed their tours of duty and had already returned home, were told that they were not welcome to return.[491] The Soviet officials were accused of engaging in military commercial and industrial espionage.

The Soviet government, almost simultaneously, expelled two Canadian diplomats from Moscow and banned the return of three others, who had already left the Soviet Union.[492] On 23 June 1988, Canada ousted an additional diplomat and banned another one. Canada also cut the Soviet contingent in Ottawa to 60 from 63. On 25 June 1988, the Soviet government also expelled Canada's military attaché for "activities incompatible with his official status."[493] At the same time the Soviets declared seven former diplomats personae non gratae and withdrew 25 Soviet members of the Canadian Embassy staff, more than half the total.[494]

"Unacceptable activities", "activities incompatible with the status of diplomats", or "interference in the internal affairs of the receiving state", could constitute veiled references to espionage. There are numerous expressions in which espionage activities are veiled. That makes it difficult for any person to find out or attempt to find out the details of any accusations against diplomats.

Before the June 1988 expulsions, Canada had expelled 42 Russians since 1946.[495] The names of banned diplomats are automatically put into the computer banks of all 16 members of the North Atlantic Treaty Organization (NATO). The members of NATO could eventually each decide on the admissibility on their territories of any of the banned diplomats. An official of the Canadian Security Intelligence Service explained that the expulsion of Soviet spies was meant to cripple the KGB's ability to operate in the Western hemisphere.[496] These attempts to cripple espionage are not longlasting. Electronic espionage has perfected the art of spying. The Vienna Conventions of (1961) and (1963) dealt with diplomatic and consular relations at a time, when electronic espionage was less perfected.

c) <u>The Difficulty of Preventing Espionage</u>

The inviolability of diplomatic and consular premises makes the fight against espionage difficult. The immunities and privileges which missions and consular posts, while making it easy for the diplomatic or consular agent to function, also provide a general cover for espionage within the receiving state. Between the legal gathering of information and espionage there is a thin line, which is not easily drawn by the receiving and sending states. R. Venneman suggests an example where the line is blurred. He points out that in the economic sector, simple research is hardly distinguishable from an act of economic espionage.[497] In the <u>American Hostages Case</u> (1980) the Court stated that it was difficult to determine when the exercise of normal diplomatic functions

> expressly recognized in Article 3 (1) (d) of the 1961 Convention, of 'ascertaining by all lawful means, conditions and developments in the receiving State' may be considered as involving 'espionage' or 'interference in internal affairs'.[498]

Thus the Diplomatic Convention (1961) and even the Consular Convention (1963) fall short of determining what methods of gathering information are lawful or unlawful. The accusations usually made against diplomats or consular agents are vague. Most of the time the accusations hardly use the words "espionage" or "spying". "Unacceptable activities" or "activities incompatible with diplomatic functions" and other expressions have been euphemisms for "espionage" or "spying".[499] The vagueness of the accusations is further compounded by the fact that the truth is known only to either receiving or sending state or to both states. Each of the states in its espionage or counter-espionage operations uses covert methods. Thus the accusations made and methods used have not allowed for the development of a useful definition of espionage in international law.

In the American Hostages Case (1980) the Court pointed out that in cases where, under the cover of diplomatic privileges and immunities, embassy staff engage in abuses such as espionage or interference in the internal affairs of the receiving state, there are remedies.[500] The receiving state, under Article 9 of the Diplomatic Convention (1961), could declare the diplomatic agent *persona non grata*. The sending state would either recall that person or terminate his functions with the mission. Similarly, Article 23, paragraph 4, of the Consular Convention (1963) provides that the receiving state is not obliged to give the sending state reasons for declaring any person undesirable. In grave cases the receiving state could break diplomatic relations with the sending state and call for the closure of the offending mission.

The fight against espionage is difficult, because spies are hardly ever known to the receiving state. Spies have the titles of diplomats and carry on with their espionage discreetly. The receiving state may declare certain diplomatic or consular agents personae non gratae, but it is never known how many spies stay back to continue to spy. Secondly, declaring a few diplomats undesirable hardly undoes the spy network, which the expelled spies, and spies who are not expelled might have set up. Such networks may include nationals of the receiving state. Many nationals sell secrets to spies. To those nationals it is a financially lucrative business.

Espionage and even counter-espionage elude clear legislation. To legislate effectively would imply understanding and explaining the purposes and processes of intelligence agencies. In their reactions against spies, governments take positions, in order to limit espionage. Also, many governments attempt to please the electorate. That involves a high level of political judgment. As a result some expulsions might be justified, whereas others are not.

It is difficult for the receiving state to break diplomatic relations each time there is a case of espionage. Espionage is so common and so widespread, that breaking diplomatic relations each time would cripple the relations of a state that does so. In the conduct of relations between states, stability and continuity of relations bring credibility. Breaking relations is resorted to only in extremely grave circumstances. Civilized nations tolerate espionage, which has become one of the illegal, but sure components of relations between states. Some nations are responding to spying by counter-espionage, which seems to attain higher stages of improvement as the years pass. In the 1990s counter-intelligence will probably develop new scientific methods to counter espionage, more than it has done up to this moment.[501]

D. REMEDIES AVAILABLE TO THE RECEIVING STATE IF OBLIGATIONS OF THE SENDING STATE ARE VIOLATED

Sometimes a sending state refuses or is unable to live up to its obligations. In such circumstances the receiving state may ask for an apology; declare any staff of the embassy or consular post *persona non grata*; or sever diplomatic or consular relations between the two states. In certain cases, spies are arrested and are eventually swapped. There have been rare, extreme cases, where the authorities of the receiving state have forcibly entered the premises of the foreign mission. Each case depends on facts, and all the prevalent surrounding circumstances. States, which historically have a close relationship, tend to resolve their differences without much haggling. For instance, countries, which have similar political ideologies, or belong to the same military alliance, will minimize diplomatic and consular conflicts between themselves. For example, the United Kingdom and the United States of America seem to resolve their differences, without attracting the attention of the international media.

1. Demand of an Apology

The receiving state may request that the sending state apologize for some mistake or offence, which the agents of the sending state have committed.[502] Usually, the apology lays the matter to rest, and the sending and receiving states continue to relate, as they had dome before the mistake or offence was committed. State practice allows any country to ask for an apology. In April 1972 a bomb exploded at the premises of the Cuban commercial mission in Montreal.[503] One person died and some others were wounded. When policemen arrived at the scene, three armed men put up a resistance. Finally, policemen of the anti-terrorist unit intervened and arrested six persons, who were later charged with the illegal possession of firearms. The Cuban government protested. The Canadian government made an apology and also promised to end the crisis.

2. Declaration of Staff as Persona Non Grata

International law and state practice allow receiving states, to declare a diplomatic or consular agent persona non grata, for acts committed for personal reasons or official reasons.[504] The declaration makes of the agent, who is cited therein, an undesirable person within the receiving state. In June 1988 Canada declared undesirable 19 Soviet diplomats. Moscow responded by declaring 13 Canadian diplomats personae non gratae. On both sides there were accusations of espionage and unlawful activities.[505] When the sending and receiving states are very friendly, they may resort to a less painful exercise. In such a case, officials of the receiving state discreetly inform the Ambassador of the sending state, that he ought to cause one or some of his staff to be recalled for reasons, which the Foreign Ministry of the receiving state may, or may not explain to that Ambassador. In that way, the staff may be recalled, as if it were simply for the sake of redeployment.[506]

3. Severance of Diplomatic or Consular Relations

The receiving state may break relations with the sending state, because the latter or its agent has violated one or some of the different rules, which are meant to make inter-state relations go smoothly.[507] Severance of diplomatic or consular relations is one of the most severe measures, which may be Legally resorted to by any state. That type of severance makes it extremely difficult for the two states to continue to communicate efficiently. Instances of the rupture of diplomatic relations have existed throughout the history of diplomacy. For instance, Australia and the Soviet Union broke off relations, because Australia refused to let the Soviets forcibly take back to the Soviet Union one of the Embassy staff.[508] On 7 April 1980 the United States broke off diplomatic relations with the government of Iran, after Iranian militants had taken over the U. S. Embassy in Tehran on 4 November 1979.[509] This will be further discussed in Chapter IX.

Severance of relations could lead to an impasse, because it eliminates all the effective channels of communication and negotiation. This type of rupture of relations translates into reality the frustration and bitterness of the nation, that has decided to cause the severance. The practical results to be achieved by it are questionable. The rupture of relations between sending and receiving states, often does not solve the problem that caused the conflict. The rupture may instead aggravate the conflict.

4. Entry into Diplomatic Premises Without the Consent of the Sending State

There are instances, where a sending state violates its obligation to promote peaceful relations and cooperation, between both sending and receiving states. The violation by the sending state may consist of interference in the internal affairs of the receiving state, or a failure to respect the laws of the receiving state. In exceptionally grave cases, a receiving state may, for its own survival, enter diplomatic or consular premises, without necessarily obtaining the consent of the sending state. Practice shows that a forcible entry will not be tolerated by most civilized countries, unless it is certain that without such an entry, the fundamental security of the receiving state will probably be at stake.[510] Mere suspicion will not support forcible entry.

In 1973 Pakistani agents forcibly entered the Iraqi Embassy in Pakistan, searched the premises, and found huge consignments of arms stored in crates.[511] The forcible entry was justified ex post facto, because the effective discovery of the arms demonstrated that the Iraqi Embassy had violated Article 41 of the Diplomatic Convention (1961). If the Embassy were a consulate, that Iraqi possession of arms in the premises, would have been in breach of Article 55 of the Consular Convention (1963).

Because that justification is only ex post facto, the forcible entry could end up being a source of embarrassment, for both the sending and receiving states, if the entry and search do not yield the results sought after. The Pakistani government, after discovering the arms in 1973, sent a strong protest to the Iraqi government; declared the Iraqi ambassador and an attaché personae non gratae; and recalled its own Ambassador to Iraq.[512] The Iraqis abused the inviolability, which their Embassy premises enjoyed, and fell victim to severe disheartening measures, orchestrated by the Pakistani government.

Other cases of the misuse of premises of diplomatic or consular posts have been dealt with mildly or amicably. Where diplomatic or consular premises serve as refuge for an asylee, many governments have been tolerant, and have acted cautiously avoiding unnecessary conflicts. In the Asylum Case (1950) Peru did not order its agents to forcibly enter the Colombian Embassy in Lima to take hold of Haya de la Torre, who had taken refuge in that embassy. It could be argued that his presence in that embassy did not compromise the security of Peru.[513]

5. Spy Swapping

As nations develop, espionage grows with international intercourse between governments, and private organizations. Once in a while, diplomatic or consular agents are caught for spying in the receiving state. Espionage charges are sometimes vague and are hard to be proved before courts. Spies are often kept and traded or exchanged for other spies. The receiving and sending states negotiate such exchanges between themselves. The United States and the Soviet Union have resorted to spy swapping in recent years.

6. Other Remedies

Two recent events in London are worth noting. On the 5 July 1984, at Stanstead Airport, police broke open a crate and discovered in a drugged state Umaru Dikko, a former Nigerian Minister of Transport.[514] The crate, in which he was found, was supposed to be a diplomatic bag, but the crate did not "bear visible external marks of their character"[515] as required under Article 27 (4) of the Diplomatic Convention (1961).

The Secretary of State for Foreign and Commonwealth Affairs at a later date said, inter alia,

> ...that the advice given, and the advice that would have been given had the crate constituted a diplomatic bag, took fully into account the overriding duty to preserve and protect human life.[516]

Even if the two crates in which Dikko and three other persons were, had been marked diplomatic bags, they still would have been broken into, because of the overriding duty to protect life.

By extrapolation, some similarity does exist between the forcible entry into the Iraqi Embassy by Pakistani authorities, and the breaking of the crates from the Nigerian High Commission in London. Somehow, the acts, even though done without the consent of the sending states, were justified ex post facto.

Another recent event was the killing of a policewoman, Constable Yvonne Fletcher, on April 17, 1984, at St. James Square, London, by gun fire from the Libyan People's Bureau.[517] In spite of that use of arms, British authorities did not order forcible entry into the People's Bureau. The British police did not storm the Bureau. The inviolability of the Bureau was respected.[518] Goldberg suggests that in the Libyan Bureau incident, the Embassy staff acted as terrorists, failing to respect the laws of England, and that the Bureau ought to be stripped of its inviolability.[519] Goldberg further suggests that in such extreme cases, breaking diplomatic relations with the sending state, as did the United Kingdom, is almost meaningless.[520]

In the result, each of the measures available to the receiving state has to be used with caution. For instance, it is probable that if the United Kingdom had stormed the People's Bureau, the Libyans would have arrested and manhandled hundreds of British subjects in Libya. Sometimes a remedy, which appears attractive could assume new and strange dimensions. Each violation of a rule by a sending state should be studied carefully. The solution to be resorted to, should be one that does the least damage to the relations between the two states.

The position seems to be that, if a sending state does not live up to its obligations, the receiving state can apply a number of measures. However, the practice of states seems to indicate that, where the premises of a mission or consular post have been deliberately misused as in the case of the Iraqi Embassy in Pakistan, the receiving state may forcibly enter such premises; provided that the reasons, which compelled the local authorities to take that extremely severe measure, are serious enough and can be justified ex post facto. However, a justification ex post facto should not be used, as a weapon to weaken the inviolability of diplomatic and consular premises. Inviolability is the principle. Sending states should use all the means at their disposal, to make sure that diplomatic and consular staff handle themselves well in the different receiving states. Respect for the principle of the inviolability of premises also depends on how well diplomatic and consular staff respect the laws of the receiving states.

CHAPTER VII

SPECIAL PROTECTION OF THE INVIOLABILITY OF DIPLOMATIC AND CONSULAR PREMISES

Under international law, consular and diplomatic premises enjoy inviolability. The receiving state has a duty to take all appropriate measures, in order to give special protection to those premises. That special protection may include police surveillance, posting of armed guards at the premises or causing a police detachment to intervene during a public demonstration or other intrusion at diplomatic or consular premises. The main obligations of the receiving state, as concerns the special protection of those premises are: to prevent any act, which violates the inviolability of those premises; to bring to an end the act, if it has started; and, to prosecute and punish the perpetrators of the said act.[521] If a receiving state does not execute these obligations, it fails in its duty and it could be found to be responsible for the consequences of that omission.[522] Each receiving state has a duty to act diligently by taking appropriate measures, in order to adequately protect diplomatic and consular premises. Article 22 (2) of the Diplomatic Convention (1961) and Article 31 (3) of the Consular Convention (1963) both provide in similar language, that the receiving state is under a special duty to take appropriate measures, to protect mission or consular premises, against any intrusion or damage.

The appropriateness of steps to be taken by the receiving state is not defined. Each state will take steps, according to the circumstances. For instance, an armed attack will require measures, which are different from those, that will be taken in the case of a peaceful occupation of the premises.[523] States behave differently, in the way they handle the protection of foreign mission premises.[524]

The protection of consular or diplomatic premises has to be special. Its special nature comes from the fact, that there has to be increased vigilance and in the case of a crime against that protection, the punishment should be of exemplary severity. The presumption appears to be that the receiving state will ensure, that the premises of foreign missions are taken care of by local authorities, so that the vigilance exercised is higher than that deployed for ordinary offices or homes. In practice, that standard might be difficult to attain.

The due diligence expected of the receiving state is a standard and not a definition. The requirement is that the receiving state should, in its duty of special protection, act "reasonably". An analogy can be drawn between the state, which acts "reasonably" and the legendary reasonable man in the Common Law system.[525] The receiving state should aim at avoiding any violation of the inviolability of premises, and when such a violation has occurred, the receiving state should restore the inviolability of the premises, as early as possible.[526] Today civilized states endeavour to prevent the violation of diplomatic and consular premises in various ways. In some cases, states also endeavour to implement that prevention by enacting laws, and by the manner in which such laws are applied to punish offenders.

A. MEASURES AGAINST THE VIOLATION OF PREMISES

Giving special protection to diplomatic and consular premises, like any other duty for the maintenance of public peace and order, is demanding. It is always a difficult responsibility, because what is likely to happen in the future is hard to foresee. Even after the particularly protected premises have been violated, the main question to be answered is to what extent the risks of violation could be foreseen.[527] Because there is the inability to exactly predict, it is necessary that the receiving state take preventive measures. Sometimes preventive measures have to be taken in exceptional circumstances. Protective measures taken, in order to prevent attacks on the premises of diplomatic missions or consular posts, often cost a considerable amount of money. In Ottawa a security contract for the protection of embassies and some diplomats' homes is tendered by the Department of External Affairs through the Royal Canadian Mounted Police (RCMP).[528] In March 1985, when the Turkish Embassy in Ottawa was attacked, there was a security contract, between the Department of External Affairs, Pinkerton Security of Canada, Inc., and the RCMP.[529]

1. Preventive Measures in Ordinary Circumstances

Preventive measures in ordinary circumstances may range from police surveillance to the regular exchange of intelligence, between the sending and receiving states.[530] Where there is no special threat against an embassy, ordinary preventive measures are taken. In such a case there is no reason to step up security, because relative calm exists.[531]

a) Police Surveillance

The action of the police services is hardly visible. The measures are subtle and there is no need to make them visible.[532] For instance, undercover police officers or secret service agents may drive past the diplomatic or consular premises from time to time. Such premises may also have an alarm system, which is monitored by the police service in charge of the protection of foreign missions. These different methods make it possible for the local police to screen the surroundings of the protected premises.

b) Guarding Premises

Many reasons might cause the receiving state to have diplomatic or consular premises guarded permanently. For that there might be a policeman within the premises or in the vicinity of the premises. Some countries are the objects of terrorist threats. Because of the threats, guarding mission or consular premises permanently would be an appropriate measure. In certain cases that guarding might become unnecessary after a short period. These are areas where the receiving state has to be selective in its protective action. The local authorities have to establish scales of risks run by the diplomatic or consular premises. For instance, there was a Pinkerton Security guard at the Turkish Embassy, when terrorists attacked the premises on 12 March 1985.[533]

c) <u>Exchange of Intelligence between the Sending and Receiving States</u>

Article 4 of the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973)[534] stipulates, that states should take practical steps to prevent the preparation on their territories for commission, within or without their territories, of crimes against internationally protected persons. The same article requires, that states, parties to that convention, should cooperate by "exchanging information and coordinating measures to prevent the commission of those crimes".[535] The exchange of information will make it obvious to the receiving state, what risks the foreign missions in its territory run. Knowing the probable risks will also influence the choice of security measures to be taken, so as to ensure adequate protection of the premises. It is the practice, that the authorities of the receiving state will inform the head of mission or the head of consular post of any threats, or warnings of attacks or other offences against the mission or consular post.[536] Canada and Turkey exchanged intelligence a number of times, before 12 March 1985 when the Turkish Embassy, Ottawa, was attacked.[537]

2. Measures in Exceptional Circumstances

Preventive measures in ordinary circumstances become insufficient, ceasing to be appropriate, once there is a public demonstration, picketing, intrusion, takeover or violent attack at diplomatic or consular premises. The receiving state, in order to give the required special protection to the premises, should resort to measures, which are appropriate in the circumstances. The local authorities have to respond, taking into consideration all the facts, because the idea of due diligence is linked to the circumstances of place and time.[538] The receiving state must exercise its due diligence by responding to the situation, so that it is not found to have acted negligently.

a) Public Demonstration or Picketing

If there is a public demonstration or picketing at mission or consular premises, local authorities should do all in their power to bring the hostile actions of the perpetrators to an end.[539] Even peaceful public demonstration or picketing still jeopardize the dignity of the premises.

However, different countries may hold different views on this. In Great Britain picketing, except where it impedes the smooth functioning of the consular post or diplomatic mission, amounts to a simple exercise of the freedom of expression.[540] The impairment of consular or diplomatic dignity requires abusing or some insulting behaviour; and political demonstrations per se do not normally amount to impairment of dignity.[541]

In the U.S.A. the legal position is different. In that country it is an offence to display placards or flags intending to "intimidate or ridicule foreign diplomatic representatives"[542] or to congregate within five hundred feet of diplomatic mission premises.

In Canada during demonstrations the police maintain peace and order. Before the attack on the Turkish Embassy in Ottawa on 12 March 1985, demonstrations at the premises of that mission had become a "rite of spring for area residents".[543] Each time hundreds of policemen formed a line in front of the mission, and used metal barricades to keep demonstrators away from its walls. It would appear, therefore, that in Canada demonstrations are allowed, provided that they remain calm and peaceful. The situation in Canada is, therefore, similar to the one in Great Britain. Demonstrations are fundamentally an exercise of the freedom of expression.

Whether or not public demonstrations or picketing at premises are offences, the receiving state, even if it cannot or would not bring such acts to an end, is obliged to make sure that the public demonstration does not impede the smooth functioning of the embassy or consular post. The receiving state, by accepting the presence of the mission or consular post on its territory, impliedly accepts to grant it special protection. This obligation came out of the long practice of states.[544]

In the <u>American Hostages Case</u> (1980) there was evidence that in February 1979 demonstrators got into the premises of the

United States Consulates in Tabriz and Shiraz. Iranian authorities got the demonstrators out of those premises.[545] On 1 November 1979, the Iranian police took effective protective action, when policemen made sure that a big crowd of demonstrators marching up and down outside the United States Embassy in Tehran did not invade the mission premises.[546] This will be discussed in detail in Chapter IX.

b) Violent Attack or Takeover of Premises

More than forty-eight embassies were taken over in the world from 1971 to 1980.[547] Takeovers or attacks are violations of the premises of missions or consular posts. A violent attack or takeover makes it impossible for the foreign mission to function properly. The receiving state is under a duty to restore the inviolability of the attacked premises, as early as possible. The emergency measures deployed to end the attack or takeover would demonstrate the urgency with which the receiving state was ready to handle the violation of diplomatic or consular premises. The following examples will throw more light on takeovers of premises.

i) The Attack on the Rumanian Legation in Berne

In the night of 14 February 1955, persons of Rumanian origin forcibly entered the offices of the Rumanian legation in Berne, Switzerland, and killed the chauffeur of the legation.[548] Residents of that part of Berne informed the police. Policemen arrived and arrested one of the offenders, who had documents from the chancery of the legation. The police immediately gave the documents to the Chargé d'affaires of Rumania. The police, a short time before that, had helped the Chargé d'affaires escape from the legation. The Chargé d'affaires then authorized the police to enter the legation building, in order to capture the aggressors. The police refused to storm the building. The policemen explained that it would be wrong to storm the legation in the night. They also explained that as long as personnel of the legation and their families were still in the seized premises, there would be no storming of the building by the forces of law and order. For those reasons the police refused to use force at that point. The following day the Swiss Federal Parliament decided, that human lives should not be staked by any police action. After the parliamentary decision, the police resorted to intimidation and persuasion, calling on the terrorists to surrender. Thirty-eight hours from the beginning of the attack, the aggressors surrendered. The legation's documents, which were taken from the terrorists were immediately handed to the Chargé d'affaires.

Rumania, the sending state, argued that Switzerland had negligently failed to prevent the attack.[549] The sending state also criticized Switzerland for failing to put an end to the takeover and for its inability to arrest the terrorists. The Rumanian government also blamed the Swiss government for having failed to prevent the death of the wounded chauffeur of the legation. The Rumanian government asked that the Swiss government should repair the damage and loss caused by the attack, and that the terrorists be extradited to face their trial in Rumania.

The Swiss government replied that the attack could neither be foreseen nor prevented.[550] The Swiss police had intervened promptly and had acted diligently by using the methods, which it chose, due regard had to all the surrounding circumstances. The chauffeur, who later on died, had been taken to the hospital, as soon as he was found. Because there was no treaty of extradition between the sending and receiving states, the Swiss government based its decision on its national laws and decided that the aggressors would be prosecuted in Switzerland.[551] The Swiss government sent a note expressing its regrets over the death of Aurel Setu, the chauffeur.[552] The Swiss government made it known that it would, after the case had been judged, examine the possibility of making an ex gratia payment to the widow of Aurel Setu.[553]

There was no evidence that the Swiss government knew of any threat made against the Rumanian legation in Berne. The intervention of the police was diligent. The refusal of the police to stake any human lives was worthwhile. A refusal to risk the lives of human beings should be accepted as reasonable. On the whole the Swiss government acted reasonably, exercising due diligence.[554] The local police had not acted negligently. Due diligence is only a standard. The assessment of due diligence must not be divorced from the real circumstances in which the Swiss police acted. Later on the terrorists were tried and punished under Swiss law.[555] Switzerland had lived up to its obligations. It had not extradited the terrorists, but had prosecuted them accordingly. The Swiss government was not responsible for the attack of the Rumanian legation; the receiving state also handled the takeover appropriately.

ii) The American Hostages Case (1980)[556]

In November of 1979, Iranian revolutionists took over the United States Embassy in Tehran, and two United States Consulates in Tabriz and Shiraz.[557] The Iranian authorities did not intervene in order to restore inviolability to the diplomatic and consular premises. Instead, the authorities of that receiving state, in violation of international law and even Islamic law, allowed the aggressors to do what they did. Iranian authorities further praised the aggressors for having taken over the premises. The International Court of Justice found Iran responsible for refusing to protect the premises of the United States Embassy and two Consulates.[558]

The Court discussed the duty of the receiving state and drew the conclusion that Iran's obligations were

> not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.[559]

The obligation of Iran to protect the premises of the United States Embassy and the two Consulates—was all englobing. Iran was, therefore, under a special obligation to do everything possible to protect the different premises, especially because it was well known to the Iranian authorities that, because of the revolution led by Khomeini, the United States and its citizens were the objects of insults and threats in Iran.

The Court also dealt with the issue of the "appropriate steps", which a receiving state is supposed to take, in order to protect the premises of diplomatic missions or consular posts.[560] The Court held that on 4 November 1979, the Iranian government failed altogether to take any "appropriate steps" to protect the premises, staff, and archives of the United States' mission against the invasion by militants.[561] The Iranian authorities refused to take any steps to prevent the attack or stop it before it reached its completion. On 5 November 1979 Iran similarly failed to take appropriate steps to protect the United States Consulates in Tabriz and Shiraz. For instance, the Iranian authorities refused to intervene at the United States Embassy, in spite of urgent calls for help.[562] The Court pointed out that the failure of Iranian authorities to take the necessary steps "was due to more than mere negligence or lack of appropriate means".[563] It is apparent that Iran deliberately decided not to take the required appropriate steps to either prevent the takeover or stop it from attaining its completion. The American hostages crisis will be examined in Chapter IX.

iii) <u>Attack on the Turkish Embassy in Ottawa</u>

At 6:55 a.m. on 12 March 1985, a patrol of the Royal Canadian Mounted Police (RCMP) passed the Turkish Embassy building, Ottawa.[564] There was no sign of trouble. At 7:05 a.m. three men arrived at the Turkish Embassy in a truck, climbed the gate and there was a shootout with Claude Brunelle, a Pinkerton Security guard. An area resident informed the police of the shooting. The embassy door was blasted with explosives. At about that time the Turkish ambassador, Coskun Kirca, jumped from a window of the second floor. At 7:08 a.m. another area resident called the police to report the blast. At 7:09 a.m. Ottawa police and the RCMP began arriving on the scene. At about 7:10 a.m. Ottawa police constable Michael Prud'Homme scaled the wall to the south of the embassy compound, and dragged the Turkish ambassador out of the line of fire. That constable, in trying to save the ambassador, took a dangerous risk. Some person called the Ottawa office of the Canadian Press wire service to announce that he was a member of the Armenian Revolutionary Army, the group that had seized the Turkish Embassy. Negotiations between the terrorists and the police were carried on by loud hailer, because embassy telephones were busy. Later on an armoured military vehicle backed up slowly to the embassy's main gate. At about 11:10 a.m. an agreement to surrender was reached and the first hostages were released. Three terrorists surrendered.

The Turkish government denounced the attack, and asked that exemplary sentences be imposed on the terrorists.[565] The siege left one Pinkerton Security guard dead. The Turkish ambassador was critically wounded: his arm, leg and pelvis were broken. He sustained those injuries, when he jumped from the embassy's second floor window, to escape the attackers. Inside the embassy the terrorists rounded up hostages, including the wife of the

Turkish ambassador, his teen-age daughter and embassy staff members.[566] At the beginning of the attack the Pinkerton Security guard called in a "red alert" to his firm's headquarters at 7:01 a.m. and the "red alert" was immediately relayed to the RCMP's tactical squad.

On 7 May 1985 three persons Kevork Marachelian, Ohannes Noubarian, and Raffi Panos Titizian attended a preliminary hearing in which they pleaded not guilty to nine charges, which included attempting to murder Turkish Ambassador, Coskun Kirca, attacking the official residence of an internationally protected person, and the murder of Pinkerton Security guard, Claude Brunelle, on 12 March 1985.[567] After the seizure of the Turkish Embassy there were debates in the House of Commons, Ottawa. The Canadian press discussed the incident for a long time. It is important to examine the nature of the risk; and then the measures taken before, during, and after the seizure.

Nature of the Risk: The Turkish Embassy in Ottawa was a high-risk mission. In April 1982 Turkish commercial counsellor Kani Gumgor was shot and gravely wounded.[568] Four months later, Turkish military attaché, Colonel Atilla Altikat, was murdered by a gunman, who ambushed him in his car.[569] Almost every spring there were anti-Turkish demonstrations at the Turkish Embassy.[570] Each time hundreds of policemen would form a line in front of the embassy, and metal barricades would be used to keep demonstrators away from its walls. In some milieux renewed attacks against Turkish missions, in Europe or in America, were expected after a

French court handed down heavy prison sentences to Armenian terrorists.[571] In addition to all that, there was the upcoming trial in Ottawa, Canada, of three Armenian men on charges of conspiracy to murder a Turkish diplomat. That could also add to lingering fears that terrorists might strike any vulnerable Turkish targets, in order to display their determination to use violence, as a political weapon.[572] During debates in the House of Commons on 19 March 1985, Honorable Joe Clark, Secretary of State for External Affairs, stated that the Turkish Embassy approached the Canadian government more than twice to discuss the perceived threat to the embassy.[573] In mid-February 1985, the Turkish Embassy expressed concerns for the safety of the mission premises.[574] The Canadian government made a response to those concerns. The Turkish Embassy deemed the response satisfactory at that time. On 22 February 1985, a representative of the Turkish Embassy, had a conversation with the Office of Protocol about a separate issue relating to international terrorism; the Turkish representative also used the occasion to reiterate concerns about the threat perceived to the security of the embassy.[575] The conversation was reported to the RCMP. Another conversation occurred on 5 March 1985, when the RCMP visited the Turkish Embassy at their own initiative, to discuss with embassy personnel internal security provisions. During the meeting one member of the embassy staff discussed with the RCMP the level of threat to the embassy. Following each complaint about the embassy security, the RCMP acted immediately to increase their vigilance.[576] The attacks against Turkish diplomats in Ottawa, the demonstrations each spring, the heavy sentences passed on Armenian terrorists in France, and the concerns expressed by the Turkish Embassy to the Canadian government, made the Turkish mission in Ottawa a high-risk mission. An officer of the Department of External Affairs in Ottawa acknowledged, that the Turkish Embassy had become a high-risk mission.[577]

Measures taken before the Attack: The Canadian government took a series of preventive measures, because of the risk which the Turkish Embassy ran. The RCMP arranged to permanently have in the embassy compound a Pinkerton Security guard, who was armed with a handgun.[578] The guard's bullet-proof guardhouse was located inside a security fence on the embassy grounds. The guardhouse was equipped with direct alarm lines to municipal police. There were also closed circuit television cameras around the Embassy perimeter. Pinkerton guards also kept the residences of Turkish diplomats. 24-hour protective security patrols were also the practice.[579] For instance, on the day of the attack, 12 March 1985, an RCMP patrol passed at the embassy at 6:55 a.m., only ten minutes before the beginning of the seizure.[580] It was also asserted that the Canadian Security Intelligence Service (CSIS) had a network of informants within the Armenian community in Canada.[581] There was an exchange of intelligence between the Canadian government and the Turkish Embassy in mid-February 1985, on 22 February and on 5 March 1985.[582] The Canadian government assessed and intensively reviewed the security measures at the embassy in mid-February 1985. The Turkish Embassy was satisfied with the review and the changes.[583] Every time the Turkish Embassy expressed fears about its safety, the RCMP increased its vigilance.[584] Thus security up to the moment of the attack had been enhanced to meet growing threats against the embassy.

Measures taken during the Attack: The seizure started at 7:05 a.m. Ottawa police and the RCMP started to arrive at the embassy about three minutes later.[585] That was a quick arrival. As soon as the seizure began, the Pinkerton Security guard used his "red alert" system to inform his headquarters, which also informed the RCMP.[586] Constable Prud'Homme risked his life to save Ambassador Coskun Kirca.[587] The Ottawa police also carried out the negotiations with the terrorists diligently.[588] At 11:10 a.m. there was an agreement, and the terrorists were taken away for interrogation.[589] That was salutary. There have been cases, in other parts of the world, where seizures have lasted a few days or more. The manner in which the Canadian authorities handled the attack avoided further loss of life and property. The hostages, who had been held by the aggressors, were released after four hours. The happy ending goes a long way to show that the Canadian policemen used laudable negotiating skills.

Measures after the Attack: The Canadian government settled the medical and hospitalization bills incurred, because of the injuries, which the Turkish Ambassador sustained during the attack.[590] By bringing to a peaceful end the attack, the Canadian authorities restored the inviolability of the embassy premises. Canadian authorities decided to prosecute the aggressors. The terrorists, who seized the embassy were interrogated by Ottawa police, and the case was investigated. On 7 May 1985 preliminary hearing opened for three accused persons on charges related to the seizure of the Turkish Embassy on 12 March 1985.[591] The hearing was meant to determine whether or not the accused persons should be tried for their takeover of the Turkish Embassy. The trial of the three terrorists who attacked the Turkish Embassy in Ottawa started on 14 October 1986, at the Supreme Court of Ontario.[592] The terrorists, Ohannes Noubarian, Rafi Panos Titizian and Kevork Marachelian were found guilty and each sentenced to imprisonment for life; each prisoner would not be eligible for parole until he had served twenty-five years of his sentence.[593] Canada thus discharged its duty to either prosecute or extradite the terrorists. In May 1988 the Ontario Court of Appeal dismissed an appeal by the three convicted terrorists.[594] The convicted terrorists failed in their bid to overturn their first degree murder convictions for killing Claude Brunelle, a Pinkerton guard.

On the whole the Canadian authorities acted appropriately, taking all necessary steps to be vigilant, in order to protect the premises of the Turkish Embassy. Canada discharged its obligation to specially protect that diplomatic mission, as is provided under Article 22 of the Diplomatic Convention (1961). The measures Canada took before, during and after the attack, make it clear that Canadian authorities at all moments exercised due diligence. The policemen acted with due respect for human life. For instance, Constable Prud'Homme took incalculable risk to protect the wounded Turkish Ambassador. Canada, the receiving state, was not responsible for the attack against the Turkish Embassy on 12 March 1985. Canada's payment of the medical and hospital bills of Ambassador Kirca amounts to an ex gratia payment at best.

B. SPECIAL PROVISIONS IN MUNICIPAL LAWS OF THE RECEIVING STATE

It has been suggested that receiving states ought to enact special, penal legislation, geared towards rendering effective the special protection, which receiving states owe to diplomatic agents and their missions.[595] Some authors argue that since the receiving state has to protect diplomats and consular agents, there is an implication, that such a state should also enact particularly severe penal laws, in order to facilitate that protection. However, other authors say that there is no such obligation imposed on the receiving state.[596]

It is difficult to state what is a severe penal law and what is not. Severity is relative. What might be cruel and unusual punishment in one country, might be normal punishment in another country. In less democratic societies, the death penalty or a life sentence is still perceived as ordinary punishment for certain crimes. On the contrary, a good number of developed countries have abolished the death penalty, because they find it cruel and unusual.

There is no laid down obligation, that receiving states should enact special legislation to protect diplomatic and consular premises. However, it can be submitted that a receiving state, which enacts particularly severe laws and special rules of procedure, will probably find it less complicated to prosecute and punish offenders, who violate consular or diplomatic premises. Today more and more states ratify international treaties, thereby giving those treaties the force of municipal laws. For instance, the gradual ratification of certain treaties will before long make terrorists the enemies of mankind. This could become the case, even though there is yet no universally-accepted definition of the word "terrorist". In the result, it can be suggested, that wherever there are important loopholes, receiving states should enact special legislation, so as to better prosecute and punish, those who violate diplomatic and consular premises.

C. <u>DUTY TO PROSECUTE OR EXTRADITE</u>

Article 2 of the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973) stipulates that any state, party to that Convention, shall take steps to have offenders prosecuted and punished.[597] This is specifically the situation, where an embassy or consular post has been violated. In prosecuting or punishing, the state has to take into consideration the grave nature of all attacks, perpetrated on diplomatic or consular premises. Any state party to that Convention (1973) has the right to assume jurisdiction, even if the crime was committed outside its territory. This exceptional rule deviates from the principle, that criminal jurisdiction is based on the territory, where the offence was committed. The violation of diplomatic or consular premises under Article 2(b) of the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973), is therefore an international crime. That crime can be prosecuted in the state, where it was committed or in another state.

There is another obligation. At Article 6 of that Convention (1973), it is stipulated that the state, in whose territory the offender is found, must either prosecute the offender or extradite him. In this connection, it is important to add that the obligation of the receiving state to prosecute is fulfilled, if the matter has been handed over to the local authorities, who normally take care of prosecutions in matters of that nature. Whether or not punishment follows prosecutions, is for the local authorities, who prosecute to determine. The state, which hands the case to the department of prosecutions simply has to make sure that there has been due process of law. If the judicial authorities arrive at a decision, that decision should stand, except there is proof that there were serious procedural defects, which led to a miscarriage of justice. It is unnecessary that the state, where the prosecution is taking place, endeavours to secure a conviction against the offenders. That is not the role of the state in such circumstances, because that could vitiate the procedure.

After the attack on the Rumanian legation in Berne, the aggressors were tried, convicted and sentenced by the Swiss

Federal Criminal Court. The Swiss government turned down Rumanian government requests that the aggressors be extradited to Rumania.[598] In the *American Hostages Case* (1980) Iran neither prosecuted nor did it extradite the Iranian militants, who took over the United States Embassy in Tehran and its Consulates in Tabriz and Shiraz.[599] Iran failed to live up to its obligations under Article 6 of the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973). After the attack on the Turkish Embassy in Ottawa the Canadian government had the Armenian terrorists prosecuted for their criminal acts.[600]

Which offences are extraditable? Article 8 of the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973) stipulates that all offences, which amount to a violation of diplomatic or consular premises, are extraditable. The perpetrators of such offences should not be granted asylum. Those offences are not political in nature; their perpetrators are therefore common criminals and not political criminals. Article 8 further stipulates that states, parties to that Convention (1973) will in future include, those offences against diplomatic or consular premises, as extraditable offences in every future extradition treaty to be signed between themselves.

The special protection of diplomatic and consular premises has become a current topic. The question of special protection has been discussed in recent years in the Sixth Committee of the

United Nations. In October 1986, the Sixth Committee discussed "effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives."[601] The United Nations Secretary General had produced a report which placed "staff members of international intergovernmental organizations on the same footing as diplomatic and consular representatives to such organizations."[602] Some of the measures proposed for the enhancement of the protection of foreign missions and their personnel included expediting the ratification of relevant conventions, improving practical cooperation between sending and receiving states, and improving police protection for diplomatic and consular representatives and missions.[603] The General Assembly of the United Nations had on a previous occasion laid down procedures for member states to report measures taken to bring to justice violators of the protection, security and safety of diplomatic and consular missions and representatives.[604] The Canadian government had proposed that the United Nations Secretary General should develop a permanent, standardized, reporting procedure and should also prepare a form containing relevant questions to be circulated to member states.[605] Such a procedure would improve state reports. Clear reports would enhance the protection of foreign missions, by particularly drawing attention to the violations which had taken place during the year. Those reports would also show what role each state was playing, because the procedure would cause states to explain how they dealt with offenders, who, for instance, had violated diplomatic or consular premises. It would also become evident whether or not a state had prosecuted or extradited the offenders. The Sixth Committee adopted a Draft Resolution (A/C.6/41/L.8) containing the Canadian proposal.[606] The same Committee adopted another Draft Resolution (A/C.6/41/L.15) urging all states to take effective action to suppress terrorist and other acts of violence against diplomatic missions and representatives.[607] The second draft resolution also urged states, which had not yet become parties to the Vienna Conventions on Diplomatic (1961) and Consular (1963) Relations, to consider doing so at an early date.[608]

Today terrorists act privately, and in certain circumstances they are state-supported. On the international scene, more than ever before, some reactionary states have been identified, as being linked to terrorist activities. In this area reciprocity will probably play an important role. If a receiving state does not protect embassies or consular posts within its territory, that receiving state will probably not see its missions abroad enjoy any special protection. The United States Secretary of State, George Shultz, echoed that approach in 1985, when in a speech to the United States House Foreign Affairs Committee he said:

> Many nations see a relationship between the level of protection they provide our officials overseas and the protection we accord their officials here. By providing better protection here, we can help to ensure that we continue to get the same in their countries.[609]

It is not apparent in the short run, that a receiving state, which accords a high degree of protection to the missions on its ~~territory, will receive about the same degree of protection in~~ similar circumstances. However, in the long run that relationship is likely to be established. Between nations, reciprocity silently creeps into the give and take of diplomatic relations.

CHAPTER VIII

REMEDIES AVAILABLE TO THE SENDING STATE FOR VIOLATION OF ITS PREMISES

As explained in the previous chapter, a receiving state has a duty to provide special protection, for consular and diplomatic premises on its territory.[610] Whenever those premises are violated, the receiving state should act promptly, so as to re-establish the inviolability, which the violated premises are supposed to enjoy. In protecting diplomatic or consular premises, a receiving state should exercise due diligence in everything it does. In spite of that due diligence, it still happens that the premises of missions or of consular posts are violated. Sometimes the violations are committed by private persons acting privately. On some occasions the violators are state-supported. Is the responsibility of the receiving state always a result of that state's failure to fulfill its obligations under international law?[611] The receiving state is responsible for its negligence or its omissions. It must be negligence or an omission, which contravenes international law.[612]

Some sending states resort to remedies or ask that remedies be put in place, in order to repair the hardship or the loss, which was occasioned by the violation of their diplomatic or consular premises. A sending state may ask for diplomatic, political, pecuniary or other kinds of remedies. In order to have remedies, the sending state may negotiate, use good offices, ask for mediation, use commissions of inquiry, resort to conciliation, accept arbitration or seek the adjudication of the International Court of Justice. Often the method used goes a long way to determine the solution, that will be found. The solution may, in its own turn, have incalculable effects on the future relations between the sending and receiving states.

Any violation of consular or diplomatic premises is usually reacted to with vigour and promptness. Sometimes the violations seem to go straight to the core of the sovereignty of the sending state. It is as if the perpetrators of the violation sought to insult the dignity of the sending state and its agents. In other words, it can be said that the sending state is the object of the acts of violation, and the premises are only a vulnerable symbol of the sending state.[613] That partly explains, why the officials of the sending state generally react to the violation of their premises in a receiving state, with so much anger and even frustration. The 1955 attacks on the Rumanian legation in Berne[614] and the 1979 takeover of the United States Embassy compound[615] in Tehran, each attracted hard words from the sending states. Today such attacks attract the resentment of the whole international community. The attack in Berne will be discussed below in this chapter. The takeover in Tehran will be discussed in this chapter and will be dealt with in detail in chapter IX.

A. DIPLOMATIC AND POLITICAL REMEDIES

A sending state may resort to certain remedies and take some actions, which appear appropriate, when its diplomatic or consular premises have been abused. The choice of a remedy is not always easy for the sending state, because the remedy chosen could further strain relations between the sending and receiving states. A useful remedy might make both states enjoy a better relationship than they did before. Remedies should be based on clear, legal arguments and on sound political judgement.

1. An Apology

The sending state may ask for, and obtain an apology from the receiving state. In practice, the receiving state may proceed to offer an apology, without waiting to be pressured to do so, by the sending state or by the international community. An apology can set things right, by soothing the spirits of officials and even the population of the sending state. Those could be psychological factors of incalculable importance.

In Berlin on July 14, 1920, a mob tore down a flag displayed at the French Embassy.[616] France demanded and received reparation. Germany announced large rewards for information leading to the arrest of the person guilty of tearing down the flag. Germany did punish the offender according to the law. In addition to all that, Germany made apologies to France. The police officer, who was found responsible for the act was discharged. A detachment of 150 German soldiers stood and saluted the flag, the day it was restored.[617]

In 1908, during revolutionary disturbances in Tehran, Persian troops surrounded the British Embassy, because political offenders had been given refuge within that embassy.[618] The British government reacted promptly, demanding that the deployment of those troops be brought to an end. The British also requested that a formal apology be made by both the Persian Ambassador in London, and by the Persian Minister of Foreign Affairs. It was further demanded, that the Shah give a written guarantee for the lives of all the people in the surrounded embassy; and that Persian, political refugees should have a fair trial with a British representative present. In passing, it is apparent that some of those British demands were clearly exorbitant, because they came close to making a mockery of the Persian government. However, the point is that an apology is one of the remedies available to a wronged, sending state.[619]

2. Declaration of Persona non grata

Sometimes a sending state, in order to show its dissatisfaction over the violation of its diplomatic or consular premises, may declare as persona non grata diplomatic or consular staff of the receiving state.[620] That declaration renders undesirable the person or persons, who are the object of the declaration. A sending state may declare undesirable such staff, without stating the precise reasons for the declaration. It is a measure of extreme severity and generally shows, that the state taking it is dissatisfied with the receiving state for some act or omission. A person, who becomes undesirable, is obliged to leave as early as possible. In certain cases, the sending state suggests that the receiving state recall specified persons. In that way the persons are recalled, and the sending does not use the declaration to render undesirable diplomats or consular officer. A recall is usually less spectacular, because it avoids causing embarrassment to both the receiving and sending states.

On 12 July 1988 the United States government declared eight Nicaraguan diplomats personae non gratae.[621] The eight diplomats included the Nicaraguan Ambassador to the United States of America. Washington's reaction was in response to the kicking out of eight United States diplomats by the Sandinista government of Nicaragua. The Nicaraguan government claimed that the United States diplomats were guilty of carrying on activities, which were incompatible with their duties as diplomats.[622] Such expressions are generally meant to veil charges of espionage activities.

The expulsion of the Nicaraguan Ambassador, Carlos Tunnerman, was complicated, because he was also his country's envoy to the Organization of American States (OAS).[623] The United States, which is host country for the OAS, may not expel any person accredited to the hemispheric body. A spokesman for the United States government acknowledged the complication, but explained that the expulsion meant only that the Ambassador of Nicaragua would no longer be his country's envoy to the U.S.A.[624] However, Carlos Tunnerman would remain in the U.S., as his country's envoy to the Organization of American States.

In June 1988 the Canadian government expelled Soviet diplomats for engaging in improper and inadmissible activities; almost simultaneously the Soviet government expelled Canadian diplomats from Moscow.[625] Each of the two governments claimed that it had declared undesirable certain diplomats in response to behaviour that violated international law.[626]

3. Refusal of Certain Entry Visas

There are generally three types of visas: the diplomatic visa, the official visa and the ordinary visa.[627] Diplomatic visas are given on all diplomatic passports, even though they may be given on other passports exceptionally.[628] Official visas are normally granted to foreign government officials travelling on government business, and to personnel of certain international organizations, where grant of a diplomatic visa is not the practice or is not found to be necessary. Ordinary visas are given in all other cases. Each country largely determines what visas to grant in a given case.

A sending state, as a reaction to the violation of its consular or diplomatic premises, may refuse to grant certain entry visas to nationals or residents of the receiving state. That is especially severe, if there is a lot of trade or other types of business, between the sending and receiving states. Refusing to grant visas has been used as a diplomatic weapon. In 1976 Canada refused to issue entry visas to members of the Taiwanese Olympic team.[629]

Iranian militants on 4 November 1979, took over the United States Embassy in Tehran, imprisoning the Americans found in the premises. The American government took a series of measures. On 10 November 1979, the American government identified Iranian students, who did not comply with United States entry visa terms, with a view to beginning deportation proceedings against those, who had violated immigration laws.[630] Furthermore, in April, 1980, the United States government cancelled all entry visas issued to Iranians for entry into the United States.[631]

A sending state may refuse certain visas, without attracting much attention, because it is often hard to determine why a visa was refused. Reasons for each refusal are easily hidden or camouflaged under complex explanations. Instead of refusing visas, the sending state could unnecessarily delay granting visas, without explaining why. Another point of importance is that the refusal of visas is not reviewable in most countries.[632] The refusal of visas is final. Often the refusal is meant to show dissatisfaction with certain events, which the receiving state, its residents or nationals might have done.

4. <u>Severance of Diplomatic Relations</u>

Where diplomatic or consular premises have been violated, the sending state may take the severe step of breaking diplomatic relations with the receiving state.[633] Breaking diplomatic relations is a grave step, because it forces relations between the sending and receiving states to dwindle to an extremely low point. In some cases the severance indicates, that the two countries have so serious a conflict, that they can hardly tolerate each other. The sending state may use that severance to show disdain for the organs or agents of the receiving state. It could be because that receiving state has disregarded its obligations or has supported invaders of diplomatic or consular premises. The United States of America broke diplomatic relations with Iran, because Iranian, state-supported, Islamic militants took over the United States Embassy in Tehran and its Consulates in Tabriz and Shiraz.[634] In fact, severance of diplomatic and consular relations in a case like this one, was a logical reaction by the sending state. Iranian revolutionists had taken over the United States consular and diplomatic premises. The Islamic militants had also imprisoned the embassy personnel in the mission premises. This point will be discussed in detail in Chapter IX.

The sending state may refuse to continue to cooperate with the receiving state in some specific area, until reparation is made, or till such a time that certain conditions are fulfilled. In 1984, Mr. Urbina Lara, a Nicaraguan resisting the military draft, took refuge in the Costa Rican Embassy in Managua.[635] At one moment, when the Costa Rican diplomats briefly left the embassy, Sandinistas forcibly removed Urbina Lara from the building and imprisoned him. Costa Rica refused to continue to participate in the CONTADORA process until Urbina Lara was allowed to leave Nicaragua.[636] Thus because of that violation of diplomatic premises the CONTODORA process was interrupted for six months, between late 1984 and early 1985. Nicaragua had acted in total disregard of the customary, Latin American doctrine of diplomatic asylum. Costa Rica's refusal to participate in the CONTADORA process for six months was a remedy. Did that refusal punish Nicaragua alone? It appears that the refusal delayed the peace process in Central America, causing tremendous pain to more countries than Nicaragua. In other words, the punishment was not proportionate. The penalty went far beyond the "criminal".

5. Political Isolation of the Receiving State

A sending state whose diplomatic or consular premises have been violated, may attempt to politically isolate the receiving state. The sending state can do that, by making political propaganda against the receiving state. That propaganda could take the form of campaigning through different media, in order that a given receiving state should be excluded from international meetings, fora or sports competitions.

During the American hostages crises, the United States contacted friendly states, asking that measures be taken, in order to force Iran to have the hostages released. Many countries simply disapproved Iran's behaviour.[637] Third World and western governments were reluctant to adopt any sanctions against Iran. In April, 1980, European Community members and states such as Norway and Japan, decided to impose limited trade restrictions, but refused to sever diplomatic relations with Iran.[638]

The complete political isolation of any country is difficult to come by. Each country has friendly nations, no matter what its policies might be. When some countries are busy trying to isolate a receiving state, other countries might be trying to build up relations with that receiving state. The efficacy of political isolation might to carry much weight in the short run, but in the long run the country, sought to be isolated, finds a new circle of friends.

More often than not, a country which is temporarily isolated, may suffer rejection and regional insecurity and consequently resort to harsh, internal measures. Those internal measures do not help the people, that the international or regional community has been trying to protect. Political isolation could backfire and worsen things. A sending state should be careful, when it endeavours to isolate a receiving state politically.

B. PECUNIARY REMEDIES

A sending state, whose diplomatic or consular premises have been violated, could ask for pecuniary remedies from the receiving state. A sending state may ask for pecuniary, political and diplomatic remedies at the same time. Thus the sending state's demand for pecuniary remedies, should normally be compatible with a request for an apology, or for a recall of diplomatic or consular personnel. Pecuniary remedies are likely to be a solution, where the sending state lost property, human life or its reputation, as a result of the violation of its diplomatic or consular premises. Pecuniary reparation would enable the sending state to alleviate the suffering of private, physical or moral persons or of the sending state itself.

1. Payment of Damages for loss of property or human lives

During the violation of consular or diplomatic premises, nationals of the sending state may be injured or killed; the property of individuals or that of the government of the sending state, may be destroyed or illegally taken away. The Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973) does not provide, that failure by the state to fulfill its obligations entails its international responsibility.[639] However, according to the general principles of international law the responsibility of the receiving state is engaged, if that state does not show that it exercised due diligence, taking all reasonable steps for the prevention of offences, such as the violation of diplomatic or consular premises.[640] Reparation of damage caused by that violation should become a rule. The Canadian government maintains that the obligation to pay damages would induce receiving states to lay more emphasis on preventive measures.[641] However, whenever one state has to pay damages to another, there is a risk of <u>ex gratia</u> payments being made. <u>Ex gratia</u> payments are made as a gesture of goodwill by the sending state.[642] Simply making an ex gratia payment does not imply, that the state accepts its liability, or even that of its representatives; thus those are payments without any legal consideration at all.

On 12 March 1985 Armenian terrorists attacked the Turkish Embassy in Ottawa.[643] The consequences of the attack were serious. Ambassador Coskun Kirca, who was escaping from the attackers jumped out of a second-floor window. He sustained serious injury. The Canadian government paid the hospital and medical bills for the treatment administered to the ambassador.[644] Canada's payment of those bills is not conclusive evidence that the Canadian government accepted its responsibility for the seizure of the embassy and for the consequences of the attack. Receiving and sending states may grant favours to each other, even when there is no question of responsibility for actions or omissions under international law. In the whole matter, there is no available evidence that Turkey officially blamed the Canadian government for the seizure of the Turkish Embassy. All along before the seizure Turkey and Canada exchanged intelligence and co-ordinated their actions in order to step up the level of security at the Turkish mission premises.[645]

In the result, Canadian authorities acted with due diligence, exercising tremendous care and taking the appropriate steps that were required.[646] Canada discharged her special duty to protect the Turkish embassy. Canada was not responsible for the seizure. Ottawa promptly paid the medical and hospital bills for the wounded ambassador. It is submitted that the prompt payment was made "as of grace, and not of right."[647] It cannot be concluded that the payment was made because Canada was responsible for the seizure. The payment alone cannot be conclusive evidence of Canada's responsibility in international law. The payment should be seen as a sign of goodwill. Canada wanted to help alleviate the pain and frustration which the ambassador and Turkey had suffered, because of the attack. Thus the sending and receiving states solved their problems, without an open international conflict. International conflicts sometimes create more problems, than the parties to the conflicts are able to solve.

A cultural attaché of the Panamanian Embassy in Washington D.C., ran a red light and collided with Dr. Halla Brown's automobile.[648] The accident left Dr. Brown quadriplegic. Dr. Brown had to pay more than $300,000 in medical fees, because the cultural attaché, who enjoyed diplomatic immunity, could not be prosecuted. The United States government put pressure on the Panamanian government and threatened to cut aid to Panama. As a result, the Panamanian government made an *ex gratia* payment of only $10,000 to Dr. Brown. This is an example of payments, which are made in the general context of past, present and future relations, between sending and receiving states.

A receiving state, which is in trouble today, knows that tomorrow it could be a sending state in an advantageous position. Even a sending state should be cautious, in the way it presses for reparation of damage, caused to it by a receiving state. In diplomacy, receiving states are at the same time sending states. This sets the stage for compromises between states. In pressing for reparation today, no state should forget, that it could become the object of similar pressures overnight. Cases like Dr. Brown's do not come up every day. Ex gratia payments have been described as a type of restitution, which is paid "as a matter of grace and favour".[649] That ties in more with the dignity and prestige of both the receiving and sending states. Even after ex gratia payments have been made, it is hard to pinpoint the state, which is the wrong doer. Pointing an accusing finger would mean determining, which state neglected what; or which state exercised or did not exercise due diligence. An ex gratia payment avoids all those questions and the resulting, disruptive bickering.

2. Compensation for Damage to Reputation

The violation of diplomatic or consular premises could do incalculable damage to the reputation of a sending state. A violation like that could make the sending state look helpless, weak and unable to assert its sovereignty or its place on the international scene. For instance, when Islamic militants violated the U.S. embassy compound in Tehran in November 1979, and held hostage American nationals, the reputation of the United States suffered. It appeared that the American government was incapable of freeing its citizens held in Iran.

Where diplomatic or consular premises have been violated, the sending state's government might lose face in the eyes of its population and may also be made fun of by other countries. All that could make the sending state suffer politically, and lose its moral influence or leadership within regional or global organizations.

The main question which arises is simple. Should the sending state ask the receiving state for reparation for loss of reputation? It does not appear that when states ask for reparation, they ask for specific damages for loss of reputation, as a specific loss suffered. A sending state will probably ask for a lump sum, which would cover all sorts of losses or damage suffered by that sending state. It is also possible, that the requesting state either refuses or omits to mention damages for loss of reputation. Thus there could be different reasons explaining, why loss of reputation might not appear as a separate item, when a sending state makes its claims.

There is yet another point. When a receiving state apologizes to the sending state, the apology could be taken to pass for a remedy for loss of reputation. An apology will serve those purposes, especially where the apology is announced publicly on radio, television, or is published in newspapers. One of the main problems is defining or assessing the loss of reputation, which the sending state suffers, when its consular or diplomatic premises have been violated. Attempts at such definitions or assessments almost verge on wasteful thinking.

There could be cases where a sending state, because of violations of its foreign mission, suffers drawbacks on the international arena. Even in such circumstances, the sending state might benefit from the whole situation. External difficulties sometimes help build up productive, internal, political solidarity. Thus external complications could have positive internal effects. If that happens, the sending state will probably think it unnecessary to ask for damages for loss of reputation.

C. OTHER REMEDIES

The other remedies to which a sending state may resort, if its consular or diplomatic premises have been violated, include economic sanctions and third party settlement. Much ink has also been spilt on the problem of military options. The receiving state in those cases is the target of the sanctions.

1. Economic Sanctions

a) Collective Economic Sanctions

A group of states may use economic actions, which compel another state, the target, to comply with international norms.[650] The League of Nations Covenant, and later on the United Nations Charter provided, that states should bow to restraints on their conduct by settling disputes by negotiation or arbitration, instead of using force.[651] The United Nations Charter also foresees collective measures or sanctions, which are authorized by the United Nations Security Council. The Security Council will authorize or recommend sanctions to meet a serious threat to or a breach of the peace, or in response to some act of aggression. In order to use sanctions, there must be an agreement between all permanent members, and at least four non-permanent members of the Security Council.[652]

A sending state, which has suffered a violation of its diplomatic premises, may request that the United Nations Security Council authorize the application of economic sanctions against the receiving state. In January 1980 the American hostages were still in captivity in Tehran. At the Security Council, the Soviet Union, on 13 January, 1980, vetoed a U.S.-sponsored resolution for economic sanctions against Iran.[653] In spite of United States pressure, the Third World countries and western governments were reluctant to sever diplomatic relations with Iran. In April 1980, the European Community, Japan and Norway imposed limited trade restrictions against Iran.[654] Iran was in revolutionary chaos. Freezing Iranian assets in the West could easily lead to widespread withdrawals of deposits, and consequently make it difficult for Western banks and economies to function effectively. Collective and severe sanctions might have caused the Islamic militants to feel more insecure, ill-treat and even kill some of the American hostages. There was a great deal of uncertainty in dealing with Iran. It is also possible that the mere presence of western bloc embassies in Tehran checked the excesses of Iranian authorities.

b) Individual Economic Sanctions

A sending state may all alone apply economic sanctions against the receiving state. In that case the sending state would act at its own risk. In 1979, President Jimmy Carter ordered a wide range of economic measures against Iran; the sanctions included the freezing of all Iranian assets, held in the United States or assets controlled by persons subject to United States jurisdiction.[655] That presidential order led to suits, brought in the United States courts against Iranian defendants, generally on contractual grounds.[656]

Economic sanctions are humane alternatives to military coercion. Thus economic sanctions at the most, are economic aggression, which falls short of the threat or the use of force. However, economic sanctions hardly work. The existence of the veto and the power rivalry within the United Nations Organization, are handicaps to the choice of sanctions as a general measure. Recent sanctions resorted to during the American hostages incidents, the Soviet intervention in Afghanistan, the Polish government crackdown on the Solidarity Trade Union and the Falklands Crisis, have been adopted outside the framework of an international organization.[657] The Soviet Pipeline Embargo did not work successfully.[658] Each time the cost of economic sanctions to both industry and government is high, causing tremendous suffering to a substantial percentage of the population.[659] In most cases trade embargoes affect many states, which are not involved in the conflict, between the sending and the receiving states.[660] The results of economic sanctions are hardly as effective, as they were originally thought to be. They do not always penalize the target, as much as expected by the proponents of such sanctions. However, those economic sanctions are capable of inflicting irreparable suffering on national economies and individuals, who are far from being in any way a part of the target.

2. Military Measures by the sending state

Will a sending state, whose consular or diplomatic premises have been violated, be justified to use force against the receiving state? Article 2 (4) of the United Nations Charter prohibits the use of force or the threat of it, against the political independence or territorial integrity of any state, or in a manner inconsistent with the objectives of the United Nations. Article 51 of the Charter provides that nothing in the Charter shall cripple the inherent right of individual and collective self-defence, if there is an armed attack. Thus the only case, in which military coercion may be used, is when there has been an armed attack. A simple violation of consular or diplomatic premises should normally not amount to an armed attack, which warrants a military response. In a recent case, Nicaragua V. United States of America (1986)[661] the International Court of Justice restated the principle that individual or collective self-defence is lawful, only if it is a response to an armed attack. The violation of consular or diplomatic premises does not rank as an armed attack, even if the violation creates a grave, diplomatic conflict between the sending and receiving states.

3. Third Party Settlement

The political or diplomatic methods of peacefully settling international disputes include negotiations, good offices, mediation, commissions of inquiry and conciliation.[662] The adjudicative procedures include arbitration and settlement by an international court.[663] These different procedures for settling international disputes are part of the general process for the maintenance of global peace and security. A sending state may resort to the different ways of settling international disputes, for instance, if negotiations between the receiving and sending states have failed, or cannot take place at all. That will probably be the case, if diplomatic relations were severed, as soon as the violation of premises took place.

a) Political or Diplomatic Procedures

Article 6 of the Convention for the Pacific Settlement of International Disputes (1907) provides that good offices and mediation could be at the instance of one or more of the parties; it could also be at the instance of a third person or state, that is not a party to the conflict.[664] Mediation and good offices try to cause the parties to agree, or to start to negotiate in search of a peaceful solution to the dispute. According to Article 6 of that Convention (1907), the views, expressed by the person or persons involved in the good offices or mediation process, are advisory opinions, without obligatory force.

A commission of inquiry may come in to study the problem, between the sending and receiving states, in order to give an independent opinion.[665] Such an opinion is not an arbitral decision; the parties, therefore, have a right to reject it or apply it. Conciliation could be undertaken by a third party, who attempts to reconcile the parties to the dispute. Article 35 of the Convention (1907) provides that the solution proposed by the committee or group trying to reach conciliation is simply an advisory opinion.

The political or diplomatic procedures have one thing in common. Those procedures all arrive at suggestions or findings, which amount to advisory opinions. The suggestions or findings cannot, therefore, be imposed on either the sending or receiving state. Another point is that these procedures allow for solutions to the problem in amicable circumstances. In many cases arbitration and judicial process produce abrasive, solutions to international disputes. In certain instances, arbitration or judicial process tend to exacerbate the pain caused by disputes between states.

b) Arbitration and Judicial Settlement

If the diplomatic or consular premises of a sending state have been violated, that state may bring up the case for arbitration or for judicial settlement. Arbitration is possible if both parties agree to have it. Article 84 of the Convention

(1907) stipulates that the arbitral award is binding and the parties to the dispute have a duty to abide by it. The most striking distinction, between arbitration and judicial proceedings before the International Court of Justice, is the right of the parties to choose some of the arbitrators, or to agree between themselves on a single arbitrator.[666]

i) Arbitration

Arbitration is the submission of a dispute to the decision of a third party; a person or a group of persons.[667] That submission is made as an alternative to traditional litigation in court. Arbitration is, therefore, a process, which is self-regulatory, giving the parties an opportunity to put their conflict only to arbitrators of their choice.[668] Article 41 of the Convention for the Pacific Settlement of International Disputes (1907) maintains the Permanent Court of Arbitration as established by the First Peace Conference. The aim of having the Permanent Court of Arbitration is to facilitate recourse to arbitration for international differences. The Permanent Court of Arbitration, consists of a machinery for the calling into being of tribunals;[669] it is a large panel of international lawyers, nominated by states parties to the convention. The sending state, because its premises have been violated, may, along with the receiving state, ask for arbitration. The decision of the arbitrator or arbitrators is binding on the sending and receiving states.

ii) Judicial Settlement

In some circumstances a sending state, whose consular and diplomatic premises have been violated, may ask for judicial settlement by the International Court of Justice. The most recent case is the American Hostages Case (1980).[670] The decision of the International Court of Justice was not complied with by Iran. Iran's refusal to comply with that judgment does not in any way reduce the importance of the decision. Sending states, whose premises have been violated, may seek redress before the International Court of Justice.

In Chapter IX that important decision of the International Court of Justice in the American Hostages Case (1980) or United States of America v. Iran (1980) will be discussed in detail.

The Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) do not say how the responsibility of receiving state should be determined, when the inviolability of diplomatic or consular premises has been infringed. There is no universal definition of "appropriate steps". The obligations of the receiving state to protect diplomatic or consular premises is not clearly defined.[671] It would be unfair to oblige a poor receiving state to provide protection, which is so expensive that it becomes burdensome to the national budget. Protective measures should not be undertaken at diplomatic or consular premises against the will of the diplomatic or consular officials.[672] In short, no protective measures should be applied in such a way that they restrict the freedom of action of the foreign representatives.

After the seizure of the Turkish Embassy in Ottawa on 12 March 1985, a Turkish diplomat speaking on behalf of his government expressed satisfaction with the diligent manner in which Canada had handled the attack.[673] After that attack the House of Commons debated the problem of protection. While answering questions in parliament, the Honorable Erik Nielsen, the Canadian Deputy Prime Minister and Minister of National Defence, stated that Canada in protecting embassies should not provide such "a degree of security which would turn (these) embassies into armed camps."[674] Few diplomats will function properly in premises which would pass for military camps.

Reparation of loss incurred, because of the violation of mission or consular premises, is a laudable practice. The obligation to make reparation could in the long run induce receiving states to pay more attention to preventive measures.[675] Payments made in compensation by the responsible, receiving state should not be pursued ruthlessly. Such payments form a part of the diplomatic relations between states. Handled with care and foresight, the settlement of disputes between sending and receiving states could achieve great results. Badly handled disputes, whether or not they are minor or major, could threaten peace and security in the world.

CHAPTER IX

ROLE OF THE SECURITY COUNCIL AND THE INTERNATIONAL COURT OF JUSTICE IN THE AMERICAN HOSTAGES CASE

Article 7 of the United Nations Charter stipulates, *inter alia*, that the Security Council and the International Court of Justice are principal organs of the United Nations Organization. The Security Council's primary responsibility is to maintain "international peace and security."[676] The members of the United Nations are under an obligation to carry out the decisions of the Security Council, which acts on behalf of all parties to the United Nations Charter.[677] The Security Council is the main political organ of the United Nations Organization.

Article 92 of the United Nations Charter states that the International Court of Justice is the main judicial organ of the United Nations. The Statute of the International Court of Justice is part of the Charter of the United Nations. Article 93 (1) states that all members of the United Nations are *ipso facto* parties to the Statute of the Court. Article 94 (1) of the Charter provides that each member of the United Nations, party to a case before the Court shall comply with the decision of the Court in that case. At Article 94 (2) it is stipulated that if a party does not comply with a judgment of the Court, the Security Council may make recommendations or decide on the measures, which should be taken in order to give effect to the judgment.

When Iranian Islamic militants violated the United States Consulates in Shiraz and Tabriz, overran the American Embassy in Tehran, imprisoning American hostages in November 1979, the Security Council and the International Court of Justice, each tried to find a solution to the problem. That was an example of third party dispute settlement.[678] It is proposed to examine the roles of the Security Council and the International Court of Justice in the dispute between the United States and Iran.

A. ROLE OF THE SECURITY COUNCIL

In order to resolve the dispute between the Islamic Republic of Iran and the United States of America, the United Nations Security Council adopted two resolutions. They are resolutions 457 (1979) and 461 (1979).

1. Security Council Resolution 457 (1979)

The Security Council adopted this resolution at its 2178th meeting on 4 December 1979.[679] In this resolution, the Council recalls the obligation of states to settle their international disputes by peaceful means, in order to avoid endangering international peace, security and justice. The resolution also reaffirmed the obligation of states, parties to both the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963), to respect the inviolability of diplomatic and consular staff, and the premises of embassies and consular posts.

Resolution 457 calls upon Iran to release the American hostages, to protect them, and let them leave Iran.[680] The Council further called on the United States and Iran to resolve the rest of the issues peacefully, according to the objectives of the United Nations Organization. The resolution also advised the two parties to the dispute to exercise great restraint. The Secretary-General was requested to use all appropriate measures to implement the resolution. The Council decided, that it would remain seized of the matter, and receive the reports of the Secretary-General on the developments pertaining to his efforts.

2. Secretary-General's Report on the Implementation of Resolution 457 (1979)

On 22 December 1979, the Secretary-General of the United Nations reported on his efforts to implement Resolution 457, in order to end the hostage crisis in Tehran.[681] After the adoption of that resolution, the Secretary-General transmitted the text to the governments of Iran and the United States of America. The different efforts the Secretary-General deployed included: contacts with Iran's Foreign Minister Sadegh Ghotbzadeh by telephone;[682] talks with representatives of the United States at the United Nations;[683] formal communication sent to the Iranian Foreign Minister on 11 December 1979;[684] a meeting with Dr. Mansour Farhang, Iran's Ambassador to the United Nations;[685] an urgent message sent to Ayatollah Ruhollah Khomeini, which message was delivered by the United Nations Representative in Tehran;[686]

and on 21 December 1979, the Secretary-General had another telephone conversation with Iranian Foreign Minister Ghotbzadeh.[687]

After that telephone conversation and from contacts with Iran's Ambassador to the United Nations, the Secretary-General knew that an early release of the hostages was not feasible. The Iranian Foreign Minister assured the Secretary-General that the hostages were safe, and that Iran was still interested in seeking a peaceful settlement to the crisis.[688]

3. Security Council Resolution 461 (1979)

This resolution was adopted at the Security Council's 2184th meeting on 31 December 1979, by a vote of 11 in favour to none against, with four abstentions (Bangladesh, Czechoslovakia, Kuwait and the Union of Soviet Socialist Republics).[689] Resolution 461 (1979) reaffirms Resolution 457 (1979) in its entirety.[690] The Council took cognizance of the letters of the Iranian Foreign Minister, dated 13 November 1979, and 1 December 1979, in respect of the grievances and statements of the government of Iran.[691] Resolution 461 (1979) also takes into account the Order of the International Court of Justice of 15 December 1979, requesting that the Iranian government should release all United States hostages being held in Iran. The order also called on the two governments in dispute to make sure, that no action taken should be of a nature as to aggravate the tension between the two countries.[692] The Security Council further took into consideration the report of the Secretary-General of 22 December 1979, on the development of the situation, since the adoption of Security Council Resolution 457 (1979).[693] Resolution 461 (1979) deplored the continued holding of the United States hostages contrary to Resolution 457 (1979) and the Order of the International Court of Justice of 15 December 1979.[694] In Resolution 461, the Council again requested the Secretary-General to lend his good offices, in order to assist the Council, to have implemented the objectives of the Resolution.[695] That resolution also foresaw a meeting of the Security Council on 7 January, 1980, in order to review the evolution of the situation, with a view to adopting measures under Articles 39 and 41 of the United Nations Charter, if Iran refused to comply with the objectives set by the Council in Resolution 461 (1979).[696]

4. Secretary-General's Report in Pursuance of Resolution 457 (1979) and 461 (1979)

On 6 January 1980, the Secretary-General of the United Nations reported to the Security Council, on the efforts he had made in pursuance of Resolutions 457 (1979) and 461 (1979).[697] The Secretary-General visited Tehran after the Iranian government granted his request to visit that country.[698] The Secretary-General arrived in Tehran on 1 January 1980, and that day, he had contacts with some members of the diplomatic corps accredited to that city.[699] The Iranian Foreign Minister had a series of meetings with the Secretary-General. During those meetings, the Iranian government explained that the hostage crisis had to be considered, within the whole context of the history of Iran.[700] The Secretary-General constantly repeated the message, that whatever the circumstances, the release of the hostages was the best way to resolve the crisis.[701] The Iranian Foreign Minister indicated that, even if the international community took economic measures against Iran, those measures would be futile, "because Iran would be able to survive even under such an embargo."[702] The Foreign Minister accepted that the violation of diplomatic personnel and premises might be against international law, just like were the acts of diplomatic personnel, who interfered in the internal affairs of Iran, the receiving state. The Secretary-General explained that the usual practice, in those cases, was to declare any such personnel persona non grata, and have the person expelled from the receiving state.[703]

In a meeting on 3 January 1980, the Secretary-General insisted, that if an international inquiry committee had to be established, the release of the hostages should take place before, or at least, at the time of the establishment of the inquiry committee.[704] The Foreign Minister replied that the release of the hostages would be a consequence of the establishment of the international inquiry committee.[705] The Iranian Minister also stressed, that there was an urgent need for the assets of the former Shah to be returned to Iran, as those assets had been taken away illegally.[706] On 3 January 1980, the

Secretary-General met with members of the Iranian Revolutionary Council. The Revolutionary Council indicated, that it would accept the creation of an international inquiry committee, as that could lead to a mutually satisfactory solution to the crisis.[707] One of the reasons for setting up such an inquiry committee was, that the "committee would investigate allegations of grave violations of human rights and of illegal acts, under the previous regime in Iran."[708]

Even though the Secretary-General was not given an opportunity to visit the American hostages, and he was not able to see the Ayatollah Khomeini, he learned a great deal from his contacts and meetings with important persons in Tehran.[709]

5. The Action of the Secretary-General during the American Hostage Crisis

Resolutions 457 (1979) and 461 (1979) of the United Nations Security Council each requested the Secretary-General of the United Nations to lend his good offices, in order to cause the Iranian government to release the hostages.[710] The Secretary-General deployed efforts, which did not achieve the objectives of Resolution 457 (1979). This is borne out by his report concerning the implementation of Resolution 457 (1979).[711] In his report of 6 January 1980, the Secretary-General explained how he acted in pursuance of Resolutions 457 (1979) and 461 (1979).[712]

From the two reports, which the Secretary-General made, after seeking to implement Resolutions 457 (1979) and 461 (1979), some comments appear appropriate. The good offices of the Secretary-General failed to secure the release of the American hostages, held in captivity in Tehran. When he travelled to Tehran, he was unable to visit the hostages, in spite of his request to be allowed to do so. He was not able to see the Ayatollah Khomeini, who at that time played a key role in Iranian politics.[713]

However, the good offices of the Secretary-General had some significant results. First, the Secretary-General received assurances from the Iranian authorities that the hostages were safe.[714] He was also formally informed, that Iran was still interested in a peaceful settlement of the dispute. In Tehran, the Secretary-General had discussions with Iran's Revolutionary Council. Those discussions led to the acceptance of the idea of the creation of an international inquiry committee, which was supposed to study, among other things, the Iranian grievances against the Shah.[715] In late March 1980, the inquiry committee scenario collapsed, because the Ayatollah Khomeini and other religious leaders, started to add new and unacceptable conditions to be taken care of by the committee.[716]

The Secretary-General played a key role in his search for solutions to the United States/Iran hostage crisis. That key role demonstrates how the Secretary-General could help states in dispute to try to resolve their disputes, even if no easy and immediate solution is forthcoming. Thus, the Secretary-General encouraged the use of diplomatic channels to resolve the hostage crisis.

6. The Importance of the Role Played by the Security Council

Article 1 (1) of the United Nations Charter states, that one of the purposes of the United Nations is to maintain international peace and security in different ways, for instance, by the settlement of international disputes.

The Security Council has a general mission to act as the "policeman" of the world community, in order to help maintain peace and security. During the American hostage crisis, the Security Council endeavoured to make negotiations, between Iran and the United States, a continuous and fruitful process. However, the hostages were not released, as early as the members of the Council had hoped. The negotiations, under the auspices of the Security Council, made it possible for each state to discuss the problems of the crisis, during the Security Council meetings. That was especially important, because the United States and Iran had difficulty talking to each other directly. The Security Council provided a forum, where the two disputing nations could share views and raise their different arguments. Because of the role that Council played, there was constant diplomatic pressure on Iran to release the hostages. During an international crisis, diplomatic action and persuasion are extremely useful. That type of action reminds the parties in dispute that they are under an obligation to settle their dispute peacefully, in the interest of world peace. Apart from the Security Council, there is hardly any other organ of the United Nations, that could play both diplomatic and political roles. While the Iranians were reluctant to deal directly with the Americans, they had smooth contacts with the Secretary-General, who was carrying out the instructions of the Council.

Even after the International Court of Justice had indicated provisional measures, stating what Iran and the United States should each do, in order to end the hostage crisis,[717] the Security Council continued to work towards a peaceful end to the crisis. The action of the Council was complementary and salutary. The recommendations of the Security Council have considerable moral weight.[718] That is unfortunate, because moral weight is insufficient, when the Security Council adopts and proceeds to enforce coercive measures.

On 13 January 1980, the United States of America presented a draft resolution to the Security Council. The draft resolution, which the Soviet Union vetoed, was meant to institute coercive, economic measures, designed to put economic pressure on Iran.[719] The draft resolution was going to institute economic sanctions against Iran, under Articles 39 and 41 of the United Nations Charter. The negative vote of the Soviet Union and the German Democratic Republic prevented the Security Council from taking coercive, economic measures against Iran.[720] The use of that veto power of the Soviet Union was especially painful, because

Resolutions 457 (1979) and 461 (1979) had not caused the Iranians to release the hostages. Proceeding to take more severe measures, therefore, appeared to be the most logical thing to do.

All through the crisis, the Security Council assumed its delicate responsibility of seeking to maintain peace and security in the world. The Council acted promptly, even though its different moves were not always without difficulty. Those moves made substantial contributions to the reduction of tension between the nations in dispute. However, the success, which the Security Council could have had, was jeopardized and even hampered, by the veto of the Soviet Union, which by its vote barred the adoption of the United States draft resolution on 13 January 1980.[721] Two reasons may be suggested to explain why the Soviet Union and the German Democratic Republic voted against the proposed resolution, and Bangladesh and Mexico abstained. Firstly, economic sanctions might have been ineffective. The Iranian Foreign Minister had told the United Nations Secretary-General, that Iran would survive, even if it were the object of economic sanctions.[722] To the Minister such sanctions would be totally useless. It is possible that the Iranians had foreseen enough supplies to take care of any economic sanctions. Secondly, economic sanctions could cause the Iranians to manhandle the American hostages. That could have destroyed the very cause, for which the sanctions were meant. Foreign Minister Ghotbzadeh promised that the hostages would be safe and that Iran was interested in a peaceful settlement.[723] It is suggested that the promise might have not been kept, if the Security Council had taken coercive measures against Iran, which was in the throes of revolution. Economic sanctions, therefore, might have triggered unforeseeable consequences for the safety of the hostages. Economic or other sanctions could irritate Iranian authorities and increase the risks, which the American hostages were already running.

It is important to note that the above-mentioned arguments are weak, when compared with the strong arguments that existed for coercive, economic measures, designed to bring pressure to bear on Iran. Firstly, Resolution 461 (1979) provided that the Security Council would meet on 7 January 1980 to review the situation, and that if there were non-compliance with that Resolution, the Council would adopt effective measures under Articles 39 and 41 of the United Nations Charter.[724] The Council had seen the gravity of the hostage-taking and had decided to proceed to coercive measures, if Iran did not respect its obligations under international law.

Secondly, Iran by refusing to cause the militants to leave the U.S. Embassy and two Consulates had by that inaction endorsed the crimes of the militants.[725] Later on 6 May 1980 the Foreign Minister, Mr. Ghotbzadeh, confirmed the fact by announcing on Iranian television that the occupation of the United States Embassy had been done by the Iranian nation.[726] From the moment Iran gave its support to the militants and also refused to comply with the Resolutions of the Security Council, coercive economic measures were the only way to cause Iran to act in the interest of peace and security. The hostages' lives and dignity were endangered. Their liberty had been destroyed by their being falsely imprisoned in the Embassy in Tehran. The Security Council had reason to invoke sanctions against Iran, in order to save fifty threatened human lives.

While the hostages were not yet released and negotiations were still continuing for their release, the United States government broke off diplomatic relations with the Islamic Republic of Iran on 7 April, 1980.[727] That rupture dealt a serious blow to the ability of the two nations in dispute, to maintain fruitful contacts, in their difficult search for a solution to the hostage crisis. In the absence of regular diplomatic relations between the two countries, there was the total lack of a proper cadre for continuous negotiations. That enhanced the diplomatic role of the Security Council, which continued, through the Secretary-General of the United Nations, to undertake efforts aimed at obtaining the release of the hostages.

Early in the hostage crisis the Security Council started to make efforts to have the hostages released and to cause Iran to restore the inviolability of the United States Embassy and two consulates. The Council got the Secretary-General of the United Nations to travel to Tehran, in an effort to resolve the crisis peacefully.[728] The Council handled the crisis methodically and played a delicate role trying to convince Iran and the United

States to act with restraint, in order to avoid any threat to international peace and security. Resolutions 457 (1979) and 461 (1979) put pressure on both parties to resolve the crisis, so as to end a difficult situation, that had been created for fifty Americans, who enjoyed special protection under international law. The efforts and the hoped-for success of the Security Council were frustrated on 13 January 1980, when the Soviet Union cynically exercised its veto power to block the Council from taking coercive, economic sanctions against Iran. Those proposed sanctions were consistent with Articles 39 and 41 of the United Nations Charter. The negative vote of the Soviet Union brought to a standstill the course of action, which the Council had decided to take in Resolution 461 (1979).[729] The veto of the Soviet Union successfully shattered the original plan of the Council and nullified the effect of the ten votes cast in favour of economic sanctions on 13 January 1980.[730] The derisive exercise of that veto power made out of the whole Security Council a toothless dog that could bark, but could not bite. The Council was, therefore, unable to enforce its decision in Resolution 461 (1979) "to adopt effective measures under Articles 39 and 41 of the Charter of the United Nations,"[731] if Iran did not comply with that Resolution. The Council was also consequently unable to cause Iran to enforce the ruling of the International Court of Justice in <u>United States of America v. Iran</u> (1979),[732] which indicated the provisional measures pending the final judgment in the <u>American Hostages Case</u> (1980).[733] The end result is that the efforts of the Security Council were blocked by the Soviet veto and the success of those efforts seriously mitigated and reduced to only relatively effective, diplomatic intervention. The Council could have achieved more than that. The Soviet Union used its veto legally, but it was a legal use that was meant to undermine the Security Council's sincere and legitimate search for an end to a hostage crisis which threatened peace and security. That is one of the weaknesses of the voting system at the Security Council. A single member of the Council could, provided that such a member has veto power, frustrate the vote of the majority of members. The Soviet Union did just that on 13 January 1980.

B. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

The judgment of the International Court of Justice in the American Hostages Case (1980)[734] [United States of America V. Iran (1980)] shows the complex, legal problems, which were raised by the American hostage crisis. Before examining the legal problems involved in that case, it will be appropriate to summarize the facts of the case. Some aspects of the procedure in the case are also important.

1. Facts of the American Hostages Case (1980)

a) Events before 4 November 1979

On 14 February 1979, following the fall of the government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, a group of armed militants attacked and seized the United States Embassy in Tehran, imprisoning 70 people found there, including the Ambassador.[735] Two people associated with the Embassy personnel were killed; the Embassy was seriously damaged and the Ambassador's residence was pillaged.[736] The Embassy called for help during the attack and Iranian authorities acted promptly. Around 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived, accompanied by a member of the National Police and a contingent of Revolutionary Guards; they quelled the unrest and returned control of the compound to Embassy officials.[737] On 11 March 1979, the United States Ambassador received a letter from Prime Minister Dr. Bazargan, expressing regrets for the attack on the Embassy and indicating a readiness to make reparation for the damage.[738] During the same period, attacks were also made on the United States Consulates in Tabriz and Shiraz.[739] Before allowing the former Shah of Iran to travel from Mexico to the United States for treatment, the American government demanded and received assurances, that Iran would fulfill its international obligation to protect the Embassy.[740] On 1 November 1979, large numbers of demonstrators marched back and forth, in front of the United States Embassy.[741] There were Iranian policemen guarding the Embassy; the Chief of Police personally came to the Embassy and met the Chargé d'affaires, who informed Washington that the Chief was "taking his job of protecting the Embassy very seriously".[742] It was also announced on the radio and at the public prayer meeting, that people should not go to the United

States Embassy.[743] During the day, there were about 5,000 demonstrators at the Embassy, and protection was provided by Iranian security forces.[744] That evening, when the demonstrators dispersed, both the Iranian Chief of Police and Chief of Protocol expressed relief to the American Chargé d'affaires, that all had finally gone well.[745]

b) Takeover of the United States Embassy and Consulates

At about 10:30 a.m. on 4 November 1979, while about 3,000 people were demonstrating, an armed group of several hundred persons overran the United States Embassy compound in Tehran.[746] The Iranian Security personnel disappeared from the scene; there had been " no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises".[747] The invading group, "Muslim Student Followers of the Imam's Policy", ("the militants"), detained all diplomatic and consular personnel and all other persons present on the compound; later on another American and one United States private citizen, who had been seized elsewhere in Tehran, were taken to the compound and made prisoners too.[748]

During the assault, which lasted more than three hours, the United States Chargé d'affaires, who was at the Iranian Foreign Ministry, with two other members of his embassy, made contacts with the Prime Minister's Office and the Foreign Ministry.[749] The Iranian Chargé d'affaires in Washington was requested to help put an end to the seizure of the Embassy. In spite of those appeals, no help came.[750] At the end, Revolutionary Guards arrived at the Embassy, simply "to protect the safety of both the hostages and the students",[751] according to statements made afterwards by Iranian security personnel. The Iranian authorities neither made an attempt to put an end to the seizure of the premises and the staff, nor did the government seek to persuade the militants to end their action against the Embassy.[752]

On the morning of 5 November 1979, the United States Consulates in Tabriz and Shiraz were also seized, but the Iranian government again failed to take protective action.[753]. There were no United States personnel in the Consulates, as their operation had been suspended, since the attack in February, 1979.[754]

There were attempted seizures of other premises. On 5 November 1979, a group took over the British Embassy in Tehran, but was forced to get out of that Embassy, after a short period of occupation.[755] On 6 November 1979, a brief seizure of the Iraqi Consulate at Kermanshah was terminated, on instructions from the Ayatollah Khomeini.[756] On 1 January 1980, a large mob attacked the Soviet Embassy in Tehran, but no considerable damage was done, because of the protective action of Iranian security officers.[757]

Between 18 and 20 November 1979, 13 American hostages were released pursuant to a decree issued by the Ayatollah Khomeini, instructing the militants to "hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign

Affairs, so that they may be immediately expelled from Iran."[758] At the initial stages of the seizure, the militants had the hostages interrogated, threatened, blindfolded and even paraded bound, before hostile and chanting crowds.[759] At a later stage, the hostages were well treated; religious personalities or officials of the International Committee of the Red Cross were allowed to visit the hostages.[760] Whatever documents or archives had remained at the United States Embassy compound, the militants plundered, and later on the documents were purportedly disseminated, by the militants and the Iranian media.[761]

There were conflicting reports as to the exact whereabouts of the American Chargé d'affaires and the two other diplomats, who were in the premises of the Iranian Foreign Ministry, at the time of the seizure of the Embassy compound on 4 November 1979.[762] In March 1980, it was announced, that as to the fate of those three Americans, the decision rested first with the Imam of the nation, the Ayatollah Khomeini, and that the Revolutionary Council would make a decision, only if the Imam did not take a clear decision.[763]

c) Efforts to obtain the Release of the Hostages

On 7 November 1979, President Jimmy Carter appointed Mr. Ramsay Clark, a former Attorney-General of the United States, to go to Iran to deliver a message to the Ayatollah Khomeini and discuss all avenues for resolving the crisis.[764] While Mr. Clark was *en route*, Tehran radio announced that members of the Revolutionary council and other responsible, Iranian personalities, were not allowed to meet United States representatives. That announcement which came from the Ayatollah Khomeini further stated:

> Should the United States hand over to Iran the deposed Shah...and give up espionage against our movement, the way to talks would be opened on the issue of certain relations, which are in the interest of the nation.[765]

The United Nations Security Council adopted Resolutions 457 (1979) and 461 (1979), in an attempt to persuade Iran to release the hostages.[766] The United Nations Secretary-General travelled to Tehran in order to implement the two resolutions of the Security Council.[767]

d) Unilateral Actions of the United States

Before instituting proceedings, before the International Court of Justice, the American government appealed to the United Nations Security Council. On 10 November 1979, the American government identified Iranian students, who did not comply with United States entry visa terms, with a view to beginning deportation proceedings against those, who were in violation of immigration laws and regulations.[768] On 12 November 1979, the President of the United States ordered that all oil purchases from Iran, for delivery to the U.S.A. be discontinued.[769] On 14 November 1979, the American President ordered the blocking of large official, Iranian assets in the United States or in United States control. That included deposits both in banks in the United States, and in foreign subsidiaries of American banks.[770] On 12 December 1979, after instituting proceedings before the International Court of Justice, the United States informed the

Iranian Chargé d'affaires in Washington, that the number of staff assigned to the Iranian Embassy and consular posts in the United States would be restricted.[771] On the 7 April 1980, the American government severed diplomatic relations with Iran and also prohibited exports from Iran to the United States.[772] Steps were taken to make an inventory of Iranian government assets already frozen in the United States, and a census of the claims of American citizens against Iran was also made; all visas issued to Iranians for entry into the United States were cancelled.[773] On 17 April 1980, the American government prohibited travel to Iran by United States citizens, and also made further plans for reparations to be paid to American hostages and their families out of the frozen Iranian assets.[774]

During the night of 24-25 April 1980, the President of the United States ordered, but subsequently terminated for technical reasons, an operation within Iranian territory. The operation was meant to have the hostages rescued by United States military units.[775]

2. Preliminary Ruling of the International Court of Justice

In the case, United States of America V. Iran (1979)[776] the United States on 29 November 1979, unilaterally took action against the Islamic Republic of Iran, because of the takeover of the American Embassy in Tehran and the American Consulates in Tabriz and Shiraz; and the detention of some 50 Americans by Iranian militants. The United States requested, that pending final judgment in the case, the Court should indicate measures, which had to be carried out.

a) Requests of the United States

The United States asked that the hostages be released immediately; that Iran clear and restore the premises to United States control; that American diplomatic and consular personnel and persons attached to the United States Embassy and Consulates be accorded protection and freedom of movement, as well as privileges and immunities; that Iran refrain from putting on trial, any person attached to the Embassy and Consulates of the United States; and that Iran avoid taking any action, which might jeopardize the rights of the United States, while the judgment on the merits had not been rendered, especially that Iran not take any "action that would threaten the lives, safety or well-being of the hostages".[777]

b) Iran's Arguments

Iran, in its letter of 9 December 1979, urged the International Court of Justice not to "take cognizance of the case",[778] because that case was merely "a marginal and secondary aspect of an overall problem".[779] To Iran, the problem was not simply interpreting and applying the treaties, on which the United States of America based its application. The Iranian government further argued, that the consequences of the revolutionary situation in Iran were "a matter essentially and directly within the national sovereignty of Iran".[780]

c) Indication of Provisional Measures by the Court

The Court unanimously decided: that Iran immediately release the hostages and restore the control of the premises of the United States Embassy, Chancery and Consulates to the possession of American authorities; that Iran should accord to the diplomatic and consular staff of the United States full protection, privileges and immunities, including immunity from criminal jurisdiction; and that the hostages should have freedom and facilities to depart from Iranian territory.[781] The Court also decided that Iran and the United States should not take any action and should make sure that there is no action, which could aggravate the tension between the two nations or render the dispute more difficult to resolve.[782] The Court further decided that pending its final judgment, the matters covered by that order were to be continuously under its review.

d) Status of the Hostages

Another issue which is linked to the jurisdiction of the Court is the status of the hostages. 28 of the hostages were members of the diplomatic staff, according to the Vienna Convention on Diplomatic Relations (1961).[783] At least 20 hostages were members of the administrative and technical staff according to that Convention. Therefore, at least 48 hostages were covered by the two Vienna Conventions of 1961 and 1963. Two other persons of United States nationality possessed, neither diplomatic nor consular status. There were also two hostages, diplomatic agents, detained in the premises of the Iranian

Foreign Ministry in Tehran. The Court states in paragraph 18 of the Order, that its jurisdiction is founded with regard to the United States claims under the Vienna Conventions of 1961 and 1963.

It is submitted, that in respect of jurisdiction, the diplomatic or consular status of the hostages is immaterial. It might be asked how relevant was the identity or the status of the hostages. The premises of the United States Embassy were violated. That alone was enough to give the Court jurisdiction. Whether or not the hostages were diplomats or consular personnel, to that extent, was irrelevant. Even if the hostages were neither Iranian nor American nationals, the United States could, for humanitarian reasons, still bring the issue of the hostages before the Court. In any case, the holding of just any hostages within the embassy premises in those circumstances entitled the United States to bring the case before the Court. The Court could have also assumed jurisdiction, because turning an embassy into a prison compound is a violation of the Vienna Convention on Diplomatic Relations (1961). The status of the hostages may be relevant for determining the diligence to be exercised or the level of protection due to the hostages. However, the status of the prisoners per se does not, in a case like that of the American hostages, play a crucial role in determining the jurisdiction of the International Court of Justice. In the absence of any issue of the status of the hostages, there would still have been a dispute between the United States and Iran.[784]

The violation of the mission premises alone gave birth to a dispute between the two countries.

The Court in its Order did, without putting down its reasons, indicate that it took note of the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); Iran and the United States are both parties to that Convention (1973).[785]

e) Prosecution or Extradition

The premises of the United States Embassy were attacked violently, and hostages, internationally protected persons, were deprived of their liberty.[786] Iran neither prosecuted the offenders nor extradited them.[787] The United States had tried, but was unable, partly due to the recalcitrance of the Iranian government, to settle the dispute by negotiation.[788] Articles 2 (1) (b), 3 (2) and 13 (4) of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973), when read together, make it clear that the Court could have founded its jurisdiction on Article 13 (1) of that Convention. Under Article 2 (1) of that Convention, an attack on diplomatic premises or the deprivation of diplomats of their liberty is a crime, which necessitates the action of the state, where the offenders are. Iran did not prosecute nor did it extradite the militants (offenders) as is provided for under Article 3 (2) of the Convention (1973). The obligation is clear. The state, where the offenders are found, either prosecutes them or extradites them.

Iran violated international law by refusing to either prosecute or extradite the offenders, as is required under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973). In order to settle the dispute by peaceful means, the United States acted properly, when it unilaterally brought the matter before the Court, which has jurisdiction under article 13 (1) of the Convention (1973).

3. The Illegality of the Violation of United States Diplomatic and Consular Premises

The attack and takeover of the United States Embassy in Tehran on 4 November 1979, had a number of results. Considerable damage was done to the Embassy premises and property; archives were violated and seized; archives and other documents found in the premises were confiscated; and diplomatic and consular staff, together with two United States nationals were taken hostage.[789] These facts raise legal problems: Were the acts in question imputable to Iran? What were Iran's obligations under International Law, as far as the acts were concerned? Were the militants acting as agents of the Iranian State?

a) Were the Militants the agents of the Iranian government at the moment they attacked the Embassy and the Consulates?

The evidence before the International Court of Justice could not lead to the conclusion that the militants, who seized the

Embassy in Tehran, acted on behalf of the Iranian government.[790] There is no doubt, that the Ayatollah Khomeini was known to openly insult the United States, accusing the Americans of having created serious problems in Iran.[791] The attacks carried out against the United States Consulates at Tabriz and Shiraz, appear to have been the work of militants, who did not have instructions from the government of Iran to overrun the consulates.[792] Thus the attacks at the United States Embassy in Tehran and at the consulates at Tabriz and Shiraz were undertaken by militants, who acted on their own. The general declarations of some personalities and other statements, while insulting the American government, do not, in the circumstances of this case, amount to an authorization from Iran to the militants to commit crimes against the United States.[793]

Another point is what force should be given to the declarations of the religious leader of Iran. In spite of the prominence of the Ayatollah Khomeini in Iran, there is hardly any evidence that that religious leader could legally speak for the Iranian government. The political structure in Iran apparently provided for a head of state and a head of government. Khomeini remained the religious leader only. It is submitted that his pronouncements were simply advisory opinions. Even though his opinions were persuasive, they would not amount to official government pronouncements.

Professor Cherif Bassiouni suggests that Shiites believe "in the infallibility of the Imam..."[794] The Shiites, who were the majority sect in Iran at the height of the revolution in 1979, probably believed every statement their Imam, the Ayatollah Khomeini, made. Despite that, the seizure by militants of the Embassy and consulates of the United States, cannot be said to have been organized by the government of Iran. There is no evidence, which leads to a contrary conclusion.

b) What of Iran's duty of protection?

Article 22 (2) of the Vienna Convention on Diplomatic Relations (1961) stipulates:

> 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.

Under Article 29 of the Vienna Convention on Diplomatic Relations (1961), the receiving state has a duty to treat the diplomatic agent with due respect, and has to take all appropriate steps to avoid any attack on the person, freedom or dignity of the diplomatic agent. Further, the person of any diplomatic agent is inviolable.[795] The archives and documents of a diplomatic mission are "inviolable at any time and wherever they may be".[796] The receiving state is also under an obligation, "to accord full facilities for the performance of the functions of the mission".[797] The receiving state should normally "ensure to all members of the mission freedom of movement and travel in its territory".[798] The Vienna Convention on Diplomatic Relations (1961) also provides, that the receiving state will "permit and protect free communication on the part of the mission for all official purposes".[799] Similar obligations exist under Articles 31, 40, 33, 28, 34 and 35 of the Vienna Convention on Consular Relations.[800] The Court drew the conclusion that the obligations of the Iranian government in that case were:

> ...not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.[801]

The obligations of the Iranian government to provide protection for the premises and the personnel concerned were duties, which "are compatible with Islamic law and are binding on Iran".[802] The Iranian government on 4 November 1979, failed altogether to protect the premises, staff and archives at the United States mission against attack and takeover by militants.[803] On 5 November 1979, the Iranian government also failed to protect the United States consulates in Tabriz and Shiraz. The Court concluded, that Iran's failure to take appropriate steps to provide the required, special protection "was due to more than mere negligence or lack of appropriate means".[804]

i) <u>Iran's ability to protect embassies and consulates</u>

The Court found convincing evidence on which it based its conclusion. For instance, on 14 February 1979, the Iranian Revolutionary guards had freed the United States Ambassador and his staff, and restored the Embassy to him.[805] A letter of 1 March 1979, from the Prime Minister of Iran expressed deep regret at the incident of 14 February 1979.[806] On 1 November 1979, the

Iranian police effectively protected the United States Embassy, when a big crowd of demonstrators kept marching up and down outside it.[807]

In February 1979, demonstrators attacked the United States Consulates in Tabriz and Shiraz, but Iranian authorities cleared the consulates of the destructive demonstrators.[808] But the same Iranian authorities took no appropriate steps to prevent the attack of the same consulates by militants on 5 November 1979.[809] Further, Iran failed to restore the consulates to the possession of the United States. On 6 November 1979, when militants overran the Iraqi consulate in Kermanshah, Iranian authorities promptly acted causing the militants to withdraw from the consulate.[810]

ii) <u>Iran's deliberate refusal to protect United States Embassy and Consulates</u>

On 4 November 1979, the Iranian authorities did not intervene at the United States Embassy, in spite of repeated and urgent calls for help.[811] Those calls for help should have been unnecessary, if the Iranian authorities had been less negligent. Because of the general situation in that country, and especially because of former attacks and demonstrations, the Iranian authorities should have stepped up their system of protection, provided for the United States diplomatic and consular premises in Iran. The events before 4 and 5 November 1979, were good enough to serve as warnings to the Iranian government, that the United States Embassy and Consulates ran the serious risk of being attacked again. In spite of all those events, the Iranian authorities did not exercise the due diligence required by the risky situation. The symbolic actions undertaken by Iran were inadequate, in the circumstances. For instance, as soon as the United States Embassy was seized, on 4 November 1979, "the Iranian security personnel are reported to have simply disappeared from the scene".[812]

The failure of the Iranian government to protect the United States Embassy and Consulates was a violation of Iran's obligations, under the Vienna Conventions on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963). The inaction of Iranian authorities, when United States nationals were seized and detained at the mission premises, breached Iran's obligations "under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights".[813] The treaty, just like general international law, requires parties to protect each other's nationals in their territories.

The negligence of the Iranian authorities was so blatant, that it is hard to convince any reasonable person, that the militants did not see that official negligence as implicit authorization from their national authorities. The Iranian government had, on different occasions, provided protection that made it possible for militants to be persuaded, or forced to leave the premises of diplomatic missions or consular posts. The failure of Iranian authorities to prevent the takeover of the United States Embassy on 4 November 1979, amounts to a deliberate refusal by the receiving state to exercise due diligence, in order to protect the premises and personnel of a diplomatic mission. There was a similar failure to exercise due diligence, when Iranian authorities did not prevent the takeover of the two Consulates in Tabriz and Shiraz on 5 November 1979. The degree of diligence depends on the facts. The growing violence and a near-state of uncontrolled demonstrations, should have caused the government of Iran to deploy abler security services, around Embassies and Consulates, in order to protect those premises.

The Court, therefore, had reason to hold that the Iranian authorities: were aware of their obligations to protect the premises of the United States Embassy and its staff; were aware because of appeals for help from the American Embassy of the need for intervention on their part; had adequate means to perform their duties; but deliberately and completely failed to discharge their obligations under international law.[814]

The Court also concluded that in respect of the Shiraz and Tabriz Consulates, Iran knew of its obligations to take protective action, but failed to use the means available to it, for the discharge of its obligations.[815] Those obligations are essential to the conduct of international relations, in an atmosphere that contributes to peace and security in the world. Member states of the international community must, while they ask for their rights, be aware of their obligations. When the need arises, those member states should use all the means at their disposal, to perform their various obligations.

c) Iran's Failure to re-establish the Status Quo

After the takeover of the Embassy and the two Consulates, Iran still had obligations to perform by virtue of the 1961 and 1963 Vienna Conventions and general international law.[816] After the premises in Tehran, Shiraz and Tabriz had fallen to the militants, the government of Iran still had a great duty to perform. Iran had a duty to end the infringements of the inviolability of the premises, archives, and diplomatic and consular personnel of the United States Embassy. The receiving state was under an international obligation to quickly restore the premises to United States control.[817] The Iranian government took no step in that direction at all. On the contrary, the Iranian Foreign Minister, Mr. Yazdi, on 5 November 1979, announced that the action of the militants enjoyed "endorsement and support of the government, because America herself is responsible for this incident".[818] Further, approvals of the takeover of the Embassy and the Consulates at Tabriz and Shiraz came from Iranian religious, judicial, executive, police and broadcasting authorities; Khomeini made clear the endorsement, by the state, of the takeover of the Embassy and the Consulates and of the imprisonment of the hostages.[819] On 7 November 1979, Khomeini instructed members of the Revolutionary Council and other responsible officials, not to meet the special envoys sent by President Carter to negotiate the release of the hostages and the evacuation of the Embassy.[820] All those approvals and other endorsements, seemed to have given the militants the state support or authorization they expected. On 6 November 1979, the militants proclaimed the Embassy as "the U.S. centre of plots and espionage" and called their hostages "U.S. mercenaries and spies".[821] The Ayatollah Khomeini's decree of 17 November 1979, gave another endorsement to the crimes of the militants. In the decree the Imam declared that

> the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran.[822]

The Ayatollah Khomeini and other organs of the state of Iran had, therefore, given their approval to the continued occupation of the Embassy, and the detention of the hostages. The militants, who invaded the United States Embassy and imprisoned the hostages, had then become the agents of the Islamic Republic of Iran.[823] The acts of the militants had become the acts of the Iranian state. By endorsing the crimes of the militants, and by openly giving support to the jailers of the Diplomatic and consular personnel, the government of Iran became responsible for the damage and harm the militants had done and were doing to the United States Embassy, Consulates and to the American hostages, who were still detained. The Foreign Minister, Mr. Ghotbzadeh, on 6 May 1980, announced on television that the occupation of the United States Embassy had been done by the Iranian nation.[824] From that point it can be argued that the arbitrary detention of the hostages in the Embassy by militants, was also the continuation of the acts of the Iranian government. That detention did not provide the necessary guarantees, which normal detention by security and police forces could provide.

Up to the time of the Court's judgment on the merits, the premises of the Embassy and the Consulates were not yet liberated and the hostages were still imprisoned. The Iranian government had, therefore, refused to restore the said premises to the American government; and had also refused to release the hostages. The refusal of that nation, to execute the Court's Order of 15 December 1979, indicating provisional measures, further showed how well the Iranian authorities continued to support and condone the acts of the militants. The refusal of the Iranian State was also presumed, because there was no open act undertaken, by the Iranian government to have the Embassy and Consulates evacuated or hostages liberated. The Iranian authorities could not, therefore, argue that they tried to execute the Court's Order of 15 December 1979, but failed due to resistance from the militants or from some other source. Thus the failure to re-establish the status quo was imputable to the Iranian State. The refusal of the authorities of that state to negotiate with the United States, in order to peacefully end the diplomatic crisis, was further proof that the crimes of the militants tied in with some of the policies of Iran.[825] There was an international wrongful act of the state of Iran, because its conduct made up of actions and omissions amounted to a breach of obligations attributable to that nation under international law.

d) Iran's Failure to prosecute offenders or repair damage

The kidnapping or other attack upon the person or liberty of an internationally protected person is an international crime. A violent attack upon the official premises of such protected persons is unlawful. These are offences according to the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973)[826] at Article 2. Under Article 3 (2) of the same Convention, Iran had to do one of two things: extradite or prosecute the militants. The militants had intentionally attacked the premises of the United States Embassy and two Consulates in Shiraz and Tabriz. The offenders had also intentionally detained the American hostages, thereby depriving the hostages of their liberty, without just cause.

The Iranian authorities had an obligation to prosecute or extradite the offenders. There is no evidence, that the Iranian authorities took any steps to have the offenders prosecuted, as required by the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973) at Article 3 (2). On the contrary, the militants threatened to have the hostages tried, which trial would have been in violation of Iran's obligations under Article 31 (1) of the Vienna Convention on Diplomatic Relations (1961).

The government of Iran made no offer to repair the damage, caused by the offences committed by the militants. This is one of the remedies, which the Iranian authorities could have proposed to the United States government, in an attempt to bring the crisis to an end. Iran's refusal to try to end the crisis, could be seen as a lack of good faith on the part of the Iranian officials. Those officials were not keen on a diplomatic solution to the hostage crisis.

e) Long History of United States-Iranian Relations: Relevance to the Case

The Iranian Foreign Minister in his letters of 9 December, 1979, and of 16 March 1980, referred to the hostages crisis as "a marginal and secondary aspect of an overall problem.".[827] He further stated, that the problem concerned more that 25 years of interference by the United States in Iran's internal affairs, the exploitation of Iran, and the perpetration of crimes against the Iranians, in violation of international and humanitarian norms.[828]

i) Iran's Refusal to Buttress its Allegations

The Court in its Order of 15 December 1979, indicated that Iran could by way of defence to the United States' claims, present its case regarding the crimes, allegedly committed by the United States.[829] In spite of that indication, the Foreign Minister of Iran in his letter of 16 March 1980, did not furnish the Court with any details, about the alleged crimes of the United States, against the Iranian Nation. Iran was not represented in the Court, during the hearing of the case.[830] Because of a lack of details and clear evidence, there was no proof of the allegations of Iran, against the United States. In cases like that one, national courts might ask for a high standard of proof. There should be proof beyond reasonable doubt. The International Court of Justice probably was looking for details capable of pinpointing the United States as being responsible for the alleged criminal activities.

ii) Importance of Historical Context

The historical context of a case might create, at least mentally, the political and social environment, in which certain acts or omissions influenced some happenings. Even though the historical context is useful, when considering the case as a whole, that historical context might not be relevant and essential to the determination of the matter on its merits. In the American Hostages Case (1980) the 25 years of relations between the United States and Iran, whatever the outcome of the allegations of the Iranians against the Americans, cannot justify Iran's conduct in the circumstances. The activities of the United States over the 25 years did not constitute such a serious provocation that could reasonably cause Iran to use the activities, as a defence to the United States' claim in the American Hostages Case (1980).[831]

iii) Remedies available to Iran

There are remedies or measures, which are usually resorted to, by the receiving states, in those circumstances. Under Article 55 of the Vienna Convention on Diplomatic Relations (1961), diplomatic agents should respect the laws and regulations of the receiving state. Those diplomatic agents also have a duty to avoid interfering in the internal affairs of that receiving state. Article 41 (3) of the Vienna Convention on Diplomatic Relations (1961), obliges sending states to use the premises of missions, only in a manner compatible with the functions of the mission. Article 55 (2) of the Vienna Convention on Consular Relations (1963), provides a similar rule in respect of the use of consular premises. From these different provisions, it becomes obvious that the possibility of a misuse of consular and diplomatic premises, by the sending state, does exist.

According to Article 9 of the Vienna Convention on Diplomatic Relations (1961), the receiving state may, even without having to give reasons for its decision, notify the sending state that a diplomat is persona non grata. In certain cases, the receiving state may ask that the sending state recall a diplomat or end his functions. In respect of consular officers and staff, the Vienna Convention on Consular Relations (1963) at Article 23 (1) and (4) has similar provisions. The Iranian authorities over the period of 25 years, during which Americans were conducting the alleged illegal activities, were always at liberty to declare persona non grata any diplomat or consular agent, who was involved in acts of "espionage" or interfered in the internal affairs of Iran. The Iranian authorities never did, throughout the 25 years, declare or indicate any intention to declare, any American diplomatic or consular staff in Tehran persona non grata.[832] The Iranian authorities refused to resort to the laid down or accepted remedies. Unfortunately, the government of Iran supported militants, who without just cause, took the law into their own hands, took over the United States Embassy and made diplomatic and consular staff hostages.

Iran also refused to make use of another remedy. Every receiving state has the right to break off diplomatic relations with any sending state, and request the immediate recalling of the offending mission. The rupture of diplomatic relations, between Iran and the United States, would have still been better than the offences, which the militants committed by overrunning the United States Embassy and imprisoning its staff. That rupture of diplomatic relations would have made Iranian authorities appear more mature, and less arbitrary in their behaviour towards diplomats.[833] The long history of United States - Iran relations was not relevant to the determination of the matter on its merits.

iv) How Marginal were the Violations Committed by the Militants?

The Iranian Foreign Minister in his letter of 16 March 1980, said that the events, which constituted the substance of the case, brought by the United States against Iran, were "a marginal and secondary aspect of an overall problem".[834] This expression virtually minimizes the grave offences, which the militants had committed and were continuing to commit with the support of the Iranian authorities. The unjustifiable violation of inviolable premises and staff, should not be treated as "marginal and secondary". The inviolability of diplomatic staff, of mission premises, property, archives and documents, must be respected by the receiving state.[835] The principles of inviolability are, therefore, fundamental to the exercise of any diplomatic functions. To treat the violation of those fundamental principles simply as "marginal and secondary," as did Iran's Foreign Minister, underscored that Minister's and his government's disrespect for the rule of diplomatic law: The principle of the inviolability of diplomatic premises and staff, remains a pre-condition of any meaningful diplomatic relations between nations. A violation of that fundamental principle should receive the serious attention it merits, because that type of violation is neither trite nor marginal.

f) Did the Iranian Government Act with due diligence?

When diplomatic premises or staff have been violated, it is necessary to determine how responsible the receiving state is. In order to have a critical view of that responsibility, it is appropriate to examine the diligence of the receiving state, in the context of the events.[836] Did the receiving state act as it was expected to act, due regard had to the circumstances of place and time?

i) Iran exercised due Diligence before 4 November 1979.

Before 4 November, the Iranian authorities had prevented attacks and various offences, against the United States Embassy and its two Consulates on a number of occasions.[837] On each of those occasions, the Iranian authorities deployed the police and security forces, necessary to maintain peace and order, and return the control of those premises to the government of the United States. It is submitted that before 4 November 1979, the Iranian authorities, on a number of occasions, exercised the due diligence, that is required of a receiving state.

ii) Iran's failure to exercise due Diligence on 4 and 5 November 1979.

During the attacks against the Embassy on 4 November, and against the two Consulates on 5 November Iranian security forces put up no resistance to the invasion of the premises by the militants. At the Embassy the security personnel fled the premises, leaving the militants free to do whatever they thought fit.[838] Thus at the Embassy, the Iranian authorities had not taken enough care to protect the premises. As to the two Consulates at Tabriz and Shiraz, the invasion of the militants was easy, as the Iranian government had taken no protective action at all.[839]

iii) Proof of Iran's Ability to exercise Due Diligence

After the premises of the Embassy and the two Consulates of the United States had been occupied by the militants, the Iranian authorities had the power, and the adequate means to speedily bring the occupation to an end. In fact, the receiving state had done just that on a number of occasions. For instance, on 5 November 1979, a group invaded the British Embassy in Tehran, but was forced to leave that Embassy after a short occupation.[840] A short occupation of the Iraqi Consulate at Kermanshah on 6 November 1979, was brought to an end, as soon as the Ayatollah Khomeini gave instructions to that effect.[841] Because of the protection provided by the Iranian authorities, an attack made on the Soviet Embassy in Tehran, by a large mob, caused no serious damage.[842] Those different attacks showed that the militants were aggressive. Consequently, the Iranian state was under an obligation to become more vigilant, and more prepared than ever before. It is submitted that the ability of Iranian, security forces to end, even serious attacks, became evident in the cases involving the British and Soviet Embassies in Tehran and the Iraqi Consulate in Kermanshah. The Iranian authorities, therefore, had the means at their disposal, to end the occupation of any consular or diplomatic premises in Iran.

iv) Iran's Refusal to End Occupation of Embassy Premises

Instead of taking steps to end the occupation of the United States Embassy and consulates in Tabriz and Shiraz, Iranian officials, such as Mr. Yazdi, Foreign Minister, publicly endorsed the offences of the militants.[843] Expression of approval of the violation of the premises and the staff, also came from other authorities including judicial, police, broadcasting and religious personalities. The Ayatollah Khomeini, on 5 November 1979, at a reception in Qom, made it clear to his listeners, that he approved the actions of the militants in occupying the Embassy of the United States.[844]

There is no doubt, that those verbal approvals gave the support the militants needed. The approvals added weight to the acts of the offenders. The various endorsements of the militants' behaviour demonstrated that the Iranian authorities were not eager to end the occupation of the diplomatic and consular premises, and cause the release of the hostages.

The acts of the Iranian authorities before 4 November 1979; their failure to protect the American consular and diplomatic premises during the attacks; the refusal of the government of Iran to end the occupation of the premises; and the detention of the diplomatic staff make one thing clear. The Iranian government refused to prevent the attacks; refused to end the occupation of the premises, in order to end the detention of the hostages. The authorities of the receiving state did not, therefore, act with the due diligence that was required under diplomatic law.

4. Legality of the Rescue Mission

President Jimmy Carter announced, on 25 April, that during the night of 24 - 25 April 1980, United States military units, which were on Iranian territory, had to terminate a military operation for technical reasons.[845] The operation was designed to rescue the American hostages held in captivity by government-supported militants in Iran. The United States insisted that the operation was "ordered for humanitarian reasons to protect the national interests of the United States and to alleviate international tensions".[846] Pursuant to Article 51 of the United Nations Charter, the United States made a report to the Security Council on 25 April 1980. In that report the United States government argued that the rescue mission was undertaken

> in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy.[847]

The Court in its majority judgment frowned at the United States' incursion into Iran.[848] Further, the Court pointed out that the legality of the rescue operation was not in issue. The Court also stated, that the issue of the rescue operation could not have any bearing on the assessment of the conduct of the Iranian government on 4 November 1979, and over the six months preceding the judgment on the merits.[849]

Judge Morozov in his dissenting opinion argued, that the United States was not acting in self-defence.[850] Self-defence could be put forward as ~~an~~ argument, only if Iran had made an armed attack against the United States.[851]

Judge Tarazi, in his dissenting opinion argued that the notion of self-defence had to be interpreted strictly. According to him the United States could have undertaken its military operation in Iran, only if Iran had attacked United States' territory.[852] He wondered if apart form the United States Embassy and Consulates, Iran had attacked the territory of the United States. Today, it is settled international law that an Embassy or a Consulate is not part of the territory of the sending state.[853]

The rescue mission raises legal problems, which include the violation of Iranian territory and what weight should be given to the United States' argument, that it acted in self-defence. Was the operation a contempt of Court or a misuse of coercive measures <u>pendente lite</u>?

a) Violation of Iran's Territory

The United Nations Charter at Article 2 (4) outlaws the threat or the use of force between nations. That was one way of showing resentment for the devastating ravages of the first and second world wars. Article 2 (3) of the same Charter requires recourse to the peaceful settlement of disputes. The American rescue operation attempted to do forcibly, what Iran had refused to do peacefully. The United States, therefore, was trying to solve a problem using military force in circumstances, which could endanger peace, since that could provoke war or international tension. The United States military units entered Iranian territory, without the permission of Iran. The mere fact that United States forces landed on Iranian territory in those circumstances, amounts to a violation of Iranian territory. To argue that the territorial integrity and political independence of Iran were not impaired, because the aim of the action was limited, and its duration short, is not convincing.[854] To deploy armed forces in foreign territory, like did the United States, goes against the general prohibition of the use of force, as laid down in Article 2 (4) of the United Nations Charter.

Bowett argues that Article 2 (4) is in no way incompatible with the right to protect nationals abroad.[855] The reasons he gives are that actions directed at protecting nationals are essentially humanitarian; such actions are not undertaken against the territorial integrity or the political independence of another state. This interpretation is problematic, because any military intervention on foreign territory, however short-lived, violates the very essence of territorial integrity, that is a state's right to completely control access to its own territory.[856] Rescue missions might create more problems than they can solve, especially when they necessitate the violation of the territory of another state. In the case of the American hostages, the rescue mission failed causing embarrassment to the United States. Later on it was diplomacy and recourse to peaceful means, that led to the release of the hostages.

For international peace, it is necessary, that the territory of each state should be inviolable and should be free from unauthorized foreign, military occupation, even where the occupation is temporary. Each state should also be free, from any other forcible measures exercised by another state. The interpretation of Article 2 (4) of the United Nations Charter must be strict, otherwise broad interpretations lead the world back to the wars and conflicts, which preceded 1945, the year of the Charter of the United Nations.

One of the dangers of interventions, such as the United States rescue mission, is that the intervening state is "judge and jury in its own cause".[857] That is a terrible task, especially because during a crisis objective assessment is extremely difficult. The rescue operation violated Iranian territory. It was a violation of international law. The humanitarian concerns do not rid the operation of this illegality.

b) Was the Attempted Rescue Mission carried out in Self-Defence?

At Article 51 of the United Nations Charter it is provided inter alia:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The United States argued, that its rescue mission was carried out in the exercise of its inherent right of self-defence, in order to obtain the release of American nationals, who were "the victims of the Iranian armed attack"[858] on the American Embassy in Tehran. Thus the United States argued by implication, that the conditions foreseen by Article 51 of the Charter existed, and that the American military units were responding to an armed attack.[859]

It is necessary to determine whether or not the conditions for an American military response in self-defence were fulfilled. Was the attack against the United States Embassy an armed attack against American territory? The second question is whether or not the detention of the hostages was an aggression against the United States.

i) Was the seizure of the Embassy an armed attack against the United States?

For long the United States and many other countries have maintained, that an embassy is not part of the territory of the sending state.[860] That is the accepted position, even though an embassy has a right to enjoy inviolability and protection, under general international law and the Vienna Convention on Diplomatic Relations (1961).

Oscar Schacter suggests, that even if a United States Embassy is not legally United States territory, an attack against such an embassy could be considered an attack against the United States.[861] He further states that, "it would not be unlike an attack on a naval vessel or military base abroad".[862] He concludes that "the United States could use force to repel the attack".[863] The assimilation of an embassy to the territory of the sending state, appears to be a dangerously broad interpretation. Such an interpretation would lead to frequent conflicts and international tension. The mischief sought to be avoided by the United Nations Charter includes conflicts between nations and the resulting breach of the peace. Today attacks on embassies and consulates have increased with the rise of international terrorism. To assimilate embassies to the territories of sending states, would multiply the possibility of armed attacks against receiving states, by sending states in self-defence. The seizure of the American Embassy in Tehran did not amount to an armed attack against the territory of the United States. It is necessary to give a strict definition of national territory. An embassy or a consulate is not part of that territory.

ii) Did the attack and the detention of the American hostages constitute an aggression against the United States?

When Articles 2 (4) and 51 of the United Nations Charter are read together, force may be conceived in three forms: aggression; self-defence against armed attack; and sanctions authorized or ordered by the Security Council.[864] Aggression could be economic, political or military. Political or economic aggression each fall short of being adequate cause for armed intervention in self-defence. The only justification of recourse to force is prior or imminent armed attack by the adversary.[865] Force implies the use of military forms of aggression. Non-military forms of coercion do not amount to armed force.[866]

The attack and detention of the American nationals at the Embassy in Tehran did not constitute aggression against the United States. The seizure of the Americans and their detention were not an armed attack against American territory, even though those offences shocked the international community, and the militants showed no respect for human dignity and civilized behaviour.

Since 1945 there have been occasions on which a few states have resorted to difficult and hazardous operations, in order to protect their nationals or persons assimilated to nationals. Examples here include: the United Kingdom operation during the Suez crisis in 1956; the landing of United States troops in the Dominican Republic, initially meant to protect American lives and property; and the Entebbe raid in 1976.[867] These are operations, which are condemned, but are often tolerated.

The International Court of Justice frowned on the United States rescue mission, carried out on Iranian territory, adding that the operation was "of a kind calculated to undermine respect for the judicial process in international relations".[868] It is probable, that if the American soldiers had brought home the hostages, many civilized nations would have lauded the military success. In 1978, Tanzania forced Amin Dada, a ruthless dictator, out of Uganda. Tanzania violated international law.[869] However, ousting Amin Dada was praiseworthy, because he had become an embarrassment by having thousands of Ugandans killed mercilessly for no just reason. The American rescue operation had no legal backing under the United Nations Charter, because the detention of the hostages was not an armed aggression.

c) The Use of Coercive Measures "Pendente lite"

The international Court of Justice in its Order of 15 December 1979, indicated provisional measures in the case of the United States of America V. Iran (1979).[870] At paragraph 47, 1B, of that Order, the Court clearly indicated, that while waiting for the judgment on the merits, neither Iran not the United States had a right to take any action, that might "aggravate the tension between the two countries or render the existing dispute more difficult of solution".[871]

The basic question is what coercive measures the Court could allow, while the matter was still before the Court. In its Order on provisional measures, the Court ruled against actions that could worsen tension between the two nations, and complicate the search for a solution to the conflict.

The measures taken by the American government against Iran were economic, political and military.[872] Iranian assets were frozen and assessed with a view to confiscation. A ban was placed on imports of Iranian oil, and later on all imports from and exports to Iran (excepting food and medicine). The non-economic measures included the investigations of Iranian students and restrictions of Iranian diplomats. The United States broke off diplomatic relations with Iran in April 1980. The same month the U.S. government banned travel to Iran by United States citizens. All visas issued to Iranians for future travel to the United States were cancelled. Steps were also taken to facilitate payment of claims of American nationals against Iran out of frozen assets in the United States. Then on the night of 24 - 25 April 1980, the failed rescue mission took place. Of all these coercive measures, only the rescue mission was a military operation, involving the use of force.

Recourse to the Court usually imposes restraints, on each party's right to engage in certain types of activities. The Order of the Court, indicating provisional measures, suspended each party's right to resort to force or to a rescue mission in self-defence, during the proceedings (pendente lite).[873] Thus the United States, by bringing the matter before the Court, had forfeited its right to undertake any action, which the Court had forbidden. The use of force could only aggravate the tension between the United States and Iran.

There is the point that Iran disobeyed the Court's Order of 15 December 1979, by refusing to ensure the release of the hostages. However, interim measures do not imply a condition of reciprocity.[874]

The non-compliance of the Iranian government, did not mean that the United States was free to disobey the Court's Order. Any disobedience or violation of the Court's decision could pass for a contempt of court, if the conduct of the party tended "to undermine confidence in the judicial process as a method of settling international disputes impartially, reliably, and effectively."[875]

Judge S. Tarazi underscores the freedom of any state to omit to refer its dispute to the International Court of Justice, or to refuse to submit to the Court's jurisdiction, where the circumstances of the case enable that state to do so.[876] Mr. Tarazi further argues that once any state presents itself before the Court as an applicant, and asks that the Court direct the respondent state to submit to the law, the option that state "possessed before the institution of the proceedings disappears."[877] The Court takes over the whole matter and the applicant state is under an obligation to refrain from taking any decisions, which could impede the proper administration of justice.[878] Judge Tarazi suggests that the failed rescue mission and some of the non-military measures taken by the United States were "an encroachment on the functions of the Court."[879] Those measures were closely connected with the case before the Court and should not have been taken pendente lite.[880]

Judge Manfred Lachs asserts that governments, which are supposed to appear before the Court, should do so, in order to admit, defend or counter-claim as they may choose.[881] In that way governments avail themselves of the opportunity to define and develop their contentions before the Court. Mr. Lachs states that the applicant, after having instituted proceedings, is not allowed to take unilateral action, military or otherwise, as if no case were pending.[882] Unilateral action pendente lite could interfere with the work of the Court.

Judge Morozov points out, that pending the judgment of the Court, the violations committed by the United States included unilateral economic sanctions, and many other coercive measures against Iran; the military attack on the territory of Iran was the culmination of those U.S. unilateral measures.[883] Mr. Morozov, draws the conclusion that by acting unilaterally the United States became a "judge" in its own cause.[884] If every party before the Court became a "judge" in its own cause, then justice would become a charade. The Court would lose its authority, and there could be confusion in the administration of the international justice system. Judge Morozov says that because of the dangerous rescue mission and other ~~measures~~, the United States had forfeited its legal and moral right to reparations.[885]

5) Responsibility of Iran in International Law

The International Court of Justice in its judgment of 24 May 1980, on the merits, decided:

that Iran had violated and was still violating obligations, which it owed to the United States, under international conventions in force between the two nations, as well as under the rules of general international law;

that the violations of these obligations engaged the responsibility of Iran under international law;

that Iran must:

a) release all United States nationals held hostage in Iran, and must entrust them to the protecting Power;

b) ensure that all the said persons have the means of leaving Iranian territory, including the means of transport;

c) place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran;

that none of the American diplomatic or consular personnel be kept in Iran to be subjected to judicial proceedings or to participate in them as a witness;

that Iran was under an obligation to make reparation to the United States for the injury caused to the latter by the events of 4 November 1979, and what followed from those events;

that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court and that the Court reserved for that purpose the subsequent procedure in the case.[889]

The Court had established earlier in the judgment, that Iran had by acts or omissions violated the obligations it owed to the United States.[890] The Court concludes in paragraph 90 of the judgment, that Iran had committed successive and continuing breaches of conventional obligations, and of those arising from the rules of general international law. Because of those breaches, Iran had incurred responsibility towards the United States. The duty for a state to make reparation, where that state fails to live up to its international obligations, is the accepted practice.[891] Thus a breach is supposed to be compensated by adequate reparation.

Judge Morozov argued, that the United States should have no reparation, because of the rescue operation and the non-military measures, which the American government took.[892] Judge Tarazi argued, that Iran's responsibility be relative and not absolute; and that the United States had equally incurred responsibility, because of its conduct both before and after the institution of judicial proceedings before the Court.[893] The finding of the Court put the violation of diplomatic and consular premises and staff in the limelight. The issue before the Court was the acts of the militants, and the consequences of relevant acts and omissions, which engaged the responsibility of Iran.

There are surely points here and there, which could have been developed and argued by the respondent. Unfortunately, Iran refused to come before the Court and present its own case. Having turned down that opportunity, Iran had no right to complain, if certain aspects of the case were not carefully developed in its favour. Iran knowingly took the risk of refusing to appear in Court. The Court based its decision on the issues and arguments developed before it. A Court of law carefully strikes a delicate balance, so that its judgment does not lead to a miscarriage of justice. In the American Hostages Case (1980), the Court rendered justice by determining that Iran was responsible under international law for the abuses committed in Tehran, Tabriz and Shiraz, against the interests of the United States and its nationals, who were seized and imprisoned for no just cause. The acts and omissions of the Iranian government made it responsible for the damage, pain and embarrassment, suffered by the United States and its nationals during the American hostages crisis.

The American Hostages Case (1980) is a landmark case. The International Court of Justice stated that the inviolability of diplomatic or consular premises is still a cardinal principle of international relations.[894] The Court also made it clear that receiving states are obliged to take appropriate steps to protect mission and consular premises. The case leaves no doubt that takeovers of such premises are illegal acts, which can hardly be justified under international law. The Court sent a clear message all over the world, by restating categorically that inviolability of premises remains the rule. The judgment of the Court assumes even more decisive significance in the present context of diplomatic law, because embassies and consulates are seized or attacked frequently.[895]

The United Nations Security Council played an active diplomatic role especially at a time when Iran and the United States were at loggerheads. However, the role of the Council had mediocre results due to institutional provisions, which allowed the Soviet Union to use its veto power to block the adoption of a United States draft resolution aimed at imposing coercive, economic sanctions against Iran.[896]

The Court delivered judgment in the American Hostages Case (1980) on 24 May 1980. The hostages were not released until 20 January 1981.[897] The United States and Iran negotiated the release with the help of the Algerian government. Diplomacy ended the detention of the hostages, thereby ending a crisis that had created severe tensions in the world.

CONCLUSION

Common global problems, international trade and increased means of communication, have led states to relate more and more with each other. Because the relations between nations keep growing in magnitude, it is absolutely necessary that there be channels, through which these relations can be monitored and directed, so that they become useful to states. Embassies and consular posts have, as a result, become places, where states handle extremely important political, economic, cultural, military and scientific issues. These important issues have made embassies and consular posts assume a strategic status in the day to day business between nations. As a result, any threat to or breach of the inviolability of diplomatic or consular premises, becomes a serious affront to the sending state. The citizens of a sending state become bitter, if their consular or diplomatic premises in the receiving state have been violated. Those violations are interpreted as insults to the worth or dignity of the sending state.

The context in which the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963) were conceived, discussed and adopted was different from the context today. The rise in urban terrorism; electronic monitoring of communications to, from, and within embassies or consular posts; and the phenomenal increase in the techniques and practice of intelligence gathering, have brought new threats to the dignity of the missions and consular posts. Since the adoption of the Diplomatic Convention (1961) and the Consular Convention (1963), young countries have become independent, and have opened embassies and consular posts all over the world. As a consequence, the numbers of diplomatic and consular staff have swelled. These increases in the number of embassies and consular posts have made the duty of protection of these premises more arduous for receiving states. The plethora of diplomatic and consular agents has led to a situation, where within the ranks of those agents, there are persons, who unscrupulously violate the laws of the receiving state, or interfere in the internal affairs of that state. This combination of factors makes the inviolability of diplomatic and consular premises more vulnerable. The conduct of careless diplomatic or consular staff sometimes attracts uncomfortable measures or reactions from the receiving state. Some receiving states also act irresponsibly, by not protecting adequately diplomatic or consular premises. Some receiving states would forcibly enter the premises, because the embassy or consular post has acted in a manner that is incompatible with diplomatic or consular functions.

In short, there is greater need today, for the inviolability of diplomatic or consular premises to be appropriately protected. One of the problems is that due diligence is not a definition, but a standard to be ascertained, according to the circumstances of time and place.

It is proposed to make two recommendations in respect of honorary consulates and diplomatic asylum. The Diplomatic Convention (1961), the Consular Convention (1963), the Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and other Internationally Protected Persons (1973) and some national laws, have reasonable provisions for the protection of the inviolability of consular and diplomatic premises. However, honorary consulates should be given greater treaty-based protection, so that honorary consuls could perform their duties better and, consequently, handle sensitive, important issues on behalf of appointing states.

The premises of ordinary consular posts enjoy qualified inviolability under Article 31 of the Consular Convention (1963). It is recommended that honorary consulates be allowed to enjoy inviolability under Article 31 of the Consular Convention (1963). It is possible to require that, for an honorary consulate to enjoy the inviolability accorded to ordinary consular posts, such an honorary consulate should be set aside and used exclusively for consular business. For instance, the receiving state could ascertain that the premises of the honorary consulate are completely separated from other premises, where the honorary consul runs his private business. The importance and the number of honorary consulates is growing. Firstly, a substantial number of countries, which in 1963 were only colonies, have since become independent and have appointed honorary consuls. Secondly, because of growing economic and financial difficulties many states, particularly poor, young nations, are appointing more honorary consuls, since honorary consulates function at little or no cost to the appointing state. To allow honorary consulates to enjoy the inviolability under Article 31 of the Consular Convention (1963) would give cognizance to a new reality: the growing importance of honorary consulates. Those consulates need that qualified inviolability, so as to function efficiently. If they function well, that would promote good relations between states. That will be beneficial to the international community.

Diplomatic asylum is another problem. The lack of an international treaty, of general application on all continents, leaves much to be desired. Treaty-based diplomatic asylum in Latin American is a good example of what could be done at the level of the United Nations, or at the level of continents such as Africa or Asia. The humanitarian concerns, which often motivate the grant of diplomatic asylum, are essential to persons, who are fleeing persecution or an imminent threat of it.

The Caracas Convention on Diplomatic Asylum (1954) regulates diplomatic asylum among some Latin-American States. That convention puts the state granting asylum in a stronger position than it was the case before the Asylum Case (1950). Under Article 2 of that convention, every state has the right to grant asylum. The convention also provides at Article 4 that the granting state shall determine the nature of the offence or the motives for the prosecution. Furthermore, the granting state's determination of urgency, its request for a safe-conduct and its prolongation of asylum shall be respected by the territorial state. It is recommendated that the United Nations should recognize diplomatic asylum and regulate the practice, so as to enhance its qualities and limit its abuses. The United Nations could adopt a convention with provisions similar to those of the Caracas Convention on Diplomatic Asylum (1954). The absence of a United Nations convention on diplomatic asylum is a gap that ought to be filled. The humanitarian concerns that have made diplomatic asylum a generally-tolerated practice are still a reality. In fact, unstable political regimes and abuses of human rights have made diplomatic asylum become more important than it is often thought.

In order to avoid a violation of diplomatic or consular premises, receiving and sending states have both obligations and rights at the same time. Reciprocity must go together with civilized behaviour, in the conduct of relations between nations. The responsible behaviour of states is one of the major ways in which to avoid conflicts and wars, in order to work for the furtherance of the purposes of the United Nations Organization. A state which promotes terrorist acts, against embassies, sows seeds of disorder, while undermining the efforts of the world community to build a universal system, that attains and maintains peace and understanding between states.

States which have suffered wrongs should resort only to solutions, which do not imply the use of military force. Force has hardly led to any lasting solutions to international conflicts. The American Hostage Crisis sent shock waves all over the civilized world. The Iranians were, for a number of months, the undisputed victors. They held American hostages in deplorable conditions. In the long run, it is the world community of civilized nations that is the real victor. The roles played by the United Nations Security Council and the International Court of Justice gave extraordinary importance to the rule of law in circumstances, where the premises of a mission or consular post have been violated, for no just cause. The Security Council played its major role as the main political organ of the United Nations. The International Court of Justice played a decisive role, as the judicial organ of the United Nations. However, the Court and the Security Council suffered drawbacks, because of handicaps that are inherent in the very structure of the United Nations Organization.

The Security Council's plan to take coercive measures against Iran was frustrated on 13 January 1980, when the Soviet Union, a permanent member of the Council, used its veto to block a United States draft resolution for the adoption of severe, economic sanctions against Iran, because that islamic republic had refused to comply with Resolutions 457 (1979) and 461 (1979). It is unfortunate to realize that one of the nations, which has veto power could alone block the action of the Council. That makes the voting system at the Council fragile and vulnerable, because one powerful state may frustrate the majority of the whole Council by using its veto. On 13 January 1980, the Soviet

Union and the German Democratic Republic indirectly supported Iran, a terrorist state, which, by acting through unruly militants, was holding 50 Americans hostage in the United States Embassy, Tehran.

The International Court of Justice, by its preliminary order of 15 December 1979, and its judgment of 24 May 1980, decided that Iran immediately take certain provisional measures, including the release of the hostages and the re-establishment of the inviolability of United States Embassy and Consulates in Iran. Iran blatantly refused to comply with both the order and the judgment of the Court. The structure of the United Nations Organization does not always permit the prompt enforcement of the decisions of the Court. That great difficulty was evident. Because of that handicap, Iran stubbornly kept the hostages until 20 January 1981. In spite of that, one thing is clear. In its judgment the Court reiterated the supremacy of diplomatic and consular law, on issues concerning the violation of mission and consular premises. The decisive importance of the Court's decision will probably be seen as the years pass. The Court's judgment did send a message to all nations: that the inviolability of diplomatic and consular premises must be respected, in order to promote fruitful relations between nations. It is to be hoped that that message has reached all nations.

ENDNOTES

General Note: Some newspaper sources in the endnotes do not mention any pages. Those sources are newspaper cuttings which show no pages. The newspaper cuttings are found in the National Archives in Ottawa and the Library of the Department of External Affairs in Ottawa.

1. Vienna Convention on Diplomatic Relations (1961) as reproduced in 29 Canada Treaty Series 1 (1966) [hereinafter Diplomatic Convention (1961)].

   Vienna Convention on Consular Relations (1963) as reproduced in 25 Canada Treaty Series 1 (1975) [hereinafter Consular Convention (1963)].

   See also Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (1973) as reproduced in Hevener, Natalie K. (ed), Diplomacy in a Dangerous World: Protection for Diplomats Under International Law (Westview Press Inc., Boulder and London, 1986) p. 201 [hereinafter Convention on Prevention (1973)].

2. Libya and Iran have, in recent years, been accused of sponsoring terrorists for varying reasons.

   Arthur J. Goldberg, "The Shoot-out at the Libyan Self-Styled Person's Bureau: A Case of state-sponsored international terrorism," 30 South Dakota Law Review 2

(1984).

3. Leslie C. Green, "Trends in the Law Concerning Diplomats", 19 Canadian Yearbook of International Law 132 at p. 136 (1981).

4. (1980) I.C.J. Reports, p. 3.

United States of America V. Iran (1980) is also known as the American Hostages Case (1980).

This case will be discussed in detail in Chapter IX.

5. American Hostages Case (1980) I.C.J. Reports, p. 24, para. 46.

6. Ibid.

7. Ibid., p. 28, para. 55.

8. Ibid., p. 31, para. 63.

9. Ibid., pp. 44, 45, para. 95.

10. Asylum Case (1950) I.C.J. Reports, p. 269.

11. Ibid., pp. 275, 276.

12. Diplomatic intercourse existed between the most primitive societies. For example, in the grasslands of Cameroon, West Africa, kingdoms or tribal groups had, before the arrival of European missionaries and administrators, a system of diplomacy that today is similar to modern ad hoc diplomacy. Envoys took secret messages from one ruler to another even during inter-tribal hostilities. During war, envoys in that part of the world conspicuously carried the leafy branches of a shrub (often called "life" plant) which was known as a symbol of peace. Envoys were always unarmed

and never took part in war.

See also Joseph Nisot, "Diplomatie Ad Hoc: Les 'Missions Spéciales'", Revue Belge de Droit International 416 (1968).

13. William Statsky, West's Legal Thesaurus/Dictionary (Saint Paul: West Publishing Company, 1985) p. 204.

14. D.J. Harris, Cases and Materials on International Law (London: Sweet and Maxwell, 1983) p. 23.

Luke T. Lee, Vienna Convention on Consular Relations (Durham N.C.: A.W. Sijthoff, Leyden, Rule of Law Press, 1966) p. 159.

See infra Notes 178-181.

The Vienna Congress of 1815 established the principle of absolute immunity which had characterized diplomatic status for centuries of diplomacy.

15. The Diplomatic Convention (1961) at Article 47 and the Consular Convention (1963) at Article 72 allow states to agree between themselves to have rules and practices, which are peculiar to the states concerned. That does not amount to discrimination as between states.

16. Philippe Cahier, Le Droit Diplomatique Contemporain (Genève: Librairie Droz, 1964) p. 133.

Representation has become more important than it used to be. Through an embassy the presence of the sending state is felt. It is a crucial psychological aspect, because the ambassador and his staff remind the government and the citizens of the receiving state that the sending state does not only exist, but that it is also present.

17. Cahier, *ibid*., p. 134.

18. Myers S. McDougal, Harold D. Lasswell, W. Michael Reisman, "The Intelligence Function and World Public Order", 46 *Temple Law Quarterly* 368 (1973).

See Maxwell Cohen, "Espionage and Immunity--Some Recent Problems and Developments", 25 *British Yearbook of International Law* 405 (1948).

See also Manuel R. Garcia-Mora, "Treason, Sedition and Espionage as Political Offences under the Law of Extradition", 26 *University of Pittsburgh Law Review* 79, 80 (1964).

Nathaniel P. Ward, "Espionage and the Forfeiture of Diplomatic Immunity", 11 *International Lawyer* 668 (1977).

Harold W. Bank, "Espionage: The American Judicial Response. An In-Depth Analysis of the Espionage Laws and Related Statutes", 21 *American University Law Review* 330 (1972).

19. Article 3(1) (d), Diplomatic Convention (1961).

20. *Ibid*., art. 3(1) (b).

Cahier, *supra* Note 16, p. 137.

21. The North here refers to the rich industrialized countries. The South refers to the poor countries of the Third World.

22. B. Sen, A Diplomat's Handbook of International Law and Practice (The Hague: Martinus Nijhoff, 1965) p. 73.

23. Article 5 of the Consular Convention (1963) gives a list of consular functions. The list is not exhaustive. It leaves the door open for any other functions provided that those functions are not forbidden by the laws of the receiving state.

24. Geraldine Alfino, "Consular Immunity from Service of Process under the Vienna Convention on Consular Relations", 8 Fordham International Law Journal 114 (1984).

The growing mixture of diplomatic and consular functions appears to be on the rise. There are economic and political advantages derived from that growing, salutary confusion of the duties of consular posts and embassies.

25. Alfino, ibid., p. 100.

26. Ibid., p. 102.

The Diplomatic (1961) and Consular (1963) Conventions as a whole leave the impression that the International Law Commission and the delegations to the two Conferences, preceding the conclusion of each Convention, intended to allow for the overlapping of the functions of diplomatic missions and consular posts.

27. Clifton E. Wilson, Diplomatic Privileges and Immunities (Tucson: The University of Arizona Press, 1967) pp. 2-5.

Heads of state still send envoys to other States as their representatives "Extraordinary Plenipotentiary."

Those envoys are the "full" representatives of the Heads of State.

28. Wilson, *ibid*., pp. 2-4, and Cahier, *supra* Note 16, p. 185.

29. Cahier, *supra* Note 16, p. 185.

Cahier also explains at page 188 that Fauchille thought that that fiction was so vague and so untrue that it was also dangerous.

30. Wilson, *supra* Note 27, p. 9.

31. Cahier, *supra* Note 16, pp. 190, 191; and Wilson, *supra* Note 27, p. 17.

32. The Draft Convention done by the Harvard Law School on Diplomatic Privileges and Immunities, in 1932, adopted the functional theory. The Harvard Draft Convention is reproduced in Cahier, *supra* Note 16, pp. 461-469.

33. Wilson, *supra* Note 27, p. 23.

34. Article 22, Diplomatic Convention (1961); Article 33, Consular Convention (1963).

35. Articles 31(4) and 33, Consular Convention (1963).

See Sen, *supra* Note 22, p. 245.

See also Mohammed A. Ahmad, *Institution Consulaire et le Droit International* (Paris: Librairie Générale de Droit et de Jurisprudence, 1973) p. 103.

36. Article 29, Diplomatic Convention (1961); Article 41, Consular Convention (1963).

37. Wilson, *supra* Note 27, pp. 26-28.

See also Article 31, Diplomatic Convention (1961) and Article 43, Consular Convention (1963).

38. Cahier, supra Note 16, p. 283.

39. The United Nations Convention on Special Missions (1969) United Nations Juridical Yearbook, United Nations Doc. ST/LEG/SER-C/7, 125 (New York, 1971) at p. 126.

40. Article 20 (a) and (b) of the Convention on Special Missions (1969).

F. Przetacznik, "Diplomacy by Special Missions", 59 Revue de Droit International de Sciences Diplomatiques et Politiques 111, 112, (1981).

See also Maurice Waters, "The Ad Hoc Diplomat: A legal and historical analysis", Wayne Law Review 384 (1960).

41. A.H. Garretson, "The immunities of Representatives of Foreign States", 41 New York University Law Review 70 (1967).

42. Wilson, supra Note 27, p. 272.

43. Eileen Denza, Diplomatic Law (Dobbs Ferry, New York: Oceana Publications, Inc., 1976.) p. 84.

44. Goldberg, supra Note 2, pp. 1-5.

See Stephen Sutton, "Diplomatic Immunity and Siege of the Libyan People's Bureau", Public Law 193-195 (Summer 1985).

See also Rosalyn Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience", 79 American Journal of International Law 643

(1985).

45. Article 1 (i), Diplomatic Convention (1961).

46. Sen, supra Note 22, p. 93.

47. Ibid.

48. This happens to be the present practice in Ottawa. It is not certain if for the purposes of entry into diplomatic premises the consent of the head of mission must be sought even if he is out of Ottawa, but is within Canada. Apparently each case will depend on its own circumstances.

49. Article 1 (j), Consular Convention (1963).

50. Robert M. Jarvis, "The Honorary Consul in Modern International Practice: Why Article 68 of the Final Act of the United Nations Conference on Consular Relations should be amended to Provide a Uniform Regime for the Sending and Receiving of Honorary Consuls", 23 Duquesne Law Review 906 (1985).

51. Article 1 (i), Consular Convention (1963); Lee, supra Note 14, p. 93.

52. Ibid.

53. Article 1 (j), Consular Convention (1963).

54. Sen, supra Note 22, p.98.

55. 28 International Law Reports 369 at pp. 381, 382 (1959).

Brunson MacChesney, "Judicial Decisions", 54 American Journal of International Law 165 (1960).

56. 28 International Law Reports 369 at p. 381 (1959).

57. Ibid., p. 382.

58. Clive Parry (ed.), A British Digest of International Law, Vol. 7 (London: Stevens and Sons, 1965), p. 896.

59. Article 31(1), Diplomatic Convention (1961).

60. Lee, supra Note 14, p. 32.

61. Article 17, Consular Convention (1963).

R. Venneman, "La Fin des Consulats?", Revue Belge de Droit International 151 at p. 152 (1965).

At page 152 Venneman says that the consular institution came out of the Vienna Conference (1963) strengthened--(L'institution consulaire est sans nul doute sortie renforcée de la Conférence de Vienne").

62. United Kingdom-China Consular Agreement of 17 April 1984, CMND 9247 China No. 1, 3 (1984).

C.A. Whomersley, "The United Kingdom-China Consular Agreement", 34 International and Comparative Law Quarterly 623 (1985).

63. Honduras Act No. 109 of 14 March 1906 regarding Foreign Consular Missions, United Nations Legislative Series, Vol. VII (New York, 1958), p. 153.

64. Draft Article 30 in the United Nations Report of the International Law Commission, 56 American Journal of International Law 312 (1962).

65. Ibid.

See also Lee, supra Note 14, pp. 86, 87.

66. It was not possible to find the judgment at the reference, 9 PSAKIM (District Court), p. 502. The Israeli case, Heirs of the Late Moshe Shavaco V. Roger Hylan (1953) is dealt with in this thesis according to what is found at Lee, supra Note 14, p. 86. It was not possible to find the original decision in any library in Ottawa.

67. Article 31, Consular Convention (1963).

68. United Kingdom-China Consular Agreement, supra Note 62.

69. Union of Soviet Socialists Republics and People's Republic of China Consular Agreement of 23 June 1959, United Nations Treaty Series (1960) 99 at p. 102.

70. Article 33, Consular Convention (1963).

71. Hungary-Poland Consular Convention of 24 April 1936, 185 League of Nations Treaty Series (1938) 305 at p. 309.

72. Ibid.

73. Ibid.

74. 19 United States Department of State Bulletin 253 (1948).

Lawrence Preuss, "Consular Immunities: The Kasenkina Case (U.S.-U.S.S.R.)", 43 American Journal of International Law 37 (1949).

This case raised some delicate questions hinging on how far consular immunities can extend. A sending state should not under the guise of immunities exercise police powers over its citizens in the receiving state. The receiving state should avoid entering consular premises to investigate a serious crime, without the permission of the sending state.

75. 19 U.S. Department of State Bulletin 253 (1948),

76. Ibid., p. 255.

77. Lee, supra Note 14, pp. 88, 89.

78. 19 U.S. Department of State Bulletin 253 at pp. 408, 409 (1948).

Preuss, supra Note 74, p. 46.

79. 19 U.S. Department of State Bulletin 253 (1948).

80. David M. Walker, The Oxford Companion to Law (Oxford: Clarendon Press, 1980) p. 451.

81. Joseph R. Nolan and M.J. Connolly, Black's Law Dictionary (Saint Paul: West Publishing Company, 1979) p. 1172.

82. Yearbook of the International Law Commission, Vol. I (1957) pp. 66-69.

Denza, supra Note 43, p. 84.

83. Ibid.

84. Denza, supra Note 43, p. 84.

85. Walker, supra Note 80, p. 372.

86. Denza, supra Note 43, p. 85.

87. Ibid.

88. Ibid.

It is not certain what the response of the embassies might have been if the missions had to leave their premises and find new accommodation.

89. Article 31, Consular Convention (1963).

Compensation is crucial to the whole issue. Prompt and adequate help eases the pain caused by the decision of the sending state.

90. Lee, supra Note 14, pp. 93, 94.

91. United States-Costa Rican Consular Convention of 12 January 1948, 896 United Nations Treaty Series (1950) 27 at pp. 32-34.

92. Denza, supra Note 43, pp. 78, 79.

93. Ibid.

94. Article 22(3), Diplomatic Convention (1961).

Denza, supra Note 43, p. 81.

95. Sen, supra Note 22, p. 123.

96. Article 31(2), Consular Convention (1963).

This case applies more when there is an outbreak of fire or some other emergency, which necessitates immediate intervention by the local authorities: police, fire department, army, etc.

97. Dusan Djonovich (ed), United Nations Resolutions (Dobbs Ferry, New York: Oceana Publications, Inc. Vol. I, 1973) p. 21.

98. Denza, supra Note 43, p. 90.

99. Department of External Affairs Circular Note No XDC-2070 of 22 April 1986, addressed to Chiefs of Diplomatic missions, pp. 1-4.

100. Article 24, Diplomatic Convention (1961) and Article 33, Consular Convention (1963).

101. Department of External Affairs of Canada, Ottawa, Guide for the Diplomatic and Consular Corps in Canada (1988) p. 12.

102. Ibid.

103. (1980) I.C.J. Reports, p. 3.

See also Oscar Schachter, "International Law in the Hostage Crisis" in Warren Christopher et al, American Hostages in Iran--The Conduct of a Crisis (New Haven: Yale University, 1985) pp. 345-348.

104. American Hostages Case (1980) I.C.J. Reports, pp. 44, 45, para. 95.

105. United States of America V. Iran (1979) I.C.J. Reports, pp. 20, 21, para. 46.

106. Cherif Bassiouni, "Protection of Diplomats Under Islamic Law", 74 American Journal of International Law 631 (1980).

Islamic law and current international law both provide for the special protection of diplomats and foreign missions.

107. (1969) 1 Weekly Law Reports 703 (Court of Appeal).

108. Ibid., pp. 704, 705.

109. Ibid., p. 707.

110. Ibid., p. 707.

111. Ibid., p. 707.

112. Ibid., p. 703.

113. Lawrence Preuss, "Protection of Foreign Diplomatic and Consular Premises Against Picketing", 31 American Journal of International Law 706, 707 (1937).

The U.S. Senate's Committee on Foreign Relations on 4 August 1937, recommended that picketing an embassy or congregating within 500 feet of any such premises should become a punishable offence. The resolution excluded from criminal picketing, any picketing "as a result of bona-fide labour disputes regarding the alteration, repair, or construction of either buildings or premises occupied, for business purposes, wholly or in part by representatives of foreign governments."

114. Sutton, supra Note 44, p. 195.

115. "Diplomatic Immunities and Privileges--Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to 'The Abuse of Diplomatic Immunities and Privileges'--The First Report from the Foreign Affairs Committee in the Session 1984-85", CMND. 9497 Miscellaneous No. 5, 1 at p. 17 (1985) [hereinafter British Government Report (1985)].

See also Iain Cameron, "First Report of the Foreign Affairs Committee of the House of Commons", 34 International and Comparative Law Quarterly 611 (1985).

116. Article 22(2), Diplomatic Convention (1961); Articles 40 and 31(3), Consular Convention (1963).

117. American Law Institute, Restatement of the Law, Third, Foreign Relations law of the United States, Vol. I (Saint Paul, Minnesota: American Law Institute Publishers, 1987) p. 487 [hereinafter Third Restatement].

118. Ibid.

119. Ibid.

120. 7 Whiteman's Digest of International Law 170 (1973) p. 171.

Third Restatement, supra Note 117, p. 468.

121. 59 Federal Rules Decisions 530 (District of Columbia Circuit 1973).

122. 347 Atlantic Reporter, 2d Series 280 (District of Columbia Court of Appeals 1975).

123 Ibid., pp. 282, 283.

124. United States Diplomatic Relations Act of 1978, United States Code Annotated (Saint Paul: West Publishing Co., 1988) p. 38.

125. 59 Federal Rules Decisions 530 (District of Columbia Circuit 1973).

126. Jarvis, supra Note 50, pp. 930-934.

127. (1915) 1 King's Bench Division 616.

128. Ibid., pp. 616, 617.

129. Jarvis, supra Note 50, p. 932.

130. W. Wendell Blancke, The Foreign Service of the United States (Washington: Frederick A. Praeger, Publishers, 1969) pp. 240, 241.

John Ardagh, A Tale of Five Cities: Life in Europe Today (New York: Harper and Row, Publishers, 1979) p. 45.

131. Blancke, supra Note 130, pp. 239-241.

Jarvis, supra Note 50, p. 933.

132. Ardagh, supra Note 130, pp. 45-47.

133. Lee, supra Note 14, pp. 166, 167.

See also Jarvis, supra Note 50, pp. 913-915.

134. Lee, supra Note 14, p. 166.

135. Venneman, supra Note 61, p. 151.

See also Article 17, Consular Convention (1963) which deals with the performance of diplomatic acts by consular officers.

136. Ibid.

137. Jarvis, supra Note 50, p. 915.

138. Article 59, Consular Convention (1963).

139. Ibid., Article 61.

140. Ibid., Article 62.

141. Ibid., Article 63.

142. Ibid., Article 71(1).

See also Lee, supra Note 14, p. 163.

143. Articles 42 and 71(1), Consular Convention (1963).

See Ahmad, supra Note 35, p. 25.

Because of the status of nationals or permanent residents as honorary consuls, Vattel even advocated that such persons as soon as they became heads of honorary consulates, should cease to be subjects of the state where they resided. That in practice seems hardly feasible.

144. Article 71(2), Consular Convention (1963).

145. Most African and Asian states acquired their independence in the 1960s. That suddenly increased the number of members of the United Nations Organization and other international organizations.

146. See supra Note 21.

147. The peculiar nature of the honorary consulate is partly based on the fact that the honorary consul enjoys tremendous freedom, because he independently exercises lucrative activities. Without those lucrative activities, the honorary consulate would probably be perceived differently.

148. Even where the honorary consul has used his financial power to be appointed, it is necessary that he knows the receiving state well, in order to convince the appointing state that he will be a competent honorary consul.

149. The means of obtention of information is crucial. Illegally obtaining information may amount to the crime of espionage. Such criminal activities can jeopardize the activities and security of the consul and his services.

150. A few young nations have come to be well known internationally, because of the dictatorial and tyrannical behaviour of their presidents. Examples here include Idi Amin's Uganda, Bokassa's Central African Republic and Macias Nguema's Equatorial Guinea.

151. Romania-Yugoslavia Consular Convention of 8 November,

1962, 472 United Nations Treaty Series (1963) p. 34.

152. Romania-Hungary Consular Convention of 18 March 1959, 417 United Nations Treaty Series (1961) p. 20.

153. Jarvis, supra Note 50, p. 907.

See also Kazimierz Grzybowski, Soviet International Public Law - Doctrines and Diplomatic Practice (Leyden A.W. Sijthoff, 1970) pp. 324, 325.

154. Jarvis, supra Note 50, p. 907.

155. Ibid.

156. Letter No. JIS-6119 of the 20 October 1988, addressed to me by the Director of Consular Operations, Department of External Affairs, Ottawa. The purpose of the document which accompanies the letter is to provide guidance for honorary Consuls and for Canadian missions supervising honorary consuls or preparing proposals for their appointment. The document EA 11 (2). begins with Chapter II - Honorary Consuls.

157. Jarvis, supra Note 50, p. 907.

158. United Nations Document A/CONF. 25/C.2/SR 37, 29 March 1963, p. 13.

159. Ibid.

160. Peter Porcino, "Toward Codification of Diplomatic Asylum", 8 New York Journal of International Law and Politics 435 at p. 436 (1976).

161. Ibid.

162. Parry, supra Note 58, p. 908.

There was an example of consular asylum at the German

Consulate in Zanzibar (presently part of the Republic of Tanzania). In 1986 Prince Khaled of the Sultanate of Zanzibar fled British authorities and took refuge at the German Consulate on the Island of Zanzibar.

Felice Morgenstern, " °Extra-Territorial' Asylum", British Yearbook of International Law 236 at pp. 250-253 (1948).

163. Porcino, supra Note 160, p. 437.

164. C. Neale Ronning, Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations (The Hague: Martinus Nijhoff, 1965) pp. 8, 130, 131.

At pp. 130, 131 asylum is distinguished from refuge. Where it is refuge, the refugee must be surrendered upon the simple request of the local authorities.

165. Morgenstern, supra Note 162, p. 253.

166. Ibid., p. 256.

See also 1982 Law of the Sea Convention Articles 27 and 28, United Nations Publication, New York (1983).

167. Ibid.

See also Statsky, supra Note 13, p. 204 for the definition of "Custom and Usage."

168. Porcino, supra Note 160, p. 441.

See Morgenstern, supra Note 162, p. 245.

169. Parry, supra Note 58, p. 923.

170. Ibid.

171. Ibid., pp. 924-926.

172. (1950) I.C.J. Reports, pp. 276-279.

A detailed analysis of this case will be made below in this chapter.

173. *Asylum Case* (1950) *I.C.J. Reports*, p. 272.

174. *Ibid.*, p. 271.

175. *Ibid.*

176. *Ibid.*

177. *Ibid.*, p. 276.

178. *Ibid.*, p. 276.

179. *Ibid.*, pp. 277, 278.

180. *Ibid.*, p. 277.

181. *Ibid.*, p. 277; see also text to Notes 362-365 *infra*.

182. *Asylum Case* (1950) *I.C.J. Reports*, pp. 278, 288.

183. *Ibid.*, pp. 274, 275.

184. *Ibid.*, p. 275; see also text to Notes 308-317 *infra*.

185. Report of the Fifty-First Conference held at Tokyo in 1964, "Legal Aspects of the Problem of Asylum", *The International Law Association* (London: Cambrian News (Aberystwyth) Ltd., 1965), p. 217 [hereinafter ILA Report (1964)].

186. *Ibid.*, p. 279.

187. See *infra* Notes 366-378.

188. *Asylum Case* (1950) *I.C.J. Reports*, p. 295; see also text to Notes 366-370 *infra*.

189. *Asylum Case* (1950) *I.C.J. Reports*, p. 335.

190. *Ibid.*, p. 336.

191. *Ibid.*

192. *Ibid*., p. 337.

193. *Ibid*.

194. *Ibid*.

195. *Ibid*., p. 370, para. 18.

196. *Ibid*.

197. *Ibid*., p. 279.

198. *United Nations Document AC/C6/SR 1556* (1975) p. 159.

Anthea J. Jeffery, "Diplomatic Asylum: Its Problems and Potential As a Means of Protecting Human Rights", 1 *South African Journal of Human Rights* 10 at pp. 18, 19 (1985).

Article 41, Diplomatic Convention (1961) and Article 55, Consular Convention (1963) do not preclude the grant of asylum. The articles which describe consular and diplomatic functions are not exhaustive.

199. *United Nations Document AC/C6/SR 1556* (1975) p. 161.

200. *Ibid*., p. 159.

201. Porcino, *supra* Note 160, p. 445.

202. Neale Ronning, *supra* Note 164, p. 54.

203. *Collection of International Instruments Concerning Refugees* (Geneva: Office of the United Nations High Commissioner for Refugees, 1979) p. 236 [hereinafter *Collection of Instruments*].

204. *Ibid*., pp. 236, 246; see also Neale Ronning, *supra* Note 164, pp. 64, 65.

205. *Collection of Instruments*, *supra* Note 203, p. 239.

206. *Ibid*.

207. *Ibid*., p. 247.

208. *Ibid*.

209. *Ibid*., p. 248.

210. Neale Ronning, *supra* Note 164, p. 222.

The countries which ratified the Havana Convention on Asylum (1928) were: Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay.

211. Neale Ronning, *supra* Note 164, pp. 222, 223.

212. See *infra* Notes 355-365.

213. *Collection of Instruments*, *supra* Note 203, p. 249.

214. *Ibid*., p. 249.

215. Neale Ronning, *supra* Note 164, p. 223.

The countries that ratified were: Brazil, Colombia, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama and Paraguay.

216. *Collection of Instruments*, *supra* Note 203, p. 251.

217. See *infra* Notes 304-310.

218. *Asylum Case* (1950) *I.C.J. Reports*, p. 279.

See also Porcino, *supra* Note 160, p. 442.

219. Montevideo Treaty on Political Asylum and Refuge (1939) as reproduced in Manley O. Hudson (ed.), *International*

Legislation, Vol. VIII-1938-1941 (Washington: Carnegie Endowment for International Peace, 1949) p. 404 [hereinafter Treaty (1939)].

220. Ibid., p. 404-411.

221. Ibid., p. 404.

The Editor says at page 404 that the Montevideo Treaty on Political Asylum and Refuge (1939) elaborates only Title II of the Montevideo Treaty on International Penal Law (1889). The Argentine government had proposed a draft Convention on Asylum in 1937.

222. Asylum Case (1950) I.C.J. Reports, p. 277.

See also Neale Ronning, supra Note 164, p. 54.

223. Article 1 paragraph 1, Treacy (1939), supra Note 219, p. 406.

224. Article 2, Treaty (1939), supra Note 219, p. 406.

225. Article 3, Treaty (1939), supra Note 219, pp. 406, 407.

226. Collection of Instruments, supra Note 203, p. 249.

227. Ibid.

228. Asylum Case (1950) I.C.J. Reports, p. 277.

229. Collection of Instruments, supra Note 203, p. 268.

230. Ibid., p. 268.

231. Ibid., pp. 272, 273.

See also Neale Ronning, supra Note 164, p. 65.

232. Leslie C. Green, International Law through the Cases (Toronto: The Carswell Company Ltd., 1978) p. 369.

233. Collection of Instruments, supra Note 203, p. 268.

234. ILA Report (1964), supra Note 185, pp. 220, 226.

235. (1950) I.C.J. Reports, p. 278.

236. Ibid., p. 283.

237. Ibid.

238. Article 6 Caracas Convention on Diplomatic Asylum (1954), Collection of Instruments, supra Note 203, p. 269.

239. (1950) I.C.J. Reports, p. 274.

240. Ibid., p. 275; see also text to Notes 183-184 supra.

241. Asylum Case (1950) I.C.J. Reports, p. 274.

242. Ibid.

243. Ibid., p. 279.

244. Articles 2, 4, 6, 7 and 9 Caracas Convention on Diplomatic Asylum (1954), Collection of Instruments, supra Note 203, pp. 268, 269.

245. Morgenstern, supra Note 162, p. 259; Cahier, supra Note 16, p. 207; Porcino, supra Note 160, pp. 445-447.

246. Ibid.

247. Ibid.

248. See supra Note 150.

249. See supra Note 245.

250. Morgenstern, supra Note 162, p. 259.

251. See text to Notes 204-206 supra.

252. See text to Notes 209-212 supra.

253. See text to Notes 215-218 supra.

254. See text to Notes 223-228 supra.

255. See text to Notes 231-238 supra.

256. See text to Note 222 supra.

257. Article 17, Montevideo Treaty on International Penal Law (1889), Collection of Instruments, supra Note 203, p. 239; Article 2, Havana Convention on Political Asylum (1928), Collection of Instruments, supra Note 203, p. 249; Article 2, Montevideo Treaty on Political Asylum and Refuge (1939), Treaty (1939), supra Note 219, p. 406; Article 1, Caracas Convention on Diplomatic Asylum (1954), Collection of Instruments, supra Note 229, p. 268.

258. ILA Report (1964), supra Note 185, p. 216.

259. Neale Ronning, supra Note 164, p. 65.

260. U.S. Department of State Bulletin, October 1980, at 50. Marian L. Nash, "Contemporary Practice of the United States Relating to International Law", 75 American Journal of International Law 142 at pp. 142, 143 (1981).

261. Ibid.

262. Third Restatement, supra Note 117, p. 488.

263. Ibid.

264. Ludwik Dembinski, The Modern Law of Diplomacy (Boston: Martinus Mijhoff Publishers, 1988) p. 249.

265. Third Restatement, supra Note 117, p. 488.

266. Ibid., pp. 488, 489.

267. J.-G. Castel International Law, 3rd Edition, (Toronto: Butterworths, 1976) p. 519.

268. Ibid.

269. Ibid., p. 520.

270. Jeffery, *supra* Note 198, p. 24.

271. *Ibid*., p. 27.

272. The reasons for persecution are so varied that each political system can develop its own reasons. Each political or economic environment could create different reasons for persecution. Often persecution is difficult to determine, for instance, like cases where new leadership in a country decides to get rid of the supporters of the former leadership.

273. Geoffrey S. Gilbert, "Right of Asylum: A Change of Direction", 32 *International and Comparative Law Quarterly* 633 at p. 644 (1983).

274. 658 *Federal Reporter*, 2d Series 1312 (9th Circuit 1981).

275. *Ibid*., pp. 1315, 1319.

The United States Court of Appeals 9th Circuit held that persecution includes the acts of nongovernmental groups such as the Provisional Irish Republican Army, where it can be shown that the government of the proposed state of deportation is not willing or unable to control that group. The definition of persecution depends on facts.

276. Gilbert, *supra* Note 273, p. 645.

277. *Ibid*.

278. Parry, *supra* Note 58, p. 923.

279. Sen, *supra* Note 22, p. 359.

280. Article 1, Havana Convention on Asylum (1928), _Collection of Instruments_, _supra_ Note 203, p. 247.

Article 1, Montevideo Convention on Political Asylum (1933), _Collection of Instruments_, _supra_ Note 203, p. 249.

Common crimes are defined in relation to political crimes. The difference between common and political crimes is a knotty issue. The definition of political crimes often translates into reality the fears and hopes of each political system.

281. (1950) _I.C.J. Reports_, p. 273.

282. _Ibid_., pp. 280-281.

283. Cherif Bassiouni (ed), _International Terrorism and Political Crimes_ (Springfield (Illinois): Charles C. Thomas Publisher, 1973) p. 405.

284. _Ibid_.

285. _Ibid_., p. 408.

286. _Ibid_.

287. Porcino, _supra_ Note 160, p. 437.

288. Morgenstern, _supra_ Note 162, p. 259.

289. _Ibid_.

290. See _supra_ Note 280.

291. (1950) _I.C.J. Reports_, p. 266.

292. _Ibid_., p. 272.

293. _Ibid_.

294. _Ibid_.

295. _Ibid_.

296. _Ibid._, p. 273.

297. _Ibid._

298. _Ibid._

299. _Ibid._

300. _Ibid._

301. _Ibid._, p. 269.

302. _Ibid._, p. 288.

303. _Ibid._

304. _Ibid._, pp. 273, 276.

305. _Ibid._, pp. 271, 280.

306. _Ibid._, p. 274.

307. _Ibid._

308. _Ibid._

309. _Ibid._, pp. 274, 275; see also text to Notes 183-185 _supra_.

310. _Asylum Case_ (1950) _I.C.J. Reports_, p. 275.

311. _Ibid._

312. _Ibid._

313. _Ibid._

314. _Ibid._

315. _Ibid._

316. _Ibid._

317. _Ibid._

318. _Ibid._, pp. 275, 276.

319. _Ibid._, p. 276.

320. _Ibid._, p. 276.

321. *Ibid*.

See also Article 2, Montevideo Convention on Political Asylum (1933), *Collection of Instruments*, *supra* Note 203, p. 249.

322. *Asylum Case* (1950) *I.C.J. Reports*, p. 276.

323. *Ibid*.

324. *Ibid*.

325. *Ibid*.

326. *Ibid*.

327. *Ibid*., p. 277.

328. *Ibid*.

329. *Ibid*.

330. *Ibid*.

331. *Ibid*., p. 370.

332. *Ibid*., p. 336.

333. *Ibid*.

See also text to Notes 187-192 *supra*.

334. *Asylum Case* (1950) *I.C.J Reports*, p. 294.

335. *Ibid*., p. 277.

336. *Ibid*.

337. *Ibid*.

338. *Ibid*., p. 278.

339. *Ibid*.

340. *Ibid*., p. 281.

341. *Ibid*.

342. *Ibid*.

343. *Ibid*., p. 282.

344. *Ibid*.

345. *Ibid*., p. 297.

346. *Ibid*.

347. *Ibid*.

348. *Ibid*., pp. 360, 361, para. 5.

349. *Ibid*., pp. 366, 367, para. 15.

350. *Ibid*., p. 347, para. 17.

351. *Ibid*., pp. 347, para. 18.

352. *ILA Report* (1964), *supra* Note 185, p. 269.

353. *Ibid*.

354. Green, *supra* Note 232, p. 369.

Leslie Green states that Peru has ratified the Caracas Convention on Diplomatic Asylum (1954).

355. *Asylum Case* (1950) *I.C.J. Reports*, p. 271.

356. *Ibid.*, p. 282.

357. *Ibid.*

358. *Ibid.*, p. 283.

359. *Ibid*.

360. *Ibid.*, p. 284.

361. *Ibid.*

362. *Ibid*.

363. *Ibid.*, p. 286.

364. *Ibid*.

365. *Ibid*., p. 287.

366. *Ibid*., p. 302.

367. *Ibid*., p. 309.

368. *Ibid.*, p. 313.

369. *Ibid*., pp. 374, 375.

370. *Ibid*.

371. See text to Notes 238-240 *supra.*

372. *Asylum Case* (1950) *I.C.J. Reports,* p. 278.

373. *Ibid*.

374. *Ibid*.

375. *Ibid*., p. 279.

376. *Ibid*.

377. *Ibid*.

378. *Ibid*.

379. *Ibid*.

380. *Ibid*.

381. *Ibid*.

382. *Ibid*., p. 372.

383. *Ibid*.

384. *Ibid*.

385. *Ibid*., p. 308.

386. Green, *supra* Note 232, p. 369. Colombia and Peru eventually agreed that Haya de la Torre should leave Peru. After the serious legal battles, the final solution was reached through diplomatic negotiations.

386a. *Le Devoir*, 3 January 1989, p. 4.

386b. Neale Ronning, *supra* Note 164, p. 224.

387. *Asylum Case* (1950) *I.C.J. Reports,* p. 275.

388. ILA Report (1964), supra Note 185, pp. 247, 248, 267.

389. The functions of embassies and consular posts do not expressly include the grant of asylum, as a recognized function.

ILA Report, supra Note 185, p. 267.

390. Yearbook of the International Law Commission, Vol. II (1958) p. 144, para. 63.

391. Article 2, Caracas Convention on Diplomatic Asylum (1954), Collection of Instruments, supra Note 203, p. 268.

392. (1980) I.C.J. Reports, pp. 41, 95, paras. 88, 90, 95.

393. Sutton, supra Note 44, p. 194.

Goldberg, supra Note 2, p. 2.

Goldberg says that treaties must be read in such a way that they fit into our daily reality. The literal meaning of each article, if pushed to extremes, could produce absurd situations.

394. Article 22, Diplomatic Convention (1961).

395. Ottawa Citizen, 2 February 1957;

Montreal Star, 2 February 1957;

Toronto Globe and Mail, 2 February 1957;

Ottawa Citizen, 1 February 1957;

Ottawa Journal, 1 February 1957.

396. Ottawa Citizen, 1 February 1957;

Toronto Globe and Mail, 2 February 1957;

Montreal Star, 2 February 1957.

397. Ottawa Citizen, 2 February 1957.

398. Canadian Department of External Affairs Circular Note No. A-16 of 3 August 1956.

399. Yearbook of the International Law Commission, Vol. I (1958) p. 128; the views of Mr. Bartoz and Mr. Tunkin are significant.

400. External Affairs Department (Canada), Guidelines for Fire Safety at Posts Abroad (Ottawa, 1984).

401. Ibid., p. A3-13.

402. Ibid., p. A3-8.

403. Ibid., p. A3-11.

404. Ibid., p. A3-12.

405. Third Restatement, supra Note 117, p. 484.

406. Article 22, Diplomatic Convention (1961).

407. Fire at Soviet Embassy, Ottawa, supra Note 395.

408. British Government Report (1985), supra Note 115, p. 29, para. 83.

Cameron, supra Note 115, pp. 611, 612.

409. Goldberg, supra Note 44, p. 4.

Higgins, supra Note 44, p. 645.

410. American Hostages Case (1980) I.C.J. Reports, p. 44, para. 95.

411. Green, supra Note 3, p. 142.

412. Ibid.

413. British Government Report (1985), supra Note 115, p. 29, para. 84.

414. Ibid.

415. Denza, _supra_ Note 43, pp. 84, 267.

Denza bases her account on _The Observer_, 11 February 1973. It was not possible to find that newspaper, which was probably published in London, England.

Sutton, _supra_ Note 44, p. 197.

416. Article 41(3) Diplomatic Convention (1961).

417. House of Commons Foreign Affairs Committee Session 1983-1984, Diplomatic Immunities and Privileges Minutes of Evidence taken on 20 June, 2 and 18 July 1984 (London: _Her Majesty's Stationery Office_, December 1984) p. 28, para. 49 [hereinafter British House of Commons (1984)].

418. _Ibid_.

419. See Notes 422 and 423 _infra_. In Great Britain picketing or demonstrating in front of an embassy is not a crime _per se_. It is a crime only if it paralyses the functioning of the embassy. See also _supra_ Note 115.

420. See _supra_ Notes 113 and 114.

421. _British Government Report_ (1985), _supra_ Note 115, p. 17, para. 39(e).

422. _Ibid_.

423. _Ibid_.

424. _Ibid_.

425. _Ibid_.

426. Article 31(2), Consular Convention (1963).

427. _Globe and Mail_, 15 January 1987.

428. _Globe and Mail_, 16 January 1987.

429. Articles 6, 7, U.S.-Costa Rican Consular Convention, _supra_ Note 91.

430. Articles 3(1) and (2) United Kingdom-China Consular Agreement, _supra_ Note 62; Article 22, Diplomatic Convention (1961).

See also Whomersley, _supra_ Note 62, p. 623.

431. Lee, _supra_ Note 14, pp. 87, 90, 91.

432. _Ibid_., p. 87.

Lee explains that to most communist states both diplomatic and consular relations are basically political in nature. The relations all seek to make the communist idealogy succeed in the world.

433. See _supra_ Notes 427, 428.

434. Article 3 of the Draft Convention of the Harvard Law School of 1932 on Diplomatic and Immunities in Philippe Cahier, _supra_ Note 16, p. 462.

435. Denza, _supra_ Note 43, p. 87; and Lee, _supra_ Note 14, p. 156.

436. In the absence of a laid down rule in the Diplomatic Convention (1961) and the Consular Convention (1963) each state has to judge or determine the commencement of inviolability from the facts.

437. Denza, _supra_ Note 43, p. 87.

438. 28 _International Law Reports_ 369 at p. 372 (1959).

439. _Ibid_., p. 382.

440. _Ibid_., pp. 369, 370.

441. *Ibid*., pp. 372, 374.

442. *Ibid*.

443. Each case has to be determined according to the circumstances. That absence of a clear-cut statement in the Consular Convention (1963) and the Diplomatic Convention (1961) give both the receiving and sending states an opportunity to agree between themselves, if they wish to do that.

444. 28 *International Law Reports* 369 at pp. 373, 375 (1959).

445. Article 45, Diplomatic Convention (1961).
Denza, *supra* Note 43, p. 88.

446. Articles 39 (2) and 45 Diplomatic Convention (1961).

447. *Ibid*.
See also Cahier, *supra* Note 16, p. 178.
It could also be the case of an international organization requesting that its members sever relations with a given state for specific reasons. On 12 December 1946, the United Nations General Assembly by a resolution requested member states of the United Nations Organization to sever relations with General Franco's Spain, which had a regime, whose practices were contrary to the principles of the United Nations Charter.

448. See text to Notes 768-775 *infra*.

449. Article 23 (2) Consular Convention (1963).

450. Ahmad, *supra* Note 35, p. 72.

451. Sen, <u>supra</u> Note 22, p. 184.

452. <u>Ibid</u>.

453. <u>Ibid</u>., p. 273.

454. Cahier, <u>supra</u> Note 16, pp. 180, 181.

455. Sutton, <u>supra</u> Note 44, p. 194.

456. <u>Ibid</u>.

See also Goldberg, <u>supra</u> Note 2, pp. 3, 4.

457. Article 20, United Nations Convention on Special Missions, <u>supra</u> Note 39, p. 130.

Przetacznik, <u>supra</u> Note 40, p. 133.

Nisot, <u>supra</u> Note 12, p. 417.

458. Article 45, Diplomatic Convention (1961).

459. Cahier, <u>supra</u> Note 16, p. 181.

The practice of multiple accreditation is growing rapidly, especially for financial reasons.

460. Ahmad, <u>supra</u> Note 35, p. 80.

461. Sen, <u>supra</u> Note 22, p. 185.

462. <u>Ibid</u>., p. 194.

463. <u>Ibid</u>.

464. Ahmad, <u>supra</u> Note 35, p. 82; Sen, <u>supra</u> Note 22, p. 273--Wars and "coups d'état" could determine the nature of future relations between states; Cahier, <u>supra</u> Note 16, p. 180; Lee, <u>supra</u> Note 14, p. 156.

465. Article 3 (e), Diplomatic Convention (1961).

See also Sen, <u>supra</u> Note 22, p. 67.

466. Article 70, Consular Convention (1963).

Venneman, supra Note 61, p. 151.

467. Article 3, Diplomatic Convention (1961);

See also Arun Chaturvedi, "Diplomatic Laws and Indian State Practice", 1 Indian Journal of International Law 50 at p. 54 (1985).

468. Article 3 (e), Diplomatic Convention (1961).

Article 5 (b), Consular Convention (1963).

See also Cahier, supra Note 16, p. 139;

Ahmad, supra Note 35, p. 94;

Sen, supra Note 22, p. 67.

469. Article 41, Diplomatic Convention (1961).

Article 55, Consular Convention (1963).

See also Sen, supra Note 22, p. 76.

The conduct of the internal affairs of each receiving state is a matter, wholly under the control of that state. No sending state should determine the internal policy of the receiving state. That would in most cases be interference in the internal affairs of the receiving state.

470. Green, supra Note 3, pp. 148, 150.

F. Przetacznik, "Les Devoirs de l'Agent diplomatique a l'égard de l'Etat Accréditaire", 54 Revue de Droit International de Sciences Diplomatiques et Politiques 291 at pp. 307, 308 (1976).

Cahier, supra Note 16, p. 141.

Denza, supra Note 43, p. 266

471. J.-M. Arbour, "Aspects juridiques de la Crise Américano-Iranienne", 21 Cahiers de Droit 367 at p. 398 (1980).

472. Article 41, Diplomatic Convention (1961).
Article 55, Consular Convention (1963).

473. Ibid.
See also, André Dufour, "La Protection des Immunités diplomatiques et consulaires au Canada", 12 Canadian Yearbook of International Law 3 at p. 29 (1974).

474. Guide for the Diplomatic and Consular Corps in Canada (1988), supra Note 101, p. 12.

475. Article 55, Consular Convention (1963).
Article 41, Diplomatic Convention (1961).

476. Article 27(1), Diplomatic Convention (1961).
Article 35(1), Consular Convention (1963).
Przetacznik, supra Note 470, p. 142.
See also Yu-Long Ling, "A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents", 33 Washington and Lee Law Review 91 at p. 114 (1976).
See also Denza, supra Note 43, pp. 120-123.

477. Guide for the Diplomatic and Consular Corps in Canada (1988), supra Note 101, p. 12.

478. W. Michael Reisman and Eric E. Freedman, "The Plaintiff's Dilemma: Illegally obtained Evidence and

Admissibility in International Adjudication", 76 American Journal of International Law 737 at pp. 751, 752.

479. M. S. McDougall, H.D. Lasswell, and W. Michael Reisman, supra Note 18, pp. 368, 369.

Cahier, supra Note 16, p. 145.

480. The New Lexicon Webster's Dictionary of the English Language (New York: Lexicon Publications, Inc., 1987) p. 322.

481. Walker, supra Note 80, p. 430.

482. Statsky, supra Note 13, p. 286.

483. Ingrid Delupis, "Foreign Warships and Immunity", 78 American Journal of International Law 53 at p. 62 (1984).

484. Ibid.

485. Chaturvedi, supra Note 467, p. 54.

486. Chronique, Revue Générale de Droit International Public (1972) pp. 1174-1178; Green, supra Note 264, p. 160.

487. Chronique, Revue Générale de Droit International Public (1979), p. 557; Dembinski, supra Note 264, p. 160.

488. House of Commons (Canada) Debates, 6 February, 1978, at 2697-98; Green, supra Note 3, p. 137.

489. Globe and Mail, 22 June 1988.

490. Ottawa Citizen, 25 June 1988.

Globe and Mail, 22 June 1988.

491. Ibid.

492. Maclean's Newsmagazine, 4 July 1988 pp. 10, 11.

Ottawa Citizen, 23 June 1988.

493. *Ibid*.

494. *Ibid*.

495. *Maclean's Newsmagazine*, 7 July 1988, pp. 10, 11.

496. *Ibid*.

497. Venneman, *supra* Note 61, p. 157.

498. (1980) *I.C.J. Reports*, p. 39, para. 85.

499. *Maclean's Newsmagazine*, 4 July 1988, p. 11.

500. (1980) *I.C.J. Reports*, pp. 39, 40, paras. 84, 85.

501. George Kalaris and Leonard McCoy, "Counterintelligence for the 1980s", 2 *International Journal of Intelligence and Counterintelligence* 179 at p. 183 (1988).

502. Clyde Eagleton, "The Responsibility of the State for the Protection of Foreign Officials", 19 *American Journal of International Law* 292 at p. 299 (1925).

503. Dufour, *supra* Note 473, pp. 31, 32.

504. Article 9, Diplomatic Convention (1961).
Article 23, Consular Convention (1963).

505. See text to Notes 490-494 *supra*.

506. Sen, *supra* Note 22, pp. 188, 189.

507. Article 27, Consular Convention (1963).
Article 45, Diplomatic Convention (1961).

508. Sen, *supra* Note 22, p. 194.

509. *American Hostages Case* (1980) *I.C.J. Reports*, p. 17, para. 31.

510. Denza, *supra* Note 43, p. 84.

511. *Ibid*.

512. *Ibid*.

513. *Asylum Case* (1950) *I.C.J. Reports*, pp. 267, 268. By the "Act of Lima", Peru and Colombia decided to go before the International Court of Justice. Peru did not have its agents enter the Colombian Embassy to forcibly take hold of Mr. Haya de la Torre.

514. *British House of Commons* (1984), *supra* Note 417, pp. 50, 51.

A. Akinsanya, "The Dikko Affair and Anglo-Nigerian Relations", 34 *International and Comparative Law Quarterly* 602 (1985).

515. *Ibid*.

516. *Ibid*.

517. *British Government Report* (1985), *supra* Note 115, pp. 28, 29, paras. 82, 83.

See also Higgins, *supra* Note 44, p. 643.

518. Higgins, *supra* Note 44, pp. 646, 647.

519. Goldberg, *supra* Note 2, p. 3.

520. *Ibid*., p. 5.

521. Article 31(3), Consular Convention (1963).

Article 22 (2), Diplomatic Convention (1961).

The attack on the Rumanian Legation in Berne on 14 February 1955 is an example of a violent seizure of diplomatic premises. Three articles dealt with that attack: X, L'Aggression contre la légation de Roumanie à Berne et le Fondement de la Responsabilité Internationale dans les

Délits d'Omission", Revue Générale de Droit International Public 410 at p. 430 (1957).

J. Dehaussy, "De l'Inviolabilité des Hôtels Diplomatiques", Journal du Droit International, 596 at p. 605 (1956).

P. Louis-Lucas, "L'Affaire de la Légation de Roumanie a Berne", Annuaire Francais de Droit International 175 (1955).

The three articles by X, J. Dehaussy and P. Louis-Lucas are based on debates recorded in the Bulletin sténographique officiel de l'Assemblée fédérale suisse, session de printemps 1955, p. 100 seq. and on the record of the sittings at the aggressors' trail which started on 12 June 1956 (Le Monde, 13 June and following days). My search, for those original sources in Ottawa, was futile.

See also Chaturvedi, supra Note 467, p. 61.

522. Article 31(3), Consular Convention (1963).

Article 22(2), Diplomatic Convention (1961).

See also X., supra Note 521, p. 423.

523. F. Przetacznik, "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons", 52 Revue de Droit International de Sciences Diplomatiques et Politiques 208 at p. 225 (1974).

524. Sidney A. Freifield, "Diplomatic hostage-taking: A retrospective look at Bogota", International Perspectives 13 at p. 17 (Sept., October, 1980).

525. X., supra Note 521, p. 428.

526. American Hostages Case (1980) I.C.J. Reports, p. 33, para. 69.

See also Dehaussy, supra Note 521, p. 639.

527. Dehaussy, supra Note 521, p. 645.

528. Ottawa Citizen, 13 March 1985.

Montreal Gazette, 13 March 1985.

529. Ibid.

530. Article 22(2), Diplomatic Convention (1961).

Article 31(3), Consular Convention (1963).

F. Przetacznik, "The Protection of Foreign Officials under International Law", 9 Anglo-American Law Review 177 at p. 189 (1980).

531. The insecurity of diplomatic and consular premises is so commonplace, that any calm or security is relative. There is always fear of attacks against such premises.

532. Each modern state keeps its police organization secret or does not give all details concerning its police force. Today police action, in this domain, is geared towards surprising criminals, who attack specially protected places, such as embassies and consular posts.

Przetacznik, supra Note 530, p. 189.

533. House of Commons (Canada) Debates, 12 March 1985, at pp. 2928-29.

534. Convention on Prevention (1973), supra Note 1, p. 203.

535. Ibid.

536. Przetacznik, supra Note 523, p. 226.

537. <u>House of Commons (Canada) Debates</u>, 19 March 1985, pp. 3171-72.

538. X., <u>supra</u> Note 521, p. 437.

539. Article 22(2), Diplomatic Convention (1961).
Article 31(3), Consular Convention (1963).
Dehaussy, <u>supra</u> Note 521, p. 633.

540. Sutton, <u>supra</u> Note 44, p. 195.
Goldberg, <u>supra</u> Note 2, pp. 1 and 2.

541. <u>Ibid</u>.

542. Sutton, <u>supra</u> Note 44, p. 195.
Preuss, <u>supra</u> Note 113, pp. 706, 707.

543. <u>Globe and Mail</u>, 13 March 1985.

544. Przetacznik, <u>supra</u> Note 530, p. 182.

545. <u>American Hostages Case</u> (1980) <u>I.C.J. Reports</u>, p. 32, para. 65.
See also text to Note 837 <u>infra</u>.

546. <u>American Hostages Case</u> (1980) <u>I.C.J. Reports</u>, p. 31, para. 64.

547. Green, <u>supra</u> Note 3, p. 136.

548. Louis-Lucas, <u>supra</u> Note 521, p. 176.
See X., <u>supra</u> Note 521, pp. 411-413.
See also Dehaussy, <u>supra</u> Note 521, pp. 597, 601.

549. X, <u>supra</u> Note 521, pp. 414, 415.

550. <u>Ibid</u>., p. 415.

551. <u>Ibid</u>.

552. <u>Ibid</u>.

553. *Ibid.*

554. X., *supra* Note 521, pp. 444, 445.

555. *Ibid.*

556. (1980) *I.C.J. Reports*, p. 3.

557. *Ibid.*, pp. 10, 11, para. 14.

558. The *American Hostages Case* (1980) will be discussed in Chapter IX.

559. *American Hostages Case* (1980) *I.C.J. Reports*, pp. 30, 31, para. 62.

560. *Ibid.*, p. 31, para. 63.

561. *Ibid.*

562. *Ibid.*, p. 32, para. 66.

563. *Ibid.*, p. 31, para. 63.

564. *Ottawa Citizen*, 13 March 1985.

565. *Globe and Mail*, 13 March 1985.

566. *Ibid.*

567. *Toronto Star*, 8 May 1985.
Ottawa Citizen, 8 May 1985.

568. *Globe and Mail*, 13 March 1985.

569. *Ibid.*

570. *Ibid.*

571. *Toronto Star*, 13 March 1985.

572. *Ottawa Citizen*, 15 March 1985.

573. *House of Commons (Canada) Debates*, 19 March 1985, p. 3171.

574. *Ibid.*, p. 3172.

575. *Ibid*.

576. *Ibid*.

577. *Globe and Mail*, 15 March 1985.

578. *House of Commons (Canada) Debates*, 13 March 1985, p. 2968; *Globe and Mail*, 13 March 1985.

579. *Globe and Mail*, 13 March 1985.

580. *Ottawa Citizen*, 13 March 1985.

581. *Globe and Mail*, 13 March 1985.

582. *House of Commons (Canada) Debates*, 19 March 1985, pp. 3171-72.

583. *Ibid*.

584. *Ibid*.

585. *Ottawa Citizen*, 13 March 1985.

586. *Ibid*.

587. *Ibid*.

588. *Ibid*.

589. *House of Commons (Canada) Debates*, 12 March 1985, p. 2929.

590. Mr. B. Asselin of the Protocol Service, Department of External Affairs, Ottawa, confirmed that the Canadian government settled the hospital and medical bills of Ambassador Coskun Kirca. Mr. Asselin said that he did not have it in writing. After that attack, the Deputy Prime Minister of Canada publicly expressed Canada's regrets to the Turkish Embassy (see House of Commons (Canada) Debates, 12 March 1985, p. 2928).

591. Toronto Star, 8 May 1985; Ottawa Citizen, 8 May 1985.

592. That was the sentence in R V. Ohannes Noubarian, Rafi Panos Titizien, Kevork Marachelian (1960). Ms. Gloria D. Barlow, official reporter of the Supreme Court of Ontario, explained that the Case is still unreported.

593. Ibid.

594. Ottawa Citizen, 21 May 1988.

595. Przetacznik, supra Note 530, pp. 192, 193.

596. Ibid.

597. Ibid., p. 229.

See also Convention on Prevention (1973), supra Note 1, p. 202.

598. X, supra Note 521, pp. 414, 445.

599. American Hostages Case (1980) I.C.J. Reports, p. 6, para. 8.

600. Ottawa Citizen, 8 May 1985.

Toronto Star, 8 May 1985.

601. United Nations Document A/C.6/41/SR.22, 22 October 1986, p. 2.

602. Ibid., p. 3.

603. Ibid., p. 2.

604. Ibid.

605. Ibid., p. 3.

606. United Nations Document A/C.6/41/SR.49, 20 November 1986, p. 17.

607. Ibid., pp. 16, 17.

608. Ibid., p. 17.

609. George Shultz, "Protecting United States Personnel and Property Overseas", 85 Department of State Bulletin 38 at p. 39 (September 1985).

See also George Shultz, "Enhancing Diplomatic Security", 86 Department of State Bulletin 42 at p. 44 (April 1984).

610. Article 22(2), Diplomatic Convention (1961).

Article 31(3), Consular Convention (1963).

611. F. Przetacznik, "International Responsibility of the State for Failure to afford the Special Protection for Foreign Officials", 52 Revue de Droit International de Sciences Diplomatiques et Politiques 310 at p. 323 (1974).

612. Ibid.

See also I. Brownlie, System of the Law of Nations: State Responsibility (Part 1) (Oxford: Clarendon Press, 1983) p. 37. In principle, an act or omission, which produces a result, which is on its face a breach of a legal obligation gives rise to responsibility in international law, whether the obligation rests on treaty, custom or some other basis.

613. Dehaussy, supra Note 521, pp. 615, 619.

614. See supra Notes 548 and 554.

615. American Hostages Case (1980) I.C.J. Reports, pp. 15, 16, paras. 28, ~~29~~.

See also K. Grzybowski, "The Regime of Diplomacy and the Tehran Hostages", 30 International and Comparative Law Quarterly 42 at pp. 53-54 (1981).

616. Eagleton, supra Note 502, p. 296. Clyde Eagleton's original source is the London Times, 30 July 1908. It was impossible to find the London Times, of that date, in Ottawa.

617. Eagleton, supra Note 502, p. 296.

618. Ibid., p. 297.

619. At that time the British government was influential in the Middle East. There were British nationals working all over that part of the world. The harshness of the demands of the British government in 1908 was probably meant to deter the Persians from resorting to such methods. Well, the holding of American hostages in 1979 does not show that the Iranians are very different from what they were in 1908, in this respect.

See also J.-M. Arbour, Droit International Public (Cowansville, Quebec: Les Editions Yvon Blais, Inc., 1985) p. 307.

620. Article 9, Diplomatic Convention (1961).

Article 23, Consular Convention 1963.

Chaturvedi, supra Note 467, p. 57.

Sen, supra Note 22, pp. 67, 77.

621. Globe and Mail, 13 July 1988.

622. Ibid.

623. *Ibid*.

624. *Ibid*.

625. See *supra* Notes 490-494.

626. See *supra* Notes 495, 496.

627. Sen, *supra* Note 22, pp. 349, 350.

See also Russell Wolff, "The Nonreviewability of Consular Visa Decisions: An unjustified Aberration from American Justice", 5 *New York Journal of International and Comparative Law* 341 at pp. 341-343.

628. *Ibid*.

629. James A.R. Nafziger, "Nonaggressive Sanctions in the International Sports Arena", 15 *Case Western Reserve Journal of International Law* 329 at p. 330 (1983).

See also Grzybowski, *supra* Note 615, p. 55. Soviet diplomats were expelled in the 1970s from some countries for espionage and others declared *personae non grata* for undisclosed reasons. Expulsion for espionage from: Australia, New Zealand.

Soviet Diplomats declared *personae non grata* in: Belgium, Denmark, France, Great Britain, Holland, Norway, Spain, Switzerland, and West Germany. Expulsions in Africa from: Ivory Coast, Kenya, Tunisia, Zaire.

630. *American Hostages Case* (1980) *I.C.J. Reports*, p. 16, para. 30.

631. *Ibid*., p. 17, para. 31.

632. *Ibid*.

See also Wolff, *supra* Note 627, pp. 347-350.

633. Article 45, Diplomatic Convention (1961).

Article 27, Consular Convention (1963).

Sen, *supra* Note 22, pp. 193-195.

634. (1980) *I.C.J. Reports*, p. 17, para. 31.

See also Grzybowski, *supra* Note 615, p. 53.

635. John N. Moore, "The Secret War in Central America and the Future of World Order", 80 *American Journal of International Law* 43 at p. 71 (1986).

636. *Ibid*.

637. See *infra* Notes 719 and 720. Margaret Doxey, "International Sanctions in Theory and Practice", 15 *Case Western Reserve Journal of International Law* 273 at p. 280 (1983).

638. Nafziger, *supra* Note 629, p. 337.

639. See generally, Convention on Prevention (1973), *supra* Note 1.

640. Article 31(3), Consular Convention (1963).

Article 22(2), Diplomatic Convention (1961).

Przetacznik, *supra* Note 523, pp. 246, 247.

641. *United Nations Report of the International Law Commission on the work of its 24th Session*, 1972, Doc. A/8710/Rev. 1, pp. 110, 112 and 117.

642. Nolan and Connolly, *supra* Note 81, pp. 246, 247.

643. See text to Notes 564-567 _supra_.

644. See _supra_ Note 590.

645. See text to Notes 581-584 _supra_.

646. See text to Notes 581-589 _supra_.

647. _Third Restatement_, _supra_ Note 117, pp. 239, 240.

648. Hearing before the Subcommittee on Citizens' and Shareholders' Rights and Remedies of the Committee on the Judiciary, United States Senate, 95th Congress, Second Session 6 February 1978--S. 476, S. 477, S. 478, S. 1256, S. 1257, and H.R. 7819 (Washington: U.S. Government Printing Office, 1978), pp. 2, 3, 8, 9, 14 (Statement of Senator Metzenbaum).

Terry A. O'Neill, "A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978", 54 _Tulane Law Review_ 661 at p. 674 (1980).

649. O'Neill, _supra_ Note 648, p. 674.

650. John Polakas, "Economic Sanctions: An effective Alternative to Military Coercion?", 6 _Brooklyn Journal of International Law_ 289 at p. 291 (1980).

See Nafziger, _supra_ Note 629, p. 335.

See also Doxey, _supra_ Note 637, p. 275.

651. Article 2(4), United Nations Charter.

652. Article 27, United Nations Charter.

Doxey, _supra_ Note 637, pp. 274, 275.

653. _American Hostages Case_ (1980) _I.C.J. Reports_, p. 17, para. 31.

654. Doxey, _supra_ Note 637, p. 280.

See Khai-Minh Dang, "Prejudgement Attachment of Frozen Iranian Assets", 69 _California Law Review_ 837 at pp. 837, 838 (1981).

655. _American Hostages Case_ (1980) _I.C.J. Reports_, p. 16, para. 30.

Dang, _supra_ Note 654, p. 837.

656. _Ibid_.

657. Doxey, _supra_ Note 637, pp. 285-287.

658. Gary H. Perlow, "Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo", 15 _Case Western Reserve Journal of International Law_ 253 at p. 272 (1983).

659. Donald E. deKieffer, "The Purpose of Sanctions", 15 _Case Western Journal of International Law_ 205 at p. 208 (1983).

660. Louis Dubois, "L'Embargo dans la Pratique Contemporaine", _Annuaire Francais de Droit International_ 99 at p. 114 (1967).

661. (1986) _I.C.J. Reports_, p. 110, paras. 210, 211.

See also Tom J. Farer, "Political and Economic Aggression in Contemporary International Law" in A. Cassese (ed), _The Current Legal Regulation of the Use of Force_. (Boston: Martinus Nijhoff Publishers, 1986) pp. 124, 125.

662. Arbour, _supra_ Note 619, p. 378.

See D.W. Greig, _International Law_ (London: Butterworths, 1976) p. 615.

See also I. Brownlie, Public International Law (Oxford: Clarendon Press, 1973) p. 683.

663. Articles 37-40, Convention for the Pacific Settlement of International Disputes (1907), CMND. 4105 Miscellaneous No. 21, 1 (1969) [hereinafter Convention (1907)].

Articles 33, 36, United Nations Charter.

Arbour, supra Note 619, p. 383.

664. Article 6, Convention (1907), supra Note 663.

Arbour, supra Note 619, p. 380.

665. Article 33, United Nations Charter.

Articles 9, 10, Convention (1907), supra Note 663.

Arbour, supra Note 619, p. 381.

666. Article 37, Convention (1907), supra Note 663.

667. Walker, supra Note 80, p. 73.

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671. Report of the International Law Commission on the Work of its 24th Session, 1972, supra Note 641, p. 112.

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673. House of Commons (Canada) Debates, 13 March 1985, pp. 2969, 2970.

674. Report of the International Law Commission on the work of its 24th Session, 1972, supra Note 641, p. 112.

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687. Ibid., p. 250, para. 11.

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699. Ibid., p. 252, para. 2.

700. Ibid., p. 252, paras. 5-7.

701. Ibid., p. 252, paras. 7 and 8.

702. Ibid., pp. 252, 253, para. 8.

703. Ibid., p. 253, para. 8.

704. Ibid., p. 253, para. 10.

705. Ibid.

706. Ibid., p. 253, para. 9.

707. Ibid., p. 253, para. 11.

708. Ibid., p. 253, para. 10.

709. Ibid., p. 253, 254, paras. 12 and 13.

710. Security Council Resolution 457 (1979), <u>supra</u> Note 679, p. 1645.

See also Security Council Resolution 461 (1979), <u>supra</u> Note 689, p. 251.

711. First Report of the Secretary-General, <u>supra</u> Note 681, p. 254, para. 11.

712. Second Report of the Secretary-General, <u>supra</u> Note 697, p. 254, paras. 13, 14.

713. See <u>supra</u> Note 709.

714. See <u>supra</u> Note 688.

715. Christopher et al., <u>supra</u> Note 103, p. 3.

See also Arbour, <u>supra</u> Note 471, p. 377.

716. <u>Ibid</u>.

717. <u>United States of America v. Iran</u> (1979), 19 <u>International Legal Materials</u> 139 (1980). This case dealt with the issue of provisional measures. The Court issued its Order of 15 December 1979, indicating provisional measures applicable to both the United States and Iran.

718. Arbour, <u>supra</u> Note 471, p. 384.

See Francis Boyle, "The Iranian Hostage Crisis", 63 <u>Revue de Droit International de Sciences Diplomatiques et Politiques</u> 1 at pp. 14, 15 (1985).

See also F. Przetacznik, "The Rightness of the Decisions of the International Court of Justice in the American Diplomatic Case in Iran", 61 <u>Revue de Droit International de Sciences Diplomatiques et Politiques</u> 251 at pp. 290, 291.

719. Draft Resolution of 13 January 1980, sponsored by the United States, 19 _International Legal Materials_ 256 (1980).

720. _Ibid_.

See also the Speech of Ambassador Donald McHenry, then United States Ambassador to the United Nations, 19 _International Legal Materials_ 256 (1980).

721. _Ibid_.

722. See texts to Notes 697 and 702 _supra_.

723. See text to Note 714 _supra_.

724. See _supra_ Note 696.

725. See text to Note 823 _infra_.

726. See _infra_ Note 824.

727. _American Hostages Case_ (1980) _I.C.J. Reports_, p. 17, para. 31.

728. See _supra_ Note 699.

729. See _supra_ Note 696.

730. _Ibid_.

731. See _supra_ Notes 694 and 696.

732. See _infra_ Notes 781 and 782.

733. (1980) _I.C.J. Reports_, p. 3.

734. _Ibid_.

735. _Ibid_., p. 10, para. 14.

736. _Ibid_., p. 11, para. 14.

737. _Ibid_.

738. _Ibid_.

739. _Ibid_.

740. *Ibid*., p. 11, para. 15.

741. *Ibid*., p. 11, para. 16.

742. *Ibid*., p. 12, para. 16.

743. *Ibid*.

744. *Ibid*.

745. *Ibid*.

746. *Ibid*., p. 11, para. 17.

747. *Ibid*.

748. *Ibid*.

749. *Ibid*., p. 12, para. 18.

750. *Ibid*., pp. 12, 13, para. 18.

751. *Ibid*., p. 13, para. 18.

752. *Ibid*.

753. *Ibid*., p. 13, para. 19.

754. *Ibid*.

755. *Ibid*., p. 13, para. 20.

756. *Ibid*.

757. *Ibid*.

758. *Ibid*., p. 13, para. 21.

759. *Ibid*., p. 14, para. 23.

760. *Ibid*.

761. *Ibid*., p. 14, para. 24.

762. *Ibid*., p. 14, para. 25.

763. *Ibid*., pp. 14, 15, para. 25

764. *Ibid*., p. 15, para. 26.

765. *Ibid*.

766. See *supra* Notes 679 and 689.

767. See *supra* Note 697.

768. *American Hostages Case* (1980) *I.C.J. Reports*, p. 16, para. 30.

769. *Ibid*.

770. *Ibid*., pp. 16, 17, para. 30.

771. *Ibid*., p. 17, para. 30.

772. *Ibid*., p. 17, para. 31.

773. *Ibid*.

774. *Ibid*.

775. *Ibid*., pp. 17, 18, para. 32.

776. (1979) *I.C.J. Reports* reproduced in 19 *International Legal Materials* 139 (1980).

777. *Ibid*., p. 146, para. 47.

778. *Ibid*., p. 141, para. 8.

779. *Ibid*.

780. *Ibid*.

781. *Ibid*., p. 146, para. 47.

782. *Ibid*.

783. *Ibid*., p. 145, para. 34.

784. *Ibid*., p. 146, para. 43.

785. Convention on Prevention (1973), *supra* Note 1, pp. 201-210.

See also *U.S.A. V. Iran* (1979) reproduced in 19 *International Legal Materials* 139 at p. 146, para. 43.

786. Article 2(1) (b), Convention on Prevention (1973), supra Note 1.

787. Article 3(2), Convention on Prevention (1973), supra Note 1.

See also U.S.A. V. Iran (1979) reproduced in 19 International Legal Materials 145, para. 34 (ii).

788. Article 13(1), Convention on Prevention (1973), supra Note 1.

789. American Hostages Case (1980) I.C.J. Reports, p. 29 para. 57.

790. Ibid., p. 29, para. 58.

791. Ibid., pp. 29, 30, paras. 58, 59.

792. Ibid., p. 30, para. 60.

793. Ibid., p. 30, para. 59.

See also Anthea Jeffery, "The American Hostages in Teheran: The International Court of Justice and Legality of Rescue Missions", 30 International and Comparative Law Quarterly 717 at p. 720 (1981).

794. Bassiouni, supra Note 106, p. 617.

795. Article 29, Diplomatic Convention (1961).

796. Ibid., Article 24.

797. Ibid., Article 25.

798. Ibid., Article 26.

799. Ibid., Article 27.

800. American Hostages Case (1980) I.C.J. Reports, p. 31, para. 62.

801. Ibid.

802. Bassiouni, supra Note 106, p. 616.

See also American Hostages Case (1980) I.C.J. Reports, p. 40, para. 86.

The Court recognized that Islamic traditions contributed to the principle of inviolability of persons and premises.

803. American Hostages Case (1980) I.C.J. Reports, p. 31, para. 63.

804. Ibid.

805. Ibid., p. 31, para. 64.

806. Ibid.

807. Ibid.

808. Ibid., p. 32, para. 65.

809. Ibid.

810. Ibid.

811. Ibid., p. 32, para. 66.

812. Ibid., p. 12, para. 17.

813. Ibid., p. 32, para. 67.

814. Ibid., pp. 32, 33, para. 68.

815. Ibid.

816. Ibid., p. 33, para. 69.

817. Ibid.

818. Ibid., p. 33, para. 70.

819. Ibid., p. 33, para. 71.

820. Ibid., p. 34, para. 71.

821. Ibid., p. 34, para. 72.

822. Ibid., p. 34, para. 73.

823. Ibid., p. 35, para. 74.

824. Ibid.

See also Brownlie, supra Note 612, p. 36.

825. American Hostages Case (1980) I.C.J. Reports, p. 27, para. 51.

See also Jeffery, supra Note 793, p. 721.

826. Article 2, Convention on Prevention (1973), supra Note 1, p. 202, looks like a general definition of terrorist acts against internationally protected persons.

827. American Hostages Case (1980) I.C.J. Reports, p. 37, para. 81.

828. Ibid.

829. Ibid., p. 38, para. 82.

830. Ibid.

831. Ibid., p. 38, para. 84, and p. 60.

832. Ibid., p. 40, para. 87.

See also Reisman and Freedman, supra Note 478, p. 750.

See also Judge Tarazi in American Hostages Case (1980) I.C.J. Reports, p. 60.

833. Ibid.

See also American Hostages Case (1980) I.C.J. Reports, p. 40, para. 85.

834. American Hostages Case (1980) I.C.J. Reports, p. 9, para. 10.

835. *Ibid.*, p. 40, para. 88.

836. X., *supra* Note 521, p. 437.

837. *American Hostages Case* (1980) *I.C.J. Reports*, p. 10, paras. 14, 15, 16.

838. *Ibid.*, p. 12, para. 17.

839. *Ibid.*, p. 13, para. 19.

840. *Ibid.*, p. 13, para. 20.

841. *Ibid.*

842. *Ibid.*

843. *Ibid.*, p. 33, para. 70.

844. *Ibid.*, pp. 33, 34, para. 71.

845. *Ibid.*, p. 17, para. 32.

846. *Ibid.*

847. *Ibid.*, p. 18, para. 32.

848. *Ibid.*, p. 43, para. 93.

See also Jeffery, *supra* Note 793, pp. 722, 723.

849. *American Hostages Case* (1980) *I.C.J. Reports*, pp. 43, 44, para. 94.

850. *Ibid.*, pp. 56 and 57.

851. Article 51, United Nations Charter

See also F. Przetacznik, "Fallacious Arguments of Judges of the International Court of Justice in their Dissenting Opinions in the American Diplomatic Case in Iran", 64 *Revue de Droit International de Sciences Diplomatiques et Politiques* 245 at pp. 272, 273 (1986).

852. <u>American Hostages Case</u> (1980) <u>I.C.J. Reports</u>, pp. 64, 65.

853. Jeffery, <u>supra</u> Note 793. p. 723.

Arbour, <u>supra</u> Note 471, p. 389.

854. Schachter, <u>supra</u> Note 103, p. 330.

See also Jeffery, <u>supra</u> Note 793, p. 727.

855. Derek W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in A. Cassese, <u>supra</u> Note 661, p. 40.

856. In practice, the territorial integrity of any state will be hard to conceive, if that state does not have an inalienable right to control access to its territory.

857. Jeffery, <u>supra</u> Note 793, p. 728.

858. <u>American Hostages Case</u> (1980) <u>I.C.J. Reports</u>, p. 18, para. 32.

859. <u>Ibid</u>.

860. Schachter, <u>supra</u> Note 103, p. 328.

See also Arbour, <u>supra</u> Note 471, pp. 390, 391.

861. <u>Ibid</u>.

862. <u>Ibid</u>.

863. <u>Ibid</u>.

864. Farer, <u>supra</u> Note 661, p. 124.

See also Bokor Szego, in Cassese, <u>supra</u> Note 661, p. 461.

865. <u>Ibid</u>.

866. Farer, in Cassese, <u>supra</u> Note 661, p. 126.

867. Bowett, in Cassese, <u>supra</u> Note 661, p. 42.

868. *American Hostages Case* (1980) *I.C.J. Reports*, p. 43, para. 93.

869. Arbour, *supra* Note 471, p. 396.

870. 19 *International Legal Materials* 139 (1980).

871. *Ibid*., p. 146.

872. *American Hostages Case* (1980) *I.C.J. Reports*, pp. 16, 18, paras. 30-32.

See also Doxey, *supra* Note 637, pp. 279, 280.

Schachter, *supra* Note 103, p. 364.

873. Ted L. Stein, "Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt", 76 *American Journal of International Law* 499 at p. 504 (1982).

874. Schachter, *supra* Note 103, pp. 342, 343.

875. Stein, *supra* Note 873, p. 509.

Stein suggests that under international law, contempt of court is recognized or could exist.

See also V.S. Mani, *International Adjudication: Procedural Aspects* (Boston: Martinus Nijhoff Publishers, 1980) p. 308. Mani says that international law does not seem to recognize contempt of court involving a State, party to a case.

876. *American Hostages Case* (1980) *I.C.J. Reports*, p. 63 (Judge Tarazi dissenting).

877. *Ibid*.

878. *Ibid*.

879. *Ibid*., p. 64.

880. *Ibid*.

881. *Ibid*., p. 48 (Judge Lachs' separate opinion).

882. *Ibid*.

883. *Ibid*., p. 54 (Judge Morozov dissenting).

884. *Ibid*.

885. *Ibid*., p. 53.

886. See *supra* Notes 876-885.

887. Doxey, *supra* Note 637, pp. 279, 280.

888. Stein, *supra* Note 873, p. 517.

889. *American Hostages Case* (1980) *I.C.J. Reports*, pp. 44, 45, para. 95.

890. *Ibid*., pp. 12-14, paras. 17-27; pp. 40-43, paras. 86-92.

891. Brownlie, *supra* Note 662, p. 419.

892. *American Hostages Case* (1980) *I.C.J. Reports*, p. 53 (Morozov, J., dissenting).

893. *Ibid*., pp. 64, 65 (Tarazi, J., dissenting).

See also Przetacznik, *supra* Note 851, p. 295.

Przetacznik argues that under international law the responsibility of a state is always absolute. A state is responsible or not responsible. A state's responsibility cannot, therefore, be relative.

894. *American Hostages Case* (1980) *I.C.J. Reports*, p. 43, para. 94; p. 44, para. 95.

895. Green, *supra* Note 3, p. 136.

896. See *supra* Notes 730 and 731.

897. Harris, *supra* Note 14, p. 279.

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