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DIPLOMATIC ASYLUM IN THE CONTEXT OF PUBLIC INTERNATIONAL LAW

Master Thesis

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Introduction

Issues. The issue of diplomatic asylum is controversial in public international law. On the one hand, it is common regional practice and legal institute regulated by regional conventions among Latin America States. On the other hand, the majority of the States do not recognize it as a part of public international law. Despite expressed positions, many examples can be found when diplomatic asylum was granted in order to protect people's lives or safety. An incompatibility between attitudes and practice makes the issue of diplomatic asylum a vague one. Every new instance when protection is sought in the embassy or consulate brings doubts and raises questions regarding diplomatic asylum: what is the current position of diplomatic asylum in public international law, especially in the context with Vienna Conventions on Diplomatic and Consular Relations, with human right instruments or in the context of relevant case law; on what basis it could be granted and what could be possible consequences of such a protection; should it be considered as a historical relic or, in contrary, it has potential to enrich public international law. The master thesis attempts to find out answers to these questions and to determine the role of diplomatic asylum in the context of public international law.

Actuality and novelty of the topic. Although diplomatic asylum is not a new phenomenon in public international law, this thesis is the first master thesis in Lithuania where the issue of diplomatic asylum is analyzed in a wider context of international law and the practice of States. Even if the topic of diplomatic asylum has been discussed among foreign writers, in Lithuania only certain issues of diplomatic asylum was covered in "Diplomatinė Teisė" (2003) written by Zenonas Petrauskas, Dainius Žalimas, Skirgailė Žaltauskaitė – Žalimienė¹. This master thesis is novel, because it includes new practical examples of diplomatic asylum all over the world, presents legal regulation of the issue in Latin America Conventions (with different position to the issue then in the majority of States) and discusses diplomatic asylum in the light of public international law. Moreover, the various positions of legal writers are presented in order to find out the dominant attitude in the theory of public international law.

Besides novelty of the topic, the author finds it actual nowadays. Even though diplomatic asylum is a peculiarity in Latin America region, every country might face a bid for asylum in its embassies or consulates, especially where the instable political situation, changes of governments or danger to person's life exist. Examples of diplomatic asylum can be found not only in Latin America region, where diplomatic asylum exists in the same position as territorial

¹ Petrauskas Zenonas, Žalimas Dainius, Žaltauskaitė – Žalimienė Skirgailė. *Diplomatinė Teisė*. Teisinės informacijos centras, Vilnius. 2003.

asylum, but in other countries as well. In the last decade the embassies and consulates of Western countries from time to time became a target for those persons who are seeking protection. Even in 2012 there were two attempts to seek asylum in embassies: in Latin America and in China, in the embassy of United States². The instances when Northern Koreans successfully sought asylum in various embassies in the territory of China showed that seekers for such an asylum find it as a way of protection. However, there are also instances where persons were rejected from embassies or consulates. The master thesis includes analysis of the grounds to grant diplomatic asylum, tendencies of the practice of countries and allows seeing positions of individual and the State in cases when such protection is sought. Thus, the topic is actual in every State, because no single State is prevented from persons seeking asylum in its embassies or consulates.

Authors who wrote on the topic. The majority of authors mentioned in the thesis are scholars from United States and from Latin America. They represent different attitudes dominating in the doctrine regarding diplomatic asylum in public international law and in Latin America. The references in the master thesis are done to the works of: Alona E. Evans³, S. Prakash Sinha⁴, Anthea J. Jeffery⁵, Sussane Riveles⁶, Anthony Aust⁷, Juergen Kleiner⁸, Manuel R. García-Mora⁹, Eileen Denza¹⁰, Peter Porcino¹¹, Angela M. Rossitto¹², F. Galindo Vélez¹³ and others.

² The table of Examples of Asylum Sought in Embassies and Consulates (ANNEX 1) in the period from 2002 till 2012.

³ Evans Alona E. The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum // The American Political Science Review. 1952, Vol. 46, No. 1.

⁴ Sinha Prakash S. Asylum and International Law. Hague: Martinus Nijhoff, 1971.

⁵ Jeffery Anthea J. Diplomatic asylum: Its Problems and Potential as a Meen of Protecting Human Rights // South African Journal on Human Rights. Volume 1. 1985.

⁶ Riveles Sussane. Diplomatic Asylum as a Human Right: The Case of the Durban Six // Human Rights Quarterly. The Johns Hopkins University Press. Feb., 1989, Vol. 11, No. 1.

⁷ Aust Anthony. Handbook of International Law. New York: Cambridge University Press, 2010. 2nd edition.

⁸ Kleiner Juergen. Diplomatic Practice: Between Tradition and Inovation. World Scientific Publishing Co., 2009.

⁹ García-Mora Manuel R. The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights // Virginia Law Review. Nov., 1951, Vol. 37, No. 7.

¹⁰ Denza Eileen. Diplomatic Law: Commentary on the Vienna Convnetion on diplomatic Relations. Oxford: Oxford University Press, 2004. 2nd edition.

¹¹ Porcino Peter. Toward Codification of Diplomatic Asylum // New York University Journal of International Law and Politics. 1975 – 1976, Volume 8.

The object. Diplomatic asylum in the context of public international law.

The aim of the research. To analyze relevant international law sources and to determine grounds to grant diplomatic asylum in Latin America region and in other States.

The tasks of the thesis are:

1. To reveal the notion and historical evolution of diplomatic asylum
2. To determine relations of diplomatic asylum with international and regional legal instruments
3. To find out what the dominant position in the case law is.
4. To analyse different approaches to diplomatic asylum expressed by States and to evaluate how they are implemented in their practice.
5. To discuss the possibilities of diplomatic asylum and its potential as a way to protect human rights when it is granted under humanitarian considerations.

Methodology. In the thesis author used linguistic method for formulation of definitions. Method of analysis was used for distinguishing certain features of diplomatic asylum. Comparative method was used in comparing different opinions of legal authors as well as for determining differences among positions of States and their practice. The method of generalization was used for formulating conclusions. The empiric method was used for studying legal literature and case law. The thesis is based on international treaties, practice of States, decisions of international and national courts and opinions of authors who wrote on the topic.

Structure. 1. Diplomatic asylum (the notion of diplomatic asylum, historical development and theories of immunity). 2. Diplomatic asylum under international treaties (the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and conventions among Latin America States). 3. Diplomatic asylum under case law (*Asylum case, Haya de la Torre case*, relevant national case law). 4. Diplomatic asylum under humanitarian considerations and in context of human rights (positions of States, humanitarian considerations, examples of diplomatic asylum granted on humanitarian considerations, diplomatic asylum in the context of international and regional instruments of human rights, diplomatic asylum in the context of the principle of non- refoulement).

¹² Rossitto Angela M.. Diplomatic Asylum in the United States and Latin America: a Comparative Analysis // Brooklyn Journal of International Law. 1987, Volume 13.

¹³ Galindo Vélez F., 'El asilo en el sistema de las Naciones Unidas y en el sistema interamericano' // Compilación de instrumentos jurídicos regionales relativos a derechos humanos, refugio y asilo. San José: Comisión Nacional de Derechos Humanos, ACNUR y Universidad Iberoamericana, 1992. T 2.

1. DIPLOMATIC ASYLUM

In this Chapter we raise a question how diplomatic asylum could be defined and what are the main features of this issue. Looking from historical position we are going to see how the understanding and importance of diplomatic asylum has changed till it reached nowadays. Regarding the fact that diplomatic asylum is related with diplomatic and consular relations, we are going to reveal its importance in the context of theories of immunities.

1. 1. The Notion of Diplomatic Asylum

The word "asylum" came from a Greek word *asulon* and means "refuge". The other Greek word *asulos* means "inviolable."

In the legal literature asylum is divided into several types. For example, S. Prakash Sinha divides asylum into two categories: a) territorial asylum, where the State of refuge upon its own territory accords it to individual affected by special situation or persecution in his/her country of origin, and b) non – territorial asylum, accorded to individual in embassies, consulates, or public vessels in foreign waters. Since its practice has largely involved diplomatic mission premises, such as embassies and legations, it is commonly known as diplomatic asylum¹⁴. Alonzo Gómez Robledo Verduzco says that asylum can be granted in a foreign State, when a person is persecuted in the State of origin. This author also emphasizes that international practice allows saying that diplomatic missions, consular offices, warships and military bases are also used to grant asylum for persons in need of protection. In this case the asylum is internal asylum (or diplomatic asylum if it is granted in diplomatic missions)¹⁵. F. Galindo Vélez stresses that in Latin American system asylum have two types: a) territorial asylum; and b) diplomatic asylum or political asylum as it is defined in certain legal instruments¹⁶. Maria Jose y Tella distinguishes between two sorts of asylum: diplomatic asylum also known as internal asylum, and territorial or external asylum¹⁷. According to the UN General Assembly, Question of Diplomatic Asylum : Report of the Secretary of 1975, there are two types of asylum: a) "diplomatic asylum" in the broad sense is used to denote asylum granted by a State outside its territory: in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board of its ships in the

¹⁴ Sinha Prakash S. *Asylum and International Law*. Hague: Martinus Nijhoff, 1971. PG. 51.

¹⁵ Gómez Robledo Verduzco Alonzo. *Temas Selectos de Derecho Internacional*. México : Universidad Nacional Autónoma de México, 2003. Cuarta Edición. PG 617.

¹⁶ Galindo Vélez F. , 'El asilo en el sistema de las Naciones Unidas y en el sistema interamericano' // *Compilación de instrumentos jurídicos regionales relativos a derechos humanos, refugio y asilo*. San José: Comisión Nacional de Derechos Humanos, ACNUR y Universidad Iberoamericana, 1992. T 2. PG. 37

¹⁷ Maria Jose Falcon y Tella. *Civil Disobedience*. Martinus Nijhoff Publishers, 2004. PG. 136

territorial waters of another State (naval asylum), and also on board of its aircraft and of its military or para-military installations in foreign territory; b) asylum granted to individuals, namely, that which is granted by the State within its borders, is generally given the name "territorial asylum"¹⁸.

Thus, it could be said that theoretically there are two types of asylum regarding whether it is granted outside or inside the territory of State: diplomatic asylum in a broad scene and territorial asylum. Territorial asylum is generally recognized in international law. It is regulated by the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees and by regional treaties. In Latin America region the territorial asylum is regulated by the 1984 Cartagena Declaration on Refugees. The issues of diplomatic asylum are covered only by conventions concluded among Latin America States, because in this region diplomatic asylum is a part of regional international law.

In this thesis we are going to analyze diplomatic asylum in its broad scene, particularly asylum in diplomatic legations and consulates. For this purpose it is necessary to make clear the object of the thesis. We believe it is necessary to clarify the notion of diplomatic asylum and find out what the common elements selected from the notions proposed by various authors are.

Diplomatic asylum can be defined as the concession of refuge by heads of mission, commanders of military camps, aircraft, and warships to those accused of or condemned for political crimes. The diplomatic representative who grants such asylum within the precincts of his mission purports to remove from the local jurisdiction nationals of the State to which he has been accredited¹⁹.

Anthea J. Jeffery states that diplomatic asylum is asylum given within the territory of the State from which refuge is sought and may be given in embassies and consulates, or on warships and merchant vessels in the ports of the State from which the fugitive seeks his escape.²⁰

¹⁸ UN General Assembly, *Question of Diplomatic Asylum : Report of the Secretary-General*, 22 September 1975, A/10139 (Part II) // <http://www.unhcr.org/refworld/docid/3ae68bf10.html> , accessed 06. 03. 2012.

¹⁹ Greenburgh R. B. Recent Developments in the Law of Diplomatic Asylum. *Transactions of the Grotius Society // Problems of Public and Private International Law*. Cambridge University Press on behalf of the British Institute of International and Comparative Law. 1955. Vol. 41. PG 103-122. // <http://www.jstor.org/stable/743293> , accessed 02.03. 2012.

²⁰ Jeffery Anthea J. *Diplomatic asylum: Its Problems and Potential as a Meen of Protecting Human Rights // South African Journal on Human Rights*. Volume 1. 1985.

Sussane Riveles defines diplomatic asylum as a grant of refuge by a sending State in its legation within the territory of the receiving State, which is the asylum seeker's home State or State of residence²¹.

Lisa Schuster says that the diplomatic asylum is the protection granted by the representatives of one power to a fugitive, using the immunity granted to them while in the territory of a foreign power²².

Anthony Aust defines that diplomatic asylum is the giving of protection by diplomatic mission to a person fleeing from the authorities of the host State (not just from a person or a crowd)²³.

Diplomatic asylum comes about when a persecuted person is offered protection precincts of a diplomatic mission - and in such places as enjoy diplomatic immunity - from the State wherein diplomatic mission or embassy is located²⁴.

Diplomatic asylum denotes a refuge granted to a political offender or a person qualifying as a political persecutee in a diplomatic or consular mission²⁵.

As it was mentioned, the Latin America States concluded several treaties regarding the diplomatic asylum, but the precise notion of it is not included. For example, the Convention on diplomatic asylum concluded at Caracas on 28 March 1954 does not provide any concrete notion of diplomatic asylum, but Art. I states that asylum can be granted in legations, war vessels, and military camps or aircraft, to persons being sought for political reasons or for political offences²⁶. According to the Havana Convention on Asylum on 20 February 1928 diplomatic asylum is a provisional measure for the temporary protection of political offenders²⁷.

²¹ Riveles Sussane. Diplomatic Asylum as a Human Right: The Case of the Durban Six // Human Rights Quarterly. The Johns Hopkins University Press. Feb., 1989, Vol. 11, No. 1. // <http://www.jstor.org/stable/761937> , accessed 16. 06. 2011.

²² Liza Schuster. Why do States Grant Asylum? // Politics. 1998, 18(1), PG. 11 - 16

²³ Aust Anthony. Handbook of International Law. New York: Cambridge University Press, 2010. 2nd Edition. PG. 170

²⁴ Maria Jose Falcon y Tella. Civil Disobedience. Martinus Nijhoff Publishers. 2004.PG. 136

²⁵ Kleiner Juergen. Diplomatic Practice: Between Tradition and Innovation. World Scientific Publishing Co., 2009. PG. 167

²⁶ *Convention on Diplomatic Asylum*. Concluded at Caracas on 28 March 1954. No. 24377. // <http://www.scribd.com/doc/55638915/Convention-on-Diplomatic-Asylum> , accessed 15. 05. 2012.

²⁷ *Convencion sobre el Derecho de Asilo*. La Habana. 1928. No. 40. // <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/0609> ,accessed 15. 05. 2012

After different notions have been discussed, it could be said that all the notions include similar elements of diplomatic asylum. We can distinguish such elements of the diplomatic asylum and define the object of the topic:

- a) It is internal asylum;
- b) granted in diplomatic missions or consulates;
- c) in the territory of the receiving State;
- d) by the head of mission of the Sending State;
- e) for fugitives from the Receiving State;
- f) who are being sought mainly for political reasons.

Diplomatic asylum is usually granted for persons persecuted for political reasons. That is why in the literature there can be both notions of „diplomatic“ or „political“ asylum found, talking about the same asylum granted in the embassies or consulates. In this thesis we will use the term of „diplomatic asylum“ analyzing issues of asylum granted in diplomatic premises or consulates.

1. 2. Historical Development of Diplomatic Asylum

Diplomatic asylum is not a new issue. It has a long history starting from the ancient times. In order to understand how diplomatic asylum evolved, we find necessary to distinguish certain stages. Several historical examples are going to be presented in order to reveal the role of diplomatic asylum in public international law. It is difficult to distinguish exact chronological margins. However, resuming the analysis of legal writers, we could distinguish several stages of the evolution of diplomatic asylum. In all these stages diplomatic asylum had specific features.

In the first stage, diplomatic asylum was religious rather than legal. That is why we could call diplomatic asylum a form of religious asylum. A fugitive could seek refuge in sacred places. According to ancient conviction, the very "sanctity" of foreign envoys has a religious basis and that, therefore, the residences of such envoys have the same right to grant asylum which was traditionally enjoyed, in Antiquity, in temples of pagan deities, in Middle Ages, in Christian churches and monasteries.²⁸ Asylum provided a resort for persons accused, justly or unjustly, of common crimes²⁹.

²⁸ Nahlik Stanislaw E. "Matière préliminaire." Development of diplomatic law : selected problems. Collected Courses of the Hague Academy of International Law 222. Hague: Martinus Nijhoff Publishers, 1990. PG. 284

²⁹ Evans Alona E. The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum // The American Political Science Review. 1952, Vol. 46, No. 1. PG. 142

The second stage of development of diplomatic asylum is related with the beginning of permanent diplomacy and the opening of first permanent diplomatic missions. The first permanent ambassadors were sent by Republic of Venice in XV century. Later, in 1648, the Peace treaty of Westphalia established permanent institution of embassies. It was felt necessary to add inviolability of the ambassador's dwelling to the personal inviolability that he had traditionally enjoyed in order to remove him from the influence of the receiving State³⁰. Additional to the personal inviolability of ambassadors, they were accorded by inviolability of place of residence, exemption from criminal and civil jurisdiction. Thus, from XVII century inviolability of ambassador dwelling guaranteed protection from entrance of officials of receiving states. Fugitives fled to embassies in search for protection from violence and persecution. When it became forbidden for the local authorities to enter the residence of the ambassadors, persons looking for refuge were given it there³¹. A fugitive could seek protection within an embassy, under the embassy's *franchise de l'hôtel*, or he might take refuge within the section of the city in which the embassy was located under the old concept of the embassy's *franchise des quartiers*.³² Diplomatic asylum was established in favour of common criminals, not of political offenders. Political offenders were still excluded from it.

Political offenders were seen as the highest risk to state and this approach can be seen in Statute of Venice of 1554. The Statute provides that the fugitive would not be pursued in diplomatic premises if he was guilty of common crime. If he had committed a crime against the State, he was to be captured, or if capture is not possible, killed³³. The exclusion of political offenders from diplomatic asylum prevailed almost generally until the XIX century. Apart from this exclusion, the practice of diplomatic asylum flourished in the centuries following. Its existence was officially established by a judgement of Pope Clement VIII in a dispute between the courts of France and Spain.³⁴

We find that *the third stage* of diplomatic asylum began when common criminals were excluded from diplomatic asylum. However diplomatic asylum remained as a form of protection for political offenders. From the XIX century onwards, diplomatic asylum almost ceased to be

³⁰ UN General Assembly, *Question of Diplomatic Asylum : Report of the Secretary-General*, 22 September 1975, A/10139 (Part II) // <http://www.unhcr.org/refworld/docid/3ae68bf10.html> , accessed 06. 03. 2012.

³¹ Sinha Prakash S. *Asylum and International Law*. Hague: Martinus Nijhoff, 1971.PG. 21.

³² Evans Alona E. *The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum* // *The American Political Science Review*. 1952, Vol. 46, No. 1. PG. 143

³³ Sinha Prakash S. *Asylum and International Law*. Hague: Martinus Nijhoff, 1971.PG. 21.

³⁴ *Ibid*, PG. 22.

granted in Europe except during political disturbances³⁵. In the cases which were found in Europe since the first quarter of the XIX century, the claim to grant asylum assumed a new aspect: asylum for common offenders was no longer heard of; it was for political refugees that it was claimed and tolerated.³⁶ Diplomatic asylum came to be restrictive to the political fugitive whether unsuccessful revolutionary or displaced ruler, seeking protection from the government of his own State by fleeing to an embassy or legation accredited to that State³⁷. This approach to diplomatic asylum remained till nowadays. For example, according to legal regulation in Latin America, common criminals would not be granted diplomatic asylum. The institute of diplomatic asylum enables only political offenders to seek protection in embassies.

Codification (in States where diplomatic asylum considered being a legal institute) and grant of diplomatic asylum on humanitarian basis (in States where diplomatic asylum is not a legal institute) could be considered as features attributable to *the fourth stage* of development of diplomatic asylum. Except the Latin America States, nowadays diplomatic asylum is a rare case. In other regions, especially in Europe, asylum evolved to territorial asylum, however in Latin America territorial asylum as well as diplomatic asylum evolved in parallel. In Latin America these two kinds of asylum are considered to be two aspects of one common institute of asylum³⁸. In the course of the XIX century, the institution of diplomatic asylum gradually reappeared in Latin America and so became a characteristic feature of Latin American Law³⁹. In the view of J. Esponda, there are three reasons why diplomatic asylum developed among Latin America States. First of all, the reason can be political instability and successive conflicts for the control of government and subsequent political persecutions. Secondly, almost always these conflicts threatened to spread to the neighbouring country that is way there was a need to regulate it in conventions. The third factor is the geographical and communicative conditions that made

³⁵ UN General Assembly, *Question of Diplomatic Asylum : Report of the Secretary-General*, 22 September 1975, A/10139 (Part II) // <http://www.unhcr.org/refworld/docid/3ae68bf10.html> , accessed 06. 03. 2012.

³⁶ Moore Bassett John. *Asylum in Legations and Consulates and Veelsels. I.* // *Political Science Quarterly*. Mar., 1892 , Vol. 7, No. 1, PG 5. // <http://www.jstor.org/stable/2139008> , accessed: 19. 01. 2012.

³⁷ Evans Alona E. *The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum* // *The American Political Science Review*. 1952, Vol. 46, No. 1. PG. 144

³⁸ Gross Espiell Héctor . *El derecho internacional americano sobre asilo territorial y extradición en sus relaciones con la Convención de 1951 y el Protocolo de 1967 sobre estatuto de los refugiados* // *Asilo y Protección Internacional de refugiados en América Latina*. México : Instituto de Investigaciones Jurídicas. Univerisdad Nacional Autónoma de México, 1982. PG. 36. // <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/6520> , accessed 01. 02. 2012

³⁹ Nahlik Stanislaw E. "Matière préliminaire." *Development of diplomatic law : selected problems*. Collected Courses of the Hague Academy of International Law 222. Hague: Martinus Nijhoff Publishers, 1990.PG. 280

territorial asylum impossible.⁴⁰ Latin America States often defended diplomatic asylum as a principle of law peculiar to their countries. In Latin America diplomatic asylum is a common regional practice⁴¹. As Manuel R. García Mora point out, historically speaking, the doctrine of asylum has been founded on two fundamental principles: moral and legal. From the standpoint of the first principle, asylum is considered as a practice founded on humanitarian ground. The second one is a legal fiction of exterritoriality of embassies and legations.⁴² The issue of diplomatic asylum is regulated by treaties concluded among Latin America States. Latin America States consider diplomatic asylum to be the institute of regional international law⁴³. The legal regulation in Latin America will be more discussed in further chapter.

Even though grant of diplomatic asylum in other parts of the world is a rare case, in the XX century, before and after the Second World War, there were several cases in Europe when diplomatic asylum was granted to thousands of people. Among those cases the majority of law writers mention 1936 – 1939 Spanish Civil War, application of diplomatic asylum in 1956 by the United States of America and Yugoslavia in Hungary for Cardinal Mindszenty, events of 1989 when thousands of East German citizens sought asylum in the Western German embassies and events of 1990 when Albanians sought asylum in Western embassies. In most of the cases, diplomatic asylum was granted on humanitarian reasons. These examples and humanitarian grounds of granting asylum will be discussed in further chapters.

The grant of diplomatic asylum in Spain in 1936 – 1939 is historically important, because embassies and consulates of many States were involved. The question of diplomatic asylum was also brought to the League of Nations. During three years of Civil War thousands of people obtained diplomatic asylum in Spain. Not less than 10,000 persons sought and found refuge in 19 diplomatic missions, 12 of them representing countries which were not parties to any of the

⁴⁰ Esponda J. La Tradición Latinoamericana de Asilo y la Protección Internacional de los Refugiados // L. Franco (coord.). El asilo y la protección internacional de los refugiados en Latino América. UNHCR-UNLA-Siglo. XXI Ed., 2003. 1ª edición. PG. 83// http://www.es.refugeelawreader.org/index.php?option=com_docman&task=doc_view&lang=es&gid=1624&ml=5&mlt=system&tmpl=component , accessed 05. 05. 2012

⁴¹ William Slomanson. Fundamental Perspectives on International Law. Boston: Wadsworth Cengage Learning, 2011. 6th edition. PG. 98. // http://books.google.hu/books?id=UbK3PI7nME4C&pg=PA97&dq=extraterritoriality+diplomatic+law&hl=en&sa=X&ei=nrxUT57iBobwsgbU9fnZCw&redir_esc=y#v=onepage&q=extraterritoriality%20diplomatic%20law&f=false , accessed 10. 01. 2012

⁴² García-Mora Manuel R. The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights // Virginia Law Review. Nov., 1951, Vol. 37, No. 7. PG. 932 // <http://www.jstor.org/stable/1069115> ,accessed: 19. 12. 2011.

⁴³ UN General Assembly, Question of Diplomatic Asylum. Report of the Secretary-General, 2 September 1975, A/10139 (Part I) // <http://www.unhcr.org/refworld/docid/3ae68bee0.html> , accessed 20. 06. 2011.

international conventions concerning asylum. Latin American States were the leading ones in granting diplomatic asylum at that time in Spain. But asylum was also granted in embassies and consulates of other States.

After the conference in Buenos Aires on 19 October 1936 with an aim to analyze the situation related to diplomatic asylum and compel the Spanish government to cooperate, the note to Spain was sent pointing that the conventional law of the Latin American States (Treaty on International Penal Law of 1889) authorizes the grant of asylum in legations. The Latin American States based the grant on Havana Convention on Asylum of 1928 as well. While European representatives believed that the practice of diplomatic asylum was a humanitarian act, the Latin America representatives asserted asylum as a right. The Spanish government did not want to consent to the evacuation of the refugees. The question was given to the Council of the League of Nations in 1937. In the Council's 96th session the question of "the situation of persons who have taken asylum in the embassies and legations at Madrid" was included. Numerous members participated in the debate, discussing the question of the right of diplomatic asylum, its existence, recognition, and limits. The Council abstained from pronouncing upon the legality of the principle of diplomatic asylum, and adopted a statement confirming its intention of examining the problem only as a humanitarian question.⁴⁴ The problem was expected to be solved by negotiation. The agreement of evacuation was concluded between Chile, Argentina, Poland and Netherlands and others. The last persons were evacuated and left Spain on 12 October 1940. During the period of Spanish Civil War, diplomatic asylum helped to save thousands of lives during the Civil War in Spain.

Development of consular asylum is usually not described separately from diplomatic asylum by legal writers. We could say that the same stages that we distinguished before, could reflect evolution of asylum in consular premises as well. The authors usually mention examples in both diplomatic legations and consulates while describing the evolution and giving examples of diplomatic asylum. John Bassett Moore in his work "Asylum in Legations and Consulates and in Vessels" which was published in the end of XIX century wrote „ it is a fact that in countries in which asylum under foreign flags is practiced, consulates are sometimes used for this purpose, though not as frequently as legations“⁴⁵. This author mentioned examples of XIX century when asylum was sought in consulates: In the revolution in Greece in 1862, a refuge was granted both in legations and in consulates, during the persecution of the Jews in Moldavia, Wallachia and

⁴⁴ Sinha Prakash S. Asylum and International Law. Hague: Martinus Nijhoff, 1971. PG. 32 - 33

⁴⁵ Moore Bassett John. Asylum in Legations and Consulates and Veesels. I. // Political Science Quarterly. Mar., 1892 ,Vol. 7, No. 1, PG. 5

Serbia in 1867 a refuge could be found in the British consulate⁴⁶, in 1877, during the revolution General F. O. Arce, an opponent of the president of Mexico, took refuge in the American consulate. Among examples in Haiti the author mentions cases in 1872 when the British vice-consul received political offenders and refused to give them up, in 1878 when General Salomon enjoyed asylum in the Peruvian consulate and others⁴⁷. John Bassett Moore provided the view that if a fugitive applies for protection; it is to be accorded only when his life is in imminent danger from mob violence, and only so long as such imminent danger continues⁴⁸.

In the XX century, perhaps the most known case of granting consular asylum occurred during the Spanish Civil War. Diplomatic asylum as well as consular asylum was granted for thousands of people. Antonio Manuel Moral Roncal describing the events in Spain in 1936-1937 says that there was no precedent of asylum granted in consulates in Spain before⁴⁹. The author counts three cases: grants of asylum in Madrid in consulates and embassies of Honduras, Peru, Chile and other States, in Valencia and Alicante in the consulates of Argentina and in Malaga in consulate of Mexico.

Summarising the historical development of asylum in legations and consulates, we could say that evolution of this kind of asylum could be divided into four stages with specific features: 1) diplomatic asylum as a religious asylum, when criminal offenders sought asylum in sacred places; 2) diplomatic asylum after establishment of first permanent missions, when common offender sought asylum in places of diplomatic envoys; 3) diplomatic asylum as protection in diplomatic premises only for political offenders; 4) diplomatic asylum as codified legal institute or protection on humanitarian considerations. The grant of asylum developed mostly in Latin America and it is a legal issue nowadays, regulated by the regional conventions. This kind of asylum was practiced among European legations as well. But grants of diplomatic asylum in XX century show that it was granted in rare cases and only on humanitarian basis. From the historical examples we can see that the persons sought shelter in both, diplomatic legations and consulates, because both enjoy the inviolability from other States jurisdiction. As a rule, the immunities and privileges of consular officials are less extensive as those of diplomatic staff⁵⁰.

⁴⁶ Ibid, PG. 15 – 16.

⁴⁷ Moore Bassett John. Asylum in Legations and Consulates and Veels. II. // Political Science Quarterly. Jun., 1892, Vol. 7, No. 2, PG. 215, 223.

⁴⁸ Moore Bassett John. Asylum in Legations and Consulates and Veels. III // Political Science Quarterly. Sep., 1892, Vol. 7, No. 3, PG. 404

⁴⁹ Antonio Manuel Moral Roncal. El Asilo Consular en Malaga (1936-1937): Humanitarismo y Diplomacia // <http://www.ciere.org/CUADERNOS/Art%2050/el%20asilo%20consular.htm> , accessed 01. 03. 2012.

⁵⁰ Dixon Martin. The Textbook on International Law. Oxford: Oxford University Press, 2007. PG. 199-200

This might be a reason why in the legal literature there are much more examples about diplomatic asylum than the consular one.

1. 3. Diplomatic asylum in the development of the theories of immunity

Long before the Vienna Conventions on Diplomatic and Consular Relations came into being, diplomatic and consular immunities existed in customary international law. The concept of immunity is based on three theories: personal representation, theory of extraterritoriality and the theory of functional necessity. The last one is the theory of nowadays and seems to remain at least in the near future, because it is confirmed in international law. We believe that the asylum in legations is strongly related with the question of immunities, because it is granted under the inviolability of the premises. We will describe all theories and will underline the relation with the issue of asylum.

The theory of personal representation is the oldest one. Under the theory of personal representation, diplomats acting on behalf of a sovereign State embody the ruler of that State. An affront to the representative of a sovereign State under this theory constitutes an affront to the foreign State itself⁵¹.

Under the theory of extraterritoriality, the diplomat legally resides on the soil of the sending State despite the fact that the diplomat lives abroad. Consequently, the foreign envoy is not subject to the law of the receiving State due to a lack of a local residence⁵². This is the theory of diplomatic immunities invented by Hugo Grotius in XVII century. The theory is based on the idea that diplomatic premises (and the people that occupied them) were not within the territory of the receiving State⁵³. Extraterritoriality implies that the premises of a mission in the theory are outside the territory of the receiving State and represent a sort of extension of the territory of the sending State.⁵⁴ The sovereign of the State has no right to exercise any jurisdictional act over the places which enjoy exterritoriality.⁵⁵ The institution of diplomatic asylum had been able to

⁵¹ Ross Mitchell S. Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities // American University International Law Review 4. 1989, No. 1, PG. 177. // <http://www.auilr.org/pdf/4/4-1-6.pdf> , accessed 07. 03. 2012

⁵² Ibid, PG. 178.

⁵³ Harvey J. Langholtz and Chris E. Stout. The Psychology of Diplomacy. Westport: Preager Publishers, 2004. PG. 245.

⁵⁴ Sen B. A Diplomat's Handbook of International Law and Practice. Hague: Martinus Nijhoff Publisher, 1988. 3d edition. PG. 96.

⁵⁵ Barker J. Craig. The Protection of Diplomatic Personnel. Burlington: Ashgate Publishing Limited. 2006. PG. 55.

develop on the basis of the extraterritoriality of diplomatic premises. Grant V. McClanahan states that asylum in an embassy was deduced from the theory of extraterritoriality. Now on the basis of custom and treaties, it endures despite the discarding of its original theoretical basis.⁵⁶ Diplomatic asylum was considered as an integral part of diplomatic law until the XIX century. The concept of extraterritoriality was rejected by law writers and replaced by functional necessity.

From the XIX century functional necessity is the leading theory and presents justification of immunities. It justifies immunity for the purpose of allowing diplomats to conduct their functions. According to this theory the diplomat has privileges and immunities to be able to perform his/her diplomatic function. A diplomat needs to be free from the local jurisdiction to exercise the task given by the sending State. This theory is included in 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations and is the dominant (but not exclusive) theory basing diplomatic immunity in contemporary international law⁵⁷. Regarding the grant of asylum in legations or in consulates, there is no such a function accorded to diplomats or consuls to grant asylum. The issues related with the functions of the mission and possibility of asylum will be discussed more deeply in the further part of the thesis.

Summarising the relation of asylum in legations and consulates and theories of immunities, it could be said that this kind of asylum found its explication when the theory of extraterritoriality was the dominant one. From the XIX century, since the theory of functional necessity became the leading one, asylum in legations and consulates is criticised because it is not included among the functions of diplomatic or consular missions.

⁵⁶ McClanahan Grant V. *Diplomatic Immunity. Principles, Practices, Problems*. London: Hurts and Company, 1989. PG. 32.

⁵⁷ Harvey J. Langholtz and Chris E. Stout. *The Psychology of Diplomacy*. Westport: Preager Publishers, 2004. PG. 245.

2. DIPLOMATIC ASYLUM UNDER INTERNATIONAL TREATIES

The second task of the thesis is to determine relations of diplomatic asylum with international legal instruments. In this part of the thesis we are going to find out relations of diplomatic asylum with the Vienna Convention on Diplomatic Relations, The Vienna Convention on Consular Relations and the Conventions concluded among Latin America States and to see what provisions are related with the issues of this institute. We have chosen to analyse these conventions because, The Vienna Conventions on Diplomatic and Consular Relations provides inviolability of premise that is a relevant to diplomatic asylum, and the Latin America Conventions are the only regional legal instruments where diplomatic asylum is regulated by certain legal norms. Moreover, the positions of law writers regarding these Conventions and diplomatic asylum are going to be presented.

2. 1. Diplomatic Asylum under Vienna Convention on Diplomatic Relations

The Vienna Convention on Diplomatic Relations is the international law instrument providing rules on diplomatic relations. The Vienna Convention provides a complete framework for the establishment, maintenance and termination of diplomatic relations on a basis of consent between independent sovereign States. It sets out the special rules – privileges and immunities – which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments⁵⁸.

The inviolability of the premises is one of the immunities provided in the Vienna Convention. The inviolability of the premises has two aspects. Embassy premises must be free from interference and have to be protected by the host country⁵⁹. The issue of inviolability of diplomatic premises is important in analysing the topic of diplomatic asylum, because the place of refuge for a person granted asylum is the granting State's legation. Analyzing the issue of diplomatic asylum, the most important articles of Vienna Convention on Diplomatic Relations are: art. 3: functions of diplomatic mission, art. 22: inviolability of the premises and art. 41: scope of privileges and immunities. We are going to discuss diplomatic asylum in the context of these articles.

Art. 22 par. 1 says: The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. What is

⁵⁸ Eileen Denza. Vienna Convention on Diplomatic Relations. United Nations Audiovisual Library on International Law. 2009. Pg. 3. // http://untreaty.un.org/cod/avl/pdf/ha/vcdr/vcdr_e.pdf, accessed 11. 12. 2011

⁵⁹ Kleiner Juergen. Diplomatic Practice: Between Tradition and Innovation. World Scientific Publishing Co., 2009. PG. 149

held “premises of the mission” is also defined in the Convention, art. 1: i: 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 mission⁶⁰. The person who finds him/ her self in these buildings is in the premises of the mission which are protected by Vienna Convention. The inviolability of the premises is the rule formulated in absolute terms. The Vienna Convention does not provide any exception to the requirement of consent of the head of the mission even for situations of emergency on the diplomatic premises, where human life or public safety are endangered⁶¹. If diplomatic asylum is granted to a person by the head of the mission, the agents of the receiving State have no right to enter into the premises and to take that person out without a permission of the head of the mission. Such entrance would be a breach of the Vienna Convention. Inviolability of the premises is crucial in the de facto exercise of diplomatic asylum⁶².

The preamble to the Vienna Convention on Diplomatic Relations of 1961 states that „the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States“. The premises of the mission must be used for the purpose of the mission and for its functioning. Art. 3 para 1 provides functions of the mission: the functions of a diplomatic mission consist, inter alia, of: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. Thus, literally there is no function such as granting diplomatic asylum among the functions listed in Art. 3. Moreover, Art. 41: 3 provides: the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

⁶⁰ Vienna Convention on Diplomatic Relations. Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations, *Treaty Series*, vol. 500, p. 95. //

http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf, accessed 15/ 05/ 2012.

⁶¹ Jean d'Aspremont. Premises of Diplomatic Missions // Max Planck Encyclopedia of Public International Law, 2009.

⁶² Jeffery Anthea J. Diplomatic asylum: Its Problems and Potential as a Means of Protecting Human Rights // South African Journal on Human Rights. Volume 1. 1985.

Eileen Denza emphasizes that so far the Vienna Convention is concerned; the question of asylum depends on the application of Art. 41 paragraph 1 – the duty of persons enjoying immunity to respect the law and regulations of the receiving State and not to interfere in the internal affairs of that State – and Art. 22⁶³. Thus, if the head of the mission decides to grant diplomatic asylum which is not provided among the functions of the mission under the Vienna Convention, from the point of receiving State it could be seen as interference in the internal affairs.

After looking through the provisions of Vienna Convention, it could be said that granting diplomatic asylum is neither literally found among the functions of mission, nor it is included in any other provision of the Vienna Convention on Diplomatic Relations. On the other hand, inviolability of the premises of the mission assure that in case of granting diplomatic asylum to a person, the receiving State cannot enter the premises because they are immune and protected by the Vienna Convention. The territorial State can apprehend a person only by violating the immunity of the diplomatic premises or, possibly, by breaking diplomatic relations“. Both these measures are extreme: and the result is that they are generally „considered too high a price to pay for apprehension of the refugee⁶⁴.

Dilemma of the inviolability of premises on the one hand and the duty not to interfere into internal affairs on the other was faced several times. Perhaps the most known case is the Asylum case between Colombia and Peru in 1950 regarding diplomatic asylum granted in the Colombian embassy to the Peruvian Haya de la Torre. Peruvian Government considered Haya de la Torre as a common criminal, while the Colombian Government qualified him as a political offender. The dispute was brought to the ICJ. The Court stated that: A decision to grant diplomatic asylum involves derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case⁶⁵. However the Court also stated that Colombia was under no obligation to deliver Haya de la Torre to the

⁶³ Eileen Denza. *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*. OUP Oxford. 2 edition. 2004. Pg. 118

⁶⁴ Jeffery Anthea J. *Diplomatic asylum: Its Problems and Potential as a Means of Protecting Human Rights* // South African Journal on Human Rights. Volume 1. 1985.

⁶⁵ *Asylum Case (Colombia v. Peru)*, International Court of Justice (ICJ), 20 November 1950. // <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html> , accessed 21. 05. 2012.

Peruvian authorities⁶⁶. As a rule, owing to the inviolability of legation premises, the receiving State cannot recover a refugee by force if the envoy refuses to surrender him⁶⁷. The majority of States in Latin America recognize the inviolability of the diplomatic premises, which is extended to cover the immunity from arrest fugitive granted asylum in those premises⁶⁸. Haya de la Torre remained in the embassy of Colombia for five years. During that time, authorities of Peru did not enter the embassy respecting the inviolability of the diplomatic premises. This case will be discussed wider in the further chapter.

Another example of such a dilemma is the conflict between Honduras – Brazil regarding José Manuel Zelaya Rosales, president of Honduras, who was given refuge in the embassy of Brazil in Tegucigalpa, capital of Honduras. Republic of Honduras has filed an application against the Federative Republic of Brazil in the International Court of Justice. In the application Honduras stated that the “dispute between the Republic of Honduras and the Federative Republic of Brazil relates to legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State, a principle incorporated in the Charter of the United Nations”⁶⁹ Honduras’ claimed on the violation of the principle of non-intervention provided in under Article 2 (7) of the U.N. Charter and on the 1961 Vienna Convention on Diplomatic Relations Article 41 (1) which provides duty not to interfere in the internal affairs of that State⁷⁰. This case would have been the second in ICJ, after Asylum case, related with the issue of granting diplomatic asylum. But the case was removed from the list of the cases in ICJ⁷¹, because the Minister for Foreign Affairs of Honduras informed the Court that the Honduran Government was “not going on with the

⁶⁶ *Haya de la Torre Case (Colombia v. Peru)*, International Court of Justice (ICJ), 13 June 1951. // <http://www.unhcr.org/refworld/docid/3ae6b6ee14.html> , accessed 21. 04. 2012.

⁶⁷ Kaladharan Nayar M. G. *The Right of Asylum in International Law: Its Status and Prospects*. 17 St. Louis U. L.J. 17 1972-1973 // <http://heinonline.org> , accessed 19. 01. 2012

⁶⁸ Verma S. K.. *An Introduction To Public International Law*. PHI Learning Pvt. Ltd., 2004. PG. 214

⁶⁹ Filing in the Registry of the Court of an “Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil” . International Court of Justice. Press Release. No. 2009/30 . 29 October 2009. // <http://www.icj-cij.org/docket/files/147/15585.pdf#view=FitH&pagemode=none&search=%22Zelaya%22> , accessed 17. 04. 2012.

⁷⁰ International Law Observatory. *Non-Intervention: The Honduras – Brazil Case*. *Classic International Law, Uncategorized* on January 25, 2010 // <http://ilobservatory.wordpress.com/2010/01/25/non-intervention-the-honduras-%E2%80%93-brazil-case/> , accessed 18. 04. 2012.

⁷¹ International Court of Justice. Order - 12/05/2010 - Certain questions concerning diplomatic relations (Honduras v. Brazil) // <http://www.icj-cij.org/docket/files/147/15939.pdf#view=FitH&pagemode=none&search=%22Zelaya%22> , accessed 17. 04. 2012.

proceedings” against Brazil and that “in so far as necessary, the Honduran Government accordingly [was] withdrawing this Application from the Registry. The Brazilian Government had not taken any step in the proceedings in the case⁷². This case was not analysed by ICJ, but perhaps the question of diplomatic asylum would have been analysed again in the context of the provisions of Vienna Convention on Diplomatic Relation that was not done in *Asylum case*. Ousted Honduran President Manuel Zelaya has left the Brazilian Embassy in the capital, Tegucigalpa in 2010 and was granted safe passage to the Dominican Republic⁷³. After being in exile in Dominican Republic, Former Honduran President Manuel Zelaya returned to Honduras in 2011⁷⁴.

The majority of law writers on the issue of diplomatic asylum come to the conclusion that it is not allowed in Vienna Convention, moreover, granting diplomatic asylum would come down to a violation of Art. 41 of the Vienna Convention on Diplomatic Relations. Besides this opinion, there are authors who believe that the possibility to grant diplomatic asylum does exist in Vienna Convention itself. We would like to mention some authors and their reasoning on the issue.

Eileen Denza in her book „Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations“, which is regarded as the leading work in the diplomatic law field⁷⁵, notes that “the sending State may, however—at least where there is immediate danger to the life or safety of a refugee—claim a limited and temporary right to grant diplomatic asylum on the basis of customary international law. In the Preamble to the Vienna Convention the Contracting Parties affirm ‘that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention’⁷⁶.

⁷² Certain Questions concerning Diplomatic Relations (Honduras v. Brazil) Case removed from the Court’s List at the request of Honduras // http://lawprofessors.typepad.com/international_law/2010/05/honduras-drops-case-against-brazil.html, accessed 17. 04. 2012.

⁷³ Ousted Honduran president en route to Dominican Republic // <http://www.cnn.com/2010/WORLD/americas/01/27/honduras.zelaya/index.html#cnnSTCText>, accessed 18. 04. 2012.

⁷⁴ Ousted ex-President Zelaya returns to Honduras // <http://www.cnn.com/2011/WORLD/americas/05/28/honduras.zelaya/index.html> , accessed 18. 04. 2012.

⁷⁵ Oxford University Press: Description of Eileen Denza. Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations // <http://www.oup.com/us/catalog/general/subject/Law/PublicInternationalLaw/GeneralPublicInternationalLaw/?view=usa&ci=9780199216857> , accessed 05. 01. 2012.

⁷⁶ Denza Eileen. Diplomatic Law: Commentary on the Vienna Convnetion on diplomatic Relations. Oxford: Oxford University Press, 2004. 2nd edition. PG. 118.

Peter Porcino thinks that the Vienna Convention does not absolutely prohibit grants of asylum in embassies. This author gives his comments on Art. 3 and Art. 41. Regarding Art. 3, Porcino notes that the list contained in article is not intended to be exclusive. That a particular activity of a mission does not appear on the list does not make it illegal either for purposes of the Convention or for purposes of international law. Regarding Art. 41 paragraph 3, which incorporates Article 3, the author notes that article 41(3) does not add any substantive limitations or otherwise bar the granting of diplomatic asylum. The proscription of article 41(3) should not be invoked to terminate a grant. If nations agree by treaty or otherwise to recognize the practice, then the proscription would not take effect⁷⁷.

Anthea J. Jeffery confirm position of Peter Porcino claiming that Vienna Convention does not preclude grant of diplomatic asylum: „Article 3(I) of the Diplomatic Convention defines the functions of a diplomatic mission as consisting, 'inter alia', in representing the sending State, negotiating with the receiving State and so forth. The words 'inter alia' make it quite clear that the list provided is not intended to be exhaustive“⁷⁸.

Lithuanian author Zenonas Petrauskas notes that above mentioned Art. 41 paragraph 3 of the Vienna Convention does not allow using premises of diplomatic mission with the purpose other then provided in the Convention. But the same Article, providing that the premises of the mission can be used for other purposes as well if it is regulated by special agreements between Sending and Receiving State, gives the possibility for the States to cover the right of diplomatic asylum in their agreements⁷⁹.

Thus, Vienna Convention on Diplomatic Relations does not refer to diplomatic asylum. However we could conclude that diplomatic asylum could be granted in diplomatic premises without prejudice to Vienna Convention, because: a) in certain cases (for. ex. on humanitarian considerations) it could be seen as a function of a mission under wording “inter alia” provided in art.3 and/ or b) if the special agreements exist among sending and receiving State provided in art. 41: 3 (for ex.: as it is regulated among Latin America States).

⁷⁷ Porcino Peter. *Toward Codification of Diplomatic Asylum* // *New York University Journal of International Law and Politics*. 1975 – 1976, Volume 8.

⁷⁸ Jeffery Anthea J. *Diplomatic asylum: Its Problems and Potential as a Mean of Protecting Human Rights* // *South African Journal on Human Rights*. Volume 1. 1985.

⁷⁹ Zenonas Petrauskas, Dainius Žalimas, Skirgailė Žaltauskaitė – Žalimienė. *Diplomatinė Teisė. Teisinės informacijos centras*. Vilnius. 2003. PG. 98

2. 2. Diplomatic Asylum under Vienna Convention of Consular Relations

Vienna Convention on Consular Relations is the international law instrument providing regulation on consular relations⁸⁰. The treaty now governs many important aspects of consular relations and is considered by most nations and scholars to be a codification of customary international law that sets the “baseline” to which all countries, not just the parties, need to conform⁸¹. The Vienna Convention on Consular relations of 1963 follows the pattern of the 1961 Diplomatic Convention. The provisions of the consular Convention broadly follow those of Diplomatic Convention⁸².

The main distinction between diplomatic and consular asylum is the existence and extent of immunity from local government⁸³. Consuls like diplomats represent their State, but unlike diplomats, they are not concerned with political relations between the two States⁸⁴. Consular immunities are not of the same extent as the diplomatic ones.

Again, we consider the most important questions related with diplomatic asylum are immunity of the consular office and consular functions. “Consular premises” means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post (Art. 1: j). Art. 31: 1 provides Consular premises shall be inviolable to the extent provided in this article. Convention on Consular Relations now expressly accords inviolability to those parts of consular premises used exclusively for the purposes of the mission. The same art. 31: 2 provides: The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of

⁸⁰ *Vienna Convention on Consular Relations*. Done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations, Treaty Series, vol. 596, p. 261. // http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf, accessed 15. 05. 2012.

⁸¹ Kolesnikov Yury A. Kolesnikov. Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions // *Pacific Law Journal* (-v28 (1997)). 2009, Volume 40, Issue 1. PG. 186 – 187. // http://www.mcgeorge.edu/documents/publications/mlr/Vol_40_1/11_Kolesnikov_Master1.pdf, accessed 16. 04. 2012

⁸² Anthony Aust. *Handbook of International Law*. Second Edition. Cambridge University Press. 2010. Pg. 142

⁸³ Porcino Peter. *Toward Codification of Diplomatic Asylum* // *New York University Journal of International Law and Politics*. 1975 – 1976, Volume 8.

⁸⁴ Malanczuk Peter. *Akehurst’s Modern Introduction to International Law*. New York: Routledge. 1997. 7th edition. PG. 127

the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action. The immunity of the premises is not so wide, because the convention itself provides that in certain cases the consent of the head of the post can be presumed differently than in the Vienna Convention on Diplomatic Relations.

Art. 55: 2 provides that the consular premises shall not be used in any manner incompatible with the exercise of consular functions. The preamble of Convention also provides that the purpose of privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.

The consular functions are listed in art. 5 of the Convention: Consular functions consist in <...> 5: (m) : performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State. The Draft Articles on Consular Relations With Commentaries mention other functions that consuls may perform in accordance with international law: the functions of arbitrator or conciliator *ad hoc* in any disputes which nationals of the sending State submit to them, provided that this is not incompatible with the laws and regulations of the receiving State; the functions entrusted to consuls by the international agreements in force between the sending State and the receiving State; other functions which are entrusted to consuls by the sending State, provided that the performance of these functions is not prohibited by the laws and regulations or by the authorities of the receiving State⁸⁵.

Thus, the Vienna Convention on Consular Relation providing possibility to perform other functions, enable consuls to grant diplomatic asylum in several cases: a) if such a function is provided in international agreements between sending and receiving States and b) if such a function is entrusted to consul and not expressly prohibited by the receiving State. Theoretically, granting asylum in such cases would not be contrary to Vienna Convention on Consular relation.

After looking over the provisions, we could conclude that granting of diplomatic asylum would not be a breach neither of Vienna Convention on Diplomatic Relations, nor of Vienna Convention on Consular Relations. The wording of certain provisions in both conventions does not make diplomatic asylum illicit. These provisions are the following: 1) art. 3 of Vienna Convention on Diplomatic Relations provides not exclusive list of diplomatic functions; 2) art.

⁸⁵ Draft Articles on Consular Relations, with commentaries. Text adopted by the International Law Commission at its thirteenth session, in 1961. Para. 24 – 26. // http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_2_1961.pdf , accessed 06. 05. 2012.

41 (3) of Vienna Convention on Diplomatic Relations provides possibility to conclude certain agreement regulating diplomatic asylum between sending and receiving States; 3) art. 5(m) of Vienna Convention on Consular Relations provides not exclusive list of consular functions, requirement for prohibition by laws in receiving States and provides possibility for the sending and receiving States to conclude agreements regulating the issues of diplomatic asylum. Thus, grant of diplomatic asylum is not precluded by both Vienna Conventions.

2. 3. Diplomatic Asylum under Conventions in Latin America

Porcino maintains the opinion that the practices of nations with respect to diplomatic asylum can be divided into three categories: 1) non recognition, 2) partial acceptance and 3) full recognition. Most of the Latin American countries fall within the last category, and it is in Latin America that the doctrine of diplomatic asylum achieved its modern form.⁸⁶ The institute of diplomatic asylum was often practiced in Latin America States because of specific political development of the region and due to frequent political revolutions⁸⁷. Government instability and internal disorder have existed throughout Latin America since its independence was achieved. As a result, the extension of diplomatic asylum to political offenders, many of whom have participated in revolutionary movements, has proven necessary. In addition, Latin American governments adopted the asylum practices during the revolutionary era so that their diplomatic recognition by major foreign States would not be jeopardized⁸⁸.

The practice of allowing asylum in embassies in this region is one of the foremost examples of regional international law. This law derives from conventions concluded among the Latin America States⁸⁹. The treaties regulating certain issues of diplomatic asylum are the following: 1) Treaty on International Penal Law signed in Montevideo 1889⁹⁰; 2) Convention on Asylum signed in Havana 1928⁹¹; 3) Convention on Political Asylum signed in Montevideo

⁸⁶ Porcino Peter. *Toward Codification of Diplomatic Asylum* // New York University Journal of International Law and Politics. 1975 – 1976, Volume 8.

⁸⁷ Petrauskas Zenonas, Žalimas Dainius, Žaltauskaitė – Žalimienė Skirgailė. *Diplomatinių Teisė. Teisinės informacijos centras*. Vilnius. 2003. PG. 98.

⁸⁸ Rossitto Angela M.. *Diplomatic Asylum in the United States and Latin America: a Comparative Analysis* // Brooklyn Journal of International Law. 1987, Volume 13.

⁸⁹ Henderson Conwey W. *Understanding International Law*. John Wiley and Sons, 2010. PG. 159

⁹⁰ Americas - Miscellaneous, *Treaty on International Penal Law*, 23 January 1889. // <http://www.unhcr.org/refworld/docid/3ae6b3781c.html> , accessed 14. 04. 2012.

⁹¹ *Convencion sobre el Derecho de Asilo*. La Habana. 1928. No. 40. // <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/0609> ,accessed 15. 05. 2012

1933⁹²; 4) Treaty on Political Asylum and Refuge signed in Montevideo 1939⁹³, and 5) Convention on Diplomatic Asylum signed in Caracas in 1954⁹⁴. Determining the relations between all these conventions, it could be said that all Conventions are in force in Latin America. In every instrument there are similar provisions, but certain new issues regarding diplomatic asylum were introduced too – “the concept and methods of asylum were improved by each convention”⁹⁵. For example, in Asylum case parties of the dispute referred to Havana Convention, but it did not gave the State granting asylum the competence to characterize by unilateral decision that the person given asylum was accused of a political and not a common crime.⁹⁶ After the case, the new regulation on qualification was introduced to Caracas Convention.

The Caracas Convention can be considered as the most authoritative of above mentioned instruments⁹⁷. The Caracas Convention is a result of the *Asylum case* in International Court of Justice. It regulates the most of the issues related with diplomatic asylum institute in Latin America region. This Convention purports to establish with finality the procedure and substantive rights embodied in the doctrine⁹⁸. The Convention was ratified by 14 Latin American countries: Argentina, Brazil, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. Signers of the Convention are:

⁹² Convención sobre Asilo Político. Montevideo 1933. Available at: <http://www.acnur.org/biblioteca/pdf/0509.pdf?view=1> , accessed 15. 05. 2012.

⁹³ Americas - Miscellaneous, *Treaty on Asylum and Political Refuge*, 4 August 1939. // <http://www.unhcr.org/refworld/docid/3ae6b383.html> , accessed 14. 05. 2012.

⁹⁴ *Convention on Diplomatic Asylum*. Concluded at Caracas on 28 March 1954. No. 24377. // <http://www.scribd.com/doc/55638915/Convention-on-Diplomatic-Asylum> , accessed 15. 05. 2012.

⁹⁵ Urrutia-Aparicio Carlos. Diplomatic asylum in Latin America. Editorial del Ministerio de Educación Pública "José de Pineda Ibarra,"1960. Pg. 11.

⁹⁶ Shah Prakash. Asylum, Diplomatic // Max Planck Encyclopedia of International Law. Oxford: Oxford University Press, 2008.

⁹⁷ Nahlik Stanislaw E. "Matière préliminaire." Development of diplomatic law : selected problems. Collected Courses of the Hague Academy of International Law 222. Hague: Martinus Nijhoff Publishers, 1990. PG 284

⁹⁸ Greenburgh R. B. Recent Developments in the Law of Diplomatic Asylum. Transactions of the Grotius Society // Problems of Public and Private International Law. Cambridge University Press on behalf of the British Institute of International and Comparative Law. 1955. Vol. 41. PG.: 110. // <http://www.jstor.org/stable/743293> , accessed 12. 04. 2012

Bolivia, Chile, Columbia, Cuba, Honduras and Nicaragua. Haiti denounced Convention in 1967⁹⁹.

Due to the fact that the most precise regulation on diplomatic asylum can be found in Latin America conventions, especially in Caracas Convention, we would like to overview certain provisions and find answer to the following questions: where diplomatic asylum can be granted; who is responsible for grant of the asylum; to whom the asylum can be granted; if the asylum is granted, what are the rights and duties of sending and receiving States.

Art. 1 of Caracas Convention provides: Asylum granted in legations war vessels, and military camps or aircrafts, to persons being sought for political reasons or for political offenses shall be respected by the territorial State in accordance with provisions of this convention. A legation is defined as 1) any seat of a regular diplomatic mission, 2) the residence of chiefs of mission, and 3) the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings. Convention does not include consular premises as the place for asylum. The other conventions: Treaty on International Penal Law, Convention on Asylum, and Convention on Political Asylum do not include any provision which would allow using consulate as the place for asylum. But Treaty on Political Asylum and Refuge signed in Montevideo 1939 in art. 8 says: When the number of refugees exceeds the normal capacity of the places of refuge, the diplomatic agents or military commanders may provide other places, under the protection of their flag, for the safety and lodging of the said refugees. In such cases, the agents or commanders must communicate that fact to the authorities¹⁰⁰. Thus, we could presume that consular premises could be used in a very specific situation.

Art. 1 also defines who can be subject of asylum. It is a person sought due to political reasons or political offences. Art. XX says that diplomatic asylum is not a subject of reciprocity. Every person is under its protection, whatever his nationality. Thus, according to the Caracas Convention, the ground of nationality cannot be the reason for refusing diplomatic asylum for a person. Guatemala and Uruguay made reservation on this article maintaining that “any person, without any discrimination whatsoever, has the right to the protection of asylum”; “all persons

⁹⁹ Convention on Diplomatic Asylum. General Information of the Treaty: A – 46 // <http://www.oas.org/juridico/english/sigs/a-46.html> , accessed 07. 05. 2012.

¹⁰⁰ Americas - Miscellaneous, *Treaty on Asylum and Political Refuge*, 4 August 1939. // <http://www.unhcr.org/refworld/docid/3ae6b3833.html> , accessed 14. 05. 2012.

have the right to asylum, whatever, their sex, nationality, belief, or religion¹⁰¹. The person who is seeking asylum cannot be a common criminal: it is not lawful to grant asylum to persons who, at the time of requesting it, are under indictment or on trial for common offenses or have been convicted by competent regular courts and have not served the respective sentence (art. 3).

Thus two important aspects could be emphasized already: that the asylum can be granted for a person due to political reasons or political offences, but not for common criminals and that a person may seek asylum only in special places provided by Convention.

The Convention provides the rights and duties of the sending and receiving State. First of all, the art. 2 says that Every State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it. Guatemala and Uruguay made reservations to the provision that the States are not obliged to grant asylum. Guatemala upholds a broad, firm concept of the right to asylum¹⁰². The position of Uruguay has consistently been that there is a duty to grant asylum for reasons based on human rights, which do not permit discrimination on grounds of race, sex, religion or opinion. The view taken is that the right to asylum cannot be left to the discretion of a diplomat¹⁰³.

We would like to mention some rights and duties for sending and receiving State provided in the Caracas Convention on Diplomatic Asylum.

Besides the right to grant asylum, the sending State has a right to determine the nature of the offense or the motives for the persecution (art. 4); to determine the degree of urgency in the case (art. 7); to continue the asylum or to demand a safe – conduct (art. 9); to request that the asylee be allowed to depart for foreign territory (art. 12); may require the guarantees (for safe departure from the State) be given in writing; to transfer asylee out of the country (art. 13).

The diplomatic representative of the sending States has a duty to as soon as possible after the asylum has been granted; report the fact to the Minister of Foreign Affairs of the territorial State, or the local administrative authority (art. 8). The sending State is responsible for the

¹⁰¹ *Convention on Diplomatic Asylum*. Concluded at Caracas on 28 March 1954. No. 24377. // <http://www.scribd.com/doc/55638915/Convention-on-Diplomatic-Asylum> , accessed 15. 05. 2012.

¹⁰² *Ibid*, Art. 2.

¹⁰³ UN General Assembly, Question of Diplomatic Asylum. Report of the Secretary-General, 2 September 1975, A/10139 (Part I), position of Uruguay // <http://www.unhcr.org/refworld/docid/3ae68bee0.html> , accessed 20. 06. 2011.

asylee in the rout, because the asylee is considered under protection of the sending State (art. 14). The asylee may not be landed at any point in the territorial State, except for exigencies of transportation (art. 16). The State may not return the asylee to his country of origin, unless this is the express wish of the asylee (art.17). In case of rupture of diplomatic relation, the diplomatic representative who granted asylum must leave with an asylee (art. 19).

The receiving State has a right to demand that the asylee be withdrawn from the country (art. 11); to point out the preferable route for the departure of asylee (art. 13).

After the Sending State request for asylee departure from country, the receiving State has a duty to grant immediately, except in case of force majeure, the necessary guarantees (that the life, liberty or personal integrity of the asylee may not be endangered), as well as corresponding safe – conduct (art. 12).

It is provided in art. 5 that diplomatic asylum may be granted only in urgent cases. The art. 6 details what the urgent cases can be: urgent cases are understood to be those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution and cannot, without risk, ensure his safety in any other way.

One of the newest cases in Latin America occurred in 2012 February 16, when ambassador of Panama in Quito, Ecuador received the Carlos Eduardo Pérez Barriga, Director of diary “El Universo” who presented a request for diplomatic asylum based on the 1954 Caracas Convention on Diplomatic Asylum¹⁰⁴. Perez Barriga was sentenced to three years in prison and fined \$40 million dollars in a "fixed" trial for libel against the President of the Republic of Ecuador, Rafael Correa, for the publication of an opinion. Panama's decision, according to the Ministry of Foreign Affairs, is consistent with the Panamanian and Latin American tradition of recognizing asylum for persons who, in very special circumstances, may have a well founded fear for their personal safety, or who are being pursued for crimes for political motivations, and whose departure from the country can contribute to the peace and stability in their country of origin¹⁰⁵.

¹⁰⁴ Panamá concede asilo diplomático a director de El Universo, tras sentencia de última instancia // <http://www.fundamedios.org/portada/libertades/alertas/historico/2011/item/panam-concede-asilo-diplomatico-a-director-de-el-universo-tras-sentencia-de-ltima-instancia.html> , accessed 16. 04. 16.

¹⁰⁵ Panama Formalizes Diplomatic Asylum For Ecuadoran Journalist // <http://www.panama-guide.com/article.php/20120216133352130> , accessed 17. 04. 2012.

After the safe – conduct, Carlos Eduardo Pérez Barriga came to the territory of Panama.¹⁰⁶ It is one of the newest cases when The Caracas Convention (to which both Panama and Ecuador are parties) was applied in Latin America.

Thus, the issue of diplomatic asylum is the legal institute regulated by regional conventions. The given example shows that existing regulation is being applied in practice. Caracas Convention, being the latest one, regulates many aspects of diplomatic asylum.

The parties of Caracas Convention on Diplomatic Asylum are also parties of Vienna Convention on Diplomatic Relations and Vienna Convention on Consular relations. The countries have obligations regarding both regional conventions and Vienna Conventions. In determining the relation between all these documents, we think that regional conventions in Latin America, being special agreements in force, fit within the scope of art. 41 (3), which provides that : „The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State. It also fits with the scope of art. 5 (m) of Vienna Convention of Consular Relations in a part that: „performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State“.

We could conclude that regarding conventions concluded among Latin America States, diplomatic asylum is an institute of regional international law. The Latin America Conventions could be considered as an example of special agreements concluded between parties of Vienna Conventions. Determining the relation between Vienna Conventions and Latin America Conventions, it could be said that for Latin America States the regional conventions are "lex specialis" which regulates the specific issue of diplomatic asylum not literally regulated by Vienna Conventions (lex generalis).

¹⁰⁶ Director de diario ecuatoriano El Universo está en Panamá // <http://www.estrategiaynegocios.net/2012/03/01/director-de-diario-ecuatoriano-el-universo-esta-en-panama/>, accessed 17. 04. 2012.

3. DIPLOMATIC ASYLUM IN RELEVANT CASE LAW

In this Chapter we raise the question what is the dominant attitude to diplomatic asylum in the case law. In order to find out the answer we are going to examine decisions given by the ICJ in *Asylum case*, *Haya de la Torre case* and English national court.

3. 1. The ICJ : Colombian-Peruvian Dispute

The cases that perhaps are the most known cases on the issue are *Asylum case*¹⁰⁷ and *Haya de la Torre case*¹⁰⁸. The decision taken in *Asylum case* by International Court of Justice (ICJ) is the only one decision regarding diplomatic asylum taken by the Court. *Asylum Case* was the case between Colombia and Peru, between States that recognize diplomatic asylum and practice it. The judgment was taken on 20 November 1950. Till that time the issue of diplomatic asylum was regulated by Havana Convention and Montevideo Conventions. These two conventions were taken into account by the Court in deciding on the issue.

The dispute between Colombian and Peru lied in the asylum granted on January 3rd, 1949, by the Colombian Ambassador in Lima to M. Victor Raúl Haya de la Torre, who was head of a political party in Peru, the American People's Revolutionary Alliance. In 1948, a military rebellion broke out in Peru and Peru started procedures against Haya de la Torre for the instigation and direction of that rebellion. He was granted to the refugee in the embassy of Colombia. The Colombian Ambassador requested a safe-conduct to enable Haya de la Torre, whom he qualified as a political offender, to leave the country. The Government of Peru refused to grant a safe-conduct, claiming that Haya de la Torre had committed common crimes and was not entitled to enjoy the benefits of asylum. Being unable to reach an agreement, the two Governments submitted their dispute to ICJ.

What was important to the case is that The Havana Convention (that was the main instrument at that time regulating issues of diplomatic asylum) did not recognized the right of unilateral qualification of the offence committed by the person seeking asylum and the Convention of Montevideo had not been ratified till that time by Peru. Thus only Havana Convention regulated the relationships between the countries on diplomatic asylum issue.

Colombia based its claim on custom characteristic to Latin American States and on conventions concluded among states. Colombia asked whether it was competent, as the country

¹⁰⁷ *Asylum Case (Colombia v. Peru)*, International Court of Justice (ICJ), 20 November 1950. // <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html> , accessed 21. 04. 2012.

¹⁰⁸ *Haya de la Torre Case (Colombia v. Peru)*, International Court of Justice (ICJ), 13 June 1951. // <http://www.unhcr.org/refworld/docid/3ae6b6ee14.html> , accessed 21. 04. 2012.

granting asylum, to qualify the offence for the purposes of said asylum and whether Peru, as the territorial State, was bound to give the guaranties necessary for the departure of the refugee from the country, with due regard to the inviolability of his person¹⁰⁹. To both questions Colombia thought there had been positive answers. Peru was of the position that Haya de la Torre is a common criminal and diplomatic asylum cannot be granted and that diplomatic asylum can be granted only in urgent case differently then in this case when diplomatic asylum had been granted three months later then incidents occurred.

To the first question given by Colombia the Court answered that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru. The Court also stated that the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum. To the second question Peru was under no legal obligation to conform to the safe departure. On the other hand, to the Peruvian position Court rejected the argument of Peru that Haya de la Torre was a common criminal: as Haya de la Torre was accused of military rebellion, it followed that he was not a common criminal within the meaning of the Havana Convention. On the second Peru argument, the Court pointed that the grant of asylum in embassy did not constitute an act of urgency within the meaning of the Havana Convention and found any basis for the Colombian contention that Haya de la Torre's life was in danger when he appeared at the embassy after three months after this events where he had participated. The Court concluded that the political refugee can be protected under the Havana Convention only under conditions of urgency and not as a general procedure, either during a revolution or in the unsettled period which may follow thereafter¹¹⁰.

Perhaps the most important phrase in the decision, quoted by many legal writers was that: *in the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.* It could be said that it is the dominant position in public

¹⁰⁹ Alona E. The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum // The American Political Science Review. 1952, Vol. 46, No. 1. Pg. 149

¹¹⁰ *Asylum Case (Colombia v. Peru)*, International Court of Justice (ICJ), 20 November 1950. // <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html> , accessed 21. 04. 2012.

international law and it is maintained by many States that do not recognize diplomatic asylum as a legal institute.

After the judgement the countries of the dispute renewed diplomatic discussions: Peru demanding the immediate surrender of Haya de la Torre in fulfilment of the Judgment and Colombia rejecting these demands as being incompatible with the terms of the Judgment. Both parties asked the Court for a ruling on the method to be followed in executing the Judgment of November 20, 1950¹¹¹.

The Court in the second In Haya de la Torre case of 1951 unanimously rejected the request of both parties taking the view that its function was limited to "defining legal relations" established by the Havana Convention between the parties and not to determining how the parties should carry out a Judgment. Upholding the Colombia's position the Court agreed that Colombia was under no obligation to deliver Haya de la Torre to the Peruvian authorities. Court upheld Peru position that the asylum should cease, but also stated that Colombia is under no obligation to surrender Haya de la Torre. The Court found that „it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics“¹¹²

Rephrasing the last quotation of the Court statement, it was left for both countries to solve their dispute in the way of negotiations. In November 1953 Colombia approached the Inter – American Peace Committee for help in finding a solution. Peru refused the offer of good offices. Nevertheless, the Committee recommended for the parties to settle the dispute by direct negotiations¹¹³. M. Victor Raúl Haya de la Torre totally spent five years in the embassy of Colombia till 1954, when Peru granted safe conduct and Haya de la Torre went to Mexico.

After the case in ICJ Latin America States concluded Caracas Convention which now is a leading document on the issue of diplomatic asylum. This Convention deals with aspects of

¹¹¹ Evans Alona E. The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum // The American Political Science Review. 1952, Vol. 46, No. 1. PG. 154

¹¹² *Haya de la Torre Case (Colombia v. Peru)*, International Court of Justice (ICJ), 13 June 1951. // <http://www.unhcr.org/refworld/docid/3ae6b6ee14.html> , accessed 21. 04. 2012.

¹¹³ De Waart P. J. I. M. The Element of Negotiation in the Pacific Settlement of Disputes Between States: An Analysis of Provisions Made And/or Applied Since 1918 in the Field of the Pacific Settlement of International Disputes. Hague: Martinus Nijhoff, 1973. // http://books.google.lt/books?id=jg5e0hlJ3-UC&dq=Colombia+Peru+negotiations+Asylum+case&hl=lt&source=gb_s_navlinks_s , accessed 06. 05. 2012

diplomatic asylum that were not regulated in Havana Convention such as qualification of the offence made by the asylee.

An important aspect analysed by the Court was diplomatic asylum in the context of customary international law. Colombia wanted to prove that it had a right to unilateral and definitive qualification of the offence done by the person who seeks asylum. In its claim Colombia relied on to Havana Convention and on regional or local custom peculiar to Latin – American States. It is worth to remember that The Statute of the International Court of Justice describes custom as “evidence of a general practice accepted as law.”¹¹⁴ Thus, custom is a source of international law to which a State can refer. Custom is generally considered to have two elements: State practice and *opinio juris*. State practice refers to general and consistent practice by States, while *opinio juris* means that the practice is followed out of a belief of legal obligation¹¹⁵.

Colombia had to prove that the custom is established in such a manner that it has become binding on Peru. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State¹¹⁶. The imprimatur given to a customary rule of international law by the International Court of Justice would suffice to clinch its recognition in most cases¹¹⁷.

However, the Court decided that Colombia Government did not prove that rule of unilateral and definitive qualification is a customary rule. The Court stated: “The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much

¹¹⁴ United Nations, *Statute of the International Court of Justice*, 18 April 1946. // <http://www.unhcr.org/refworld/docid/3deb4b9c0.html> , accessed 10. 03. 2012.

¹¹⁵ Roberts Anthea Elizabeth. Tradition and Modern Approaches to Customary international law: A Reconciliation // *The American Journal of International Law*. 2001, Vol. 95. Pg. 757. // http://graduateinstitute.ch/webdav/site/cig/shared/CIG/Algerie_2008/documentation/intlaw/customarylaw.pdf , accessed 09. 05. 2012.

¹¹⁶ *Asylum Case (Colombia v. Peru)*, International Court of Justice (ICJ), 20 November 1950. // <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html> , accessed 21. 04. 2012.

¹¹⁷ Briggs Herbert W. The Colombian-Peruvian Asylum Case and Proof of Customary International Law // *The American Journal of International Law*. Oct., 1951, Vol. 45, No. 4. Pg. 729 // <http://www.jstor.org/stable/2194257> , accessed: 19. 12. 2011 .

influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence". Such a conclusion of the Court showed that unilateral qualification of the offence that could be seen as essential element of diplomatic asylum could not be considered as customary international law.

There are various opinions among law writers on Colombian – Peruvian case and ICJ decision: the case is often cited for the proposition that international law does not sanction grants of diplomatic asylum, on the other hand there is an opinion that since an ICJ opinion has no binding effect on countries not party to the dispute, the Court's opinion carries no more weight than any treatise on the subject¹¹⁸. Peter Porcino thinks that the opinion of ICJ is no longer a definitive interpretation of Latin American practices, because the countries of that region drafted a convention that undid much of the decision¹¹⁹.

The position of the Court to problematic issue of the qualification resulted different opinions of the Latin America lawyers and legal writers. The decision of the Court evoked objections in Latin America continent: it did not reflect regional interpretation of the institute of diplomatic asylum and did not accept neither majority of doctrines, nor practice of numerous States of the same region, based on regional law. Three Latin-American judges who formed a part in the Court formulated diverse opinions and expressed objections to the dominant position to the qualification¹²⁰. The decision was felt to be a denial of the essential character of diplomatic asylum, a customary right in these countries, and a subordination of Latin-American international law and practice to the European conceptions of international law in this matter¹²¹. Manuel R. García-Mora in his work „The Columbian – Peruvian Asylum Case and the Doctrine of Human Rights“states: „When in the present case the World Court refused to give validity to the asylum granted by the Colombian Government to a national of Peru, the Court actually failed to take into account the sense of humanity and decency which underlies the institution of asylum.

¹¹⁸ Porcino Peter. Toward Codification of Diplomatic Asylum // New York University Journal of International Law and Politics. 1975 – 1976, Volume 8.

¹¹⁹ Porcino Peter. Toward Codification of Diplomatic Asylum // New York University Journal of International Law and Politics. 1975 – 1976, Volume 8.

¹²⁰ Sosnowski Leszek. Hacia la codificación del asilo diplomático en el derecho internacional. Estudios Latinoamericanos 10, 1985. PG. 161 // http://www.ikl.org.pl/Estudios/EL10/EL10_6.pdf, accessed 10. 15. 2012.

¹²¹ Van Essen J. L. F. Some Reflections on the Judgments of the International Court of Justice in the Asylum and Haya de la Torre Cases // The International and Comparative Law Quarterly. Cambridge University Press on behalf of the British Institute of International and Comparative Law. Oct., 1952, Vol. 1, No. 4. Pg. 533. // <http://www.jstor.org/stable/755177>, accessed 19. 01. 2012.

<...> if the establishment of protections for the individual directly under International Law is considered as the most important achievement of the modern law of nations, one would be justified in taking issue with this view on the ground that the decision of the World Court in the Colombian- Peruvian Asylum case cannot be regarded as a satisfactory evidence of that alleged development in the international jurisprudence¹²².

3. 2. Decisions of National Courts in the Cases of Diplomatic Asylum

Beside the Asylum case in ICJ, there could be mentioned several cases where the decision was given by the national courts.

An important example is the decision of English Court of Appeal in the case *R (B.) v. Secretary of State for Foreign & Commonwealth Affairs taken in 2004*¹²³. The applicants were two Afghan boys who walked into a British consulate in Australia to claim asylum in 2002, but were rejected. Children of 12 and 13 years old escaped from detention camp in Australia and travelled three weeks till they reached British Consulate in Melbourne. After rejection of their applications for asylum, they were returned to detention camp. The Court of Appeal analyzed the questions such as: could the actions of the United Kingdom diplomatic and consular officials in Melbourne fall ‘within the jurisdiction’ of the United Kingdom within the meaning of that phrase in Article 1 of the Convention (ECHR); did the actions of the United Kingdom diplomatic and consular officials in Melbourne infringe the Convention; could the actions of the United Kingdom diplomatic and consular officials in Melbourne fall ‘within the jurisdiction’ of the United Kingdom within the meaning of that phrase in Article 1 of the Convention.¹²⁴ We are going to come back to the questions of diplomatic asylum in the context of human rights in the further chapter. But in this chapter we would like to mention what the English Court ruled on the issue of diplomatic asylum itself and on what condition it could be granted in the diplomatic premises.

The Court held that „where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving State requests that the fugitive be handed over the situation is

¹²² García-Mora Manuel R. The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights // Virginia Law Review. Nov., 1951, Vol. 37, No. 7. PG. 962 – 96. // <http://www.jstor.org/stable/1069115> , accessed 19. 12. 2011

¹²³ *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office*, [2004] EWCA Civ 1344, United Kingdom: Court of Appeal (England and Wales), 18 October 2004 // <http://www.unhcr.org/refworld/docid/42b048fb6.html> , accessed 21. 05. 2012.

¹²⁴ Ibid, Para. 25

very different. The basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction; <...>Where such a request is made, the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. *Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending State to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment.*¹²⁵. The Court's choice of phrase is, for now, English law (it was applied as such in *R (Al-Saadoon) v. Secretary of State for Defence* [2008] EWHC 3098 (Admin), para 89 *et seq.*, and followed *obiter* in *R (Al-Saadoon) v. Secretary of State for Defence* [2009] EWCA Civ 7, para 50)¹²⁶.

We would like to rephrase the statement of the national English Court and emphasize that international law (including the ECHR) could be applied in granting refuge in diplomatic premises to a person, when it is clear that the receiving State intends to commit a crime against humanity to this person. Then, diplomatic asylum would be granted on humanitarian considerations.

However, in the case *R (B.) v. Secretary of State for Foreign & Commonwealth Affairs*, the Court concluded that the applicants were not subject to the type and degree of threat that, under international law, would have justified granting them diplomatic asylum. To have given the applicants refuge from the demands of the Australian authorities for their return would have been an abuse of the privileged inviolability accorded to diplomatic premises. It would have infringed the obligations of the United Kingdom under public international law¹²⁷. The Court found no infringement of the Convention in the actions of diplomatic officers of United Kingdom in Australia.

After looking through the cases of international and national levels, the common aspect can be noticed. In both cases sending and receiving State found themselves in complicated situations

¹²⁵ Ibid, Para.88

¹²⁶ Tobias Thienel. Zelaya Dispute Goes to the ICJ (UPDATED) // <http://invisiblecollege weblog.leidenuniv.nl/2009/10/29/zelaya-dispute-goes-to-the-icj> , accessed 20. 14. 2012.

¹²⁷ *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office*, [2004] EWCA Civ 1344, United Kingdom: Court of Appeal (England and Wales), 18 October 2004 // <http://www.unhcr.org/refworld/docid/42b048fb6.html> , accessed 21. 05. 2012. Para.96

when the collision of values arose. The States faced the question which value should prevail, human rights in case of infringement (prevention of infringement) or the sovereignty of the State.

The sovereignty of the State is not absolute. The State limits certain sovereign rights by concluding treaties or under customary international law. As in the case of Latin America States, legal regulation exists regarding the diplomatic asylum. Sending and receiving States have certain limits on their rights and duties regarding granting diplomatic asylum. However in case of other States, no limitations exist and the head of the mission has to take a difficult decision which might have a serious impact on relation between States.

In the only decision regarding diplomatic asylum, the ICJ concluded a general rule that has a dominant position in public international law that „ *a decision to grant diplomatic asylum involves derogation from the sovereignty of that State.<...> Such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.*“ If diplomatic asylum would be granted to a common criminal, that would constitute derogation from the sovereignty of the receiving State.

However, there might raise situations when the receiving State grants diplomatic asylum not to common criminals, but persons who find themselves in danger in a specific circumstances. In the case of *R (B.) v. Secretary of State for Foreign & Commonwealth Affairs* it was stated by the Court that in order to protect person from the crime against humanity, the sending State could grant refuge in the diplomatic premises. In such cases, protection of human rights seems to prevail against the sovereignty of the receiving State. Moreover, Peter Porcino expresses an opinion that a grant of asylum in an embassy involves only passive infringement on the rights of the sovereign. There is no "active" intervention on behalf of sending State. It is the refugee who actively seeks out the protection of the foreign State¹²⁸. When diplomatic asylum is granted on the basis of humanity, it should be understood, that the proper protection for a person in the receiving State does not exist. The receiving State cannot ensure proper protection of human rights.

In the ruling of the English Court it was decided that the two youngsters are not under the risk of a crime against humanity. We described certain examples when diplomatic asylum was

¹²⁸ Porcino Peter. Toward Codification of Diplomatic Asylum // New York University Journal of International Law and Politics. 1975 – 1976, Volume 8.

granted in order to protect human rights. It can be noticed that the practice is not uniform. Every time the head of the mission receives a request on asylum, he/she has to try to find the balance between mentioned values. That is why it is considered that diplomatic asylum can be granted on a case -by -case basis evaluating all the circumstances and a level of danger to a person seeking protection.

4. DIPLOMATIC ASYLUM UNDER HUMANITARIAN CONSIDERATIONS

In the further part of thesis we are going to find out what positions the other countries express regarding diplomatic asylum, how it is implemented in practice and on what basis diplomatic asylum can be granted by those States which do not consider diplomatic asylum as part of international law. We also raise a question whether diplomatic asylum could be a mean to protect human rights and whether principle of non – refoulement could be applied in cases of asylum in embassies or consulates.

4. 1. Positions of States

The table in ANNEX 1 show that not only Latin America States face a bid for asylum. Other States of the world also face the question whether diplomatic asylum can be granted or not. This question was given to United Nations General Assembly by Australia in 1974. Australia saw the problem of determination of the limits within which such asylum could be granted. Government of Australia was of the opinion that codification of diplomatic asylum was in need.

On 14 December 1974 the General Assembly adopted resolution 3321 (XXIX) and invited Member States to express their views on the question. We find this resolution important because it let us to see the dominant positions of the States. Latin America States welcomed initiative for codification of asylum and other States did not. Due to different approaches and opinions expressed by countries, the question of codification was left. However, majority of states expressed position that diplomatic asylum could be granted on humanitarian basis¹²⁹. We would like to mention several different positions.

Austria considered diplomatic asylum as interference with the sovereignty of the receiving country. „Any such interference with another State’s sovereignty is only justifiable under special circumstances: where a person is in immediate, serious danger, or where a State persecutes the person concerned in a manner incompatible with minimum standards of human rights“. The Government of Belgium expressed that „in spite of its humanitarian nature, the granting of diplomatic asylum implies derogation from the State sovereignty of the State authorizing the granting of asylum“. Denmark expressed that „on the basis of humanitarian considerations a person may be granted temporary protection provided he is exposed to an imminent physical threat“. The Government of France did not consider diplomatic asylum was in need of codification. Norway and Sweden were of the position that „there may be cases in which

¹²⁹ UN General Assembly, Question of Diplomatic Asylum. Report of the Secretary-General, 2 September 1975, A/10139 (Part I), // <http://www.unhcr.org/refworld/docid/3ae68bee0.html> , accessed 20. 06. 2011.

humanitarian considerations and the necessity of protecting fundamental human rights are of decisive importance. In the view of the Norwegian and Swede Governments, it would be inhuman and repugnant in specific situations not to use a possibility of protecting the life of a person or of saving him from inhuman treatment or punishment. For humanitarian reasons it should therefore be considered legitimate for diplomatic missions to grant protection in their premises in such exceptional situations“. The Turkish Government attached importance to humanitarian aspect provided that diplomatic asylum is applied under very exceptional conditions. Poland expressed the position that diplomatic asylum is incompatible with generally recognized principles of diplomatic and consular law, in particular with article 41, paragraph 1 of the Vienna Convention on Diplomatic Relations and with article 55, paragraph 2 of the Vienna Convention on Consular Relations¹³⁰. In this resolution United States were in contra to further development of diplomatic asylum. Canada approach was that it is possible „to grant protection in Canadian diplomatic premises for purely humanitarian reasons. This protection is granted only in exceptional cases where the life, liberty or physical integrity of the individual seeking protection are threatened by violence against which local authorities are unable or unwilling to offer protection. This protection is extended for reasons of humanity, and is done unilaterally. Canada does not recognize any right of individuals to have such protection“. ¹³¹ Jamaica expressed that that the regime should only be used to protect persons who are being persecuted as a result of their political activities, and not to shelter common criminals and that diplomatic asylum should only be made in urgent and exceptional cases. Liberia was of the opinion The right of diplomatic asylum should be allowed persons who have committed political offences and, on humanitarian grounds, to persons fleeing from imminent personal danger of persecution on account of race, religion, nationality, membership of a particular social group and political opinions. Pakistan expressed view that „diplomatic asylum may be granted in the case of persecution for political, racial and religious reasons where there is an imminent danger to life“.

4. 2. Humanitarian Considerations

The positions expressed by the States regarding diplomatic asylum allow us to say, that even if diplomatic asylum is not recognized as international law institute, it could be granted on

¹³⁰ UN General Assembly, Question of Diplomatic Asylum. Report of the Secretary-General, 2 September 1975, A/10139 (Part I), // <http://www.unhcr.org/refworld/docid/3ae68bee0.html> , accessed 20. 06. 2011.

¹³¹ UN General Assembly, Question of Diplomatic Asylum. Report of the Secretary-General, 2 September 1975, A/10139 (Part I), // <http://www.unhcr.org/refworld/docid/3ae68bee0.html> , accessed 20. 06. 2011.

humanitarian basis. Thus, what are humanitarian basis? To whom and in what kind of situations diplomatic asylum could be granted on humanitarian considerations?

Generally, humanitarian reasons could refer to events or situations that causes or involves widespread human suffering, especially one that requires the large-scale provision of aid¹³². The OECD defines „Foreigners admitted for humanitarian reasons (other than asylum proper or temporary protection) “: foreigners who are not granted full refugee status but are nevertheless admitted for humanitarian reasons because they find themselves in refugee-like situations¹³³.

Humanitarian considerations were named as principle by International Court of Justice in Corfu Channel case: "...certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war"¹³⁴. Elementary considerations of humanity named in Corfu Channel Case do not differ from the principle of humanity¹³⁵. In the principle of humanity vision, all human beings who suffer must be helped, wherever they are, even if this thing is difficult to be achieved¹³⁶. This principle is the cornerstone in humanitarian law and as the ICJ named, it is a source of public international law. The ICJ in Asylum case considered that “in principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents”¹³⁷.

As it will be shown in the practical examples provided in the thesis, many States granted asylum in embassies and consulates for those persons who sought protection in various situations. In most of them, persons found their lives in danger. Regarding above mentioned

¹³² Oxford Dictionaries: *humanitarian* // <http://oxforddictionaries.com/definition/humanitarian?region=us> , accessed 05. 03. 2012.

¹³³ Foreigners admitted for humanitarian reasons (other then asylum proper or temporary protection)// <http://stats.oecd.org/glossary/detail.asp?ID=1038> , accessed 05. 03. 2012.

¹³⁴ *Corfu Channel Case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 22. // <http://www.icj-cij.org/docket/files/1/1645.pdf> , accessed 10. 03. 2012.

¹³⁵ Meron Theodor. The Marten Clause, Principles of Humanity, and Dictates of Public Conscience //The American Journal of International Law. Jan., 2000, Vol. 94, No. 1. PG. 82. // <http://users.polisci.wisc.edu/kinsella/martens%20clause.pdf> , accessed 10. 03. 2012.

¹³⁶Vasile Radu. The Principle of Humanity – the Cornestone of the International Humanitarian Law. Romanian Association of Humanitarian Law –Prahova’s Branch (RAHLBPH) // <http://www.arduph.ro/the-principle-of-humanity-the-cornerstone-of-the-international-humanitarian-law/> , accessed 10. 05. 2012

¹³⁷ *Asylum Case (Colombia v. Peru)*, International Court of Justice (ICJ), 20 November 1950. // <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html> , accessed 21. 04. 2012.

positions of the States, special circumstances in which diplomatic asylum could be granted could be: 1) immediate, serious danger, 2) State persecution incompatible with minimum standards of human rights (position of Austria), 3) when a person is exposed to an imminent physical threat (position of Denmark), 4) inhuman treatment or punishment (positions of Sweden, Norway), 5) where the life, liberty or physical integrity are threatened by violence against which local authorities are unable or unwilling to offer protection (position of Canada), 6) urgent cases (position of Jamaica), 7) imminent personal danger of persecution (position of Liberia), 8) an imminent danger to life (position of Pakistan).

Beside positions by States, many authors consider that diplomatic asylum finds its justification in humanitarian considerations.

In *Oppenheim's International Law* it is written: It is sometimes suggested that there is, exceptionally, a right to grant asylum on grounds of urgent and compelling reasons of humanity, usually involving the refugee's life being in imminent jeopardy from arbitrary action. The practice of States has afforded instances of the grant of asylum in such circumstances. The grant of asylum 'against the violent and disorderly action of irresponsible sections of the population' is a legal right which, on grounds of humanity, may be exercised irrespective of treaty; the territorial authorities are bound to grant full protection to a diplomatic mission providing shelter for refugees in such circumstances. There is some uncertainty how far compelling reasons of humanity may justify the grant of asylum in other cases¹³⁸.

Myint Zan asks: are the premises of an embassy a 'suitable' or 'proper' place for asylum or refugee seekers to seek protection? A pragmatic or functional answer would be only if the asylum-seekers are very desperate and have really genuine fears of persecution.¹³⁹

A variety of diplomatic asylum, especially relevant in dealing with civil disobedience, would be that known as „humanitarian asylum“, conceded in cases of uprisings, revolutions, and so on, where it is feared that persecuted person will be treated below the minimum humanitarian standard¹⁴⁰.

¹³⁸ *para 495 of Oppenheim's International Law*, quoted in *Immigration Appeals: Selected Reports of Decisions of the House of Lords, the Court of Appeal, the Court of Session and the High Court and Selected Reported Determinations of the Immigration Appeal Tribunal and the Asylum and Immigration Tribunal ("AIT")*. Great Britain: Immigration Appeal Tribunal. The Stationery Office. 2005. Pg. 59. // http://books.google.lt/books/about/Immigration_Appeals.html?id=tngqkBZIfYAC&redir_esc=y, accessed 11.05.2012.

¹³⁹ Zan Myint. *Embassies, Asylum Seekers, International Law and Politics* // *Alternative Law Journal*. 1998, Vol. 23. PG 199-200,

¹⁴⁰ Maria Jose Falcon y Tella. *Civil Disobedience*. Martinus Nijhoff Publishers. 2004. PG. 136 - 137

Anthea J. Jeferry giving her view on asylum for purely humanitarian reasons cites art. 3 of 1950 Resolution adopted at Institute of International Law Bath Session: asylum could be granted to ‘any person whose life, liberty or person is threatened by violence emanating from the local authorities or against which they are obviously powerless to protect him, or even which they tolerate or provoke’ or ‘when such threat is the result of civil strife’. This author opines that the sending State can, under these circumstances, grant asylum to individuals as long as the situation justifying the asylum continues. Even if the asylum so granted turns out to be unlawful, the receiving States is not entitled to enter the premises that remain absolutely inviolable under any circumstances, by virtue of the self-contained character of diplomatic law¹⁴¹.

Most formulations of diplomatic asylum require an element of urgency to legitimize a grant of refuge. Thus, asylum may be granted only when a person in flight is in immediate danger of loss of life, limb or freedom and the embassy is his only potential haven. Asylum may not be promised for the future, nor can it be granted when a person believes he is under suspicion or when the danger is still inchoate¹⁴².

It is generally accepted that asylum should be afforded only to persons accused of committing political crimes or persecuted for religious, racial or ethnic reasons, and never to common criminals. Of course, when a person appears at the embassy door asking for refuge, the danger of imminent loss of life or liberty precludes immediate determination of the nature of his crimes. The only course open to the embassy is to grant temporary refuge and then make the necessary inquiries¹⁴³.

Regarding the question to whom such asylum could be granted, it is worth to remember that in Latin American conventions diplomatic asylum is provided in favour of political offenders excluding other persons persecuted on other reasons, but not to common offenders. Latin America States concluded the Cartagena Convention which regulates territorial asylum as well. In general, when asylum is granted in embassies or consulate on humanitarian grounds, it can be any person who is in dangerous situation to his life, such as mob, riots, etc. He or she might be persecuted on any ground by authorities of receiving State or non – State entities, it can be national of other States as well (as examples of Northern Koreans seeking for asylum in Western embassies in territory of China).

¹⁴¹ Jeferry Anthea J. Diplomatic asylum: Its Problems and Potential as a Meen of Protecting Human Rights // South African Journal on Human Rights. Volume 1. 1985.

¹⁴² Porcino Peter. Toward Codification of Diplomatic Asylum // New York University Journal of International Law and Politics. 1975 – 1976, Volume 8.

¹⁴³ Ibid.

Alona E. Evans thinks that motives of humanitarianism may well inspire the grant of diplomatic asylum where violence marks changes in government and no quarter is allowed to dissenters. In the face of these conditions, even countries such as the United States, which refuse to condone diplomatic asylum as a legal principle, will permit the use of an embassy as a temporary refuge for political offenders. Yet as long as extra-legal methods are used in countries to effect political changes, it will be necessary on occasion to offer protection to the opposing forces.¹⁴⁴

Despite the fact that certain States do not recognize diplomatic asylum, practice shows that there is a tendency to grant diplomatic asylum on humanitarian reason regarding elementary considerations of humanity – a general principle named by the ICJ. Asylum in consulates and embassies might be granted to anyone (with exception to common criminals) in exceptional situations where the life, liberty or physical integrity are threatened by violence and this person is in urgent need of protection.

4. 3. Examples of Diplomatic Asylum Granted on Humanitarian Considerations

The United States strongly disapprove diplomatic asylum and do not concenter it as a part of international law. The United States have been consistent in constant refusal to officially recognize the practice of asylum¹⁴⁵. However, they are willing to grant temporary refuge for humanitarian reasons “in extreme or exceptional circumstances when the life or safety of a person is put in immediate danger, such as pursuit by a mob¹⁴⁶”. The United States policy permits asylum to be granted, on a temporary basis, to persons who are in immediate physical danger¹⁴⁷.

One of the most known cases is the one of Cardinal Mindszenty, who was given diplomatic asylum in the embassy of United States in 1956. After the collapse of the Hungarian people's revolution against the Soviet-backed government, the outspoken anticommunist Mindszenty, who had been freed after eight years of incarceration, was threatened with rarest and detention

¹⁴⁴ Evans Alona E. *The Columbian – Peruvian Asylum case: The Practice of Diplomatic Asylum* // *The American Political Science Review*. 1952, Vol. 46, No. 1. Pg. 157

¹⁴⁵ Rossitto Angela M.. *Diplomatic Asylum in the United States and Latin America: a Comparative Analysis* // *Brooklyn Journal of International Law*. 1987, Volume 13.

¹⁴⁶ Quotation from policy laid down in the *Foreign Affairs Manual of United States* used by Kleiner Juergen. *Diplomatic Practice: Between Tradition and Inovation*. World Scientific Publishing Co., 2009.

¹⁴⁷ Rossitto Angela M.. *Diplomatic Asylum in the United States and Latin America: a Comparative Analysis* // *Brooklyn Journal of International Law*. 1987, Volume 13.

when the Soviet Union gained military control over the Hungarian situation¹⁴⁸. The Cardinal Mindszenty, Primate of Hungary, found refuge in the American legation in Budapest where he stayed for about 19 years, until the Hungarian Government finally allowed him to leave Hungary unhindered. It was, indeed, a strange case since neither Hungary nor the United States recognizes the right of asylum.¹⁴⁹ Another example from United States practice is the one of 7 members of the Vashchenkos and the Chmykhalovs families. In June 1978, the United States granted asylum to seven Russian Pentecostal dissidents who rushed into the United States embassy in Moscow. They were granted an unofficial and temporary asylum pending Russian acceptance of a United States proposal for assurances of no punishment. Even though there were negotiations held between United States and Soviet officials, fearing reprisals, the seven dissidents steadfastly refused to leave the embassy. In 1983, after five years of being in United States embassy, members of both Russian families departed from the Soviet Union. In 1985 United States faced the question of diplomatic asylum again when a Soviet soldier, Aleksandr Vasilyevich Sukhanov, walked into the United States embassy in Kabul, Afghanistan. He wanted to return to the Soviet Union. During the period that Sukhanov was in the United States embassy in Kabul, Afghanistan, troops attempted to force the American diplomats to expel him, by surrounding the building, cutting off its electricity and dousing it with powerful searchlights. The American ambassadors did not expel Sukhanov from the embassy. After meetings with Soviet ambassador and getting insurances of not being punished, Mr. Sukhanov safely left the embassy in Afghanistan with the Soviet Ambassador. The newest attempt to seek asylum was in United States' embassy in China, in 2012. Blind Chinese dissident Chen Guangcheng appealed to be granted asylum in the United States. He had taken refuge at mission for six days till he was escorted by United States officials to the hospital. This case is still in process: the United States and China are negotiating on the future of Chen Guangcheng¹⁵⁰.

There are number of examples when diplomatic asylum was granted in embassies of Canada. Charle V. Cole, of the New Brunswick Bar and a former member of the Department of Foreign Affairs and International Trade, mentions cases such as: granting of asylum to the Belgian Embassy staff members in Cairo in 1961, when the embassy building was set on fire; in

¹⁴⁸ Riveles Sussane. Diplomatic Asylum as a Human Right: The Case of the Durban Six // Human Rights Quarterly. The Johns Hopkins University Press. Feb., 1989, Vol. 11, No. 1. PG> 139 – 159. // <http://www.jstor.org/stable/761937>

¹⁴⁹ Nahlik Stanislaw E. "Matière préliminaire." Development of diplomatic law : selected problems. Collected Courses of the Hague Academy of International Law 222. Hague: Martinus Nijhoff Publishers, 1990. PG 284

¹⁵⁰ 'Let me leave on Hillary Clinton's plane': Blind Chinese dissident pleads for asylum in U.S. as tensions rise during Secretary of State's visit // <http://www.dailymail.co.uk/news/article-2138808/Chen-Guangcheng-pleads-asylum-U-S-tensions-rise-Secretary-States-visit.html?ito=feeds-newsxml> , accessed 16. 05/ 2012.

1968 individuals of various nationalities, but mostly Czechoslovak, were given temporary asylum at the Canadian Embassy in Prague due to genuine fears of concentration of foreign armed forces in the city; in 1973 temporary refuge was given to a number of individuals in Santiago, in Chile¹⁵¹. During the 1979 occupation of the U.S. Embassy in Teheran by student militants, Canadian diplomats had assisted six members of the U.S. Embassy to leave Teheran using Canadian passports. The six had avoided capture when Iranian students took over the Embassy and had been secretly sheltered. Canada based the legality and humanitarianism of its assistance on the concept of diplomatic asylum¹⁵². One of the recent cases that Canada faced was in 2004 when Forty-four people from North Korea climbed over a wall into the Canadian Embassy in Beijing. It is believed to be one of the largest defection attempts by North Koreans hiding in China. The ambassador said the Canadian government will deal with the issue from a humanitarian standpoint¹⁵³. Regarding Canada's approach, Charle V. Cole cites the Department of External Affairs position expressed in 1961: „ . . . our consulates and diplomatic missions abroad may not grant asylum on the premises of a post except in extra-ordinary circumstances The sort of circumstances that we have in mind is where temporary asylum would be granted on humanitarian grounds to a person, whether a Canadian citizen or not, if he is in imminent personal danger to his life during political disturbances or riots, with care being taken to ensure that the humanitarian character of the mission's intervention should not be misunderstood.”¹⁵⁴

Among European Countries there are not many cases when diplomatic asylum was granted in their embassies. Besides Cardinal Mindszenty case in Hungary, perhaps the most know case happened during Spanish Civil War, already described in the thesis. The number of States sheltered from 10.000 to 15.000 persons basing on humanitarian reasons and tolerance to the government of Republicans¹⁵⁵. The Latin America States were leaders in granting asylum, but there were also embassies of European countries where asylum was granted to thousands of

¹⁵¹ Cole Charles V.. Is There Safe Refuge in Canadian Missions Abroad? // International Journal of Refugee Law. Oxford University Press. 1997, Vol. 9 No. 4. PG. 659 – 661

¹⁵² Ibid, PG. 661 – 662.

¹⁵³ 3RD LD: 44 N. Koreans enter Canadian Embassy in Beijing // <http://www.thefreelibrary.com/3RD+LD%3A+44+N.+Koreans+enter+Canadian+Embassy+in+Beijing.-a0122779011> accessed 23. 02. 2012.

¹⁵⁴ Cole Charles V.. Is There Safe Refuge in Canadian Missions Abroad? // International Journal of Refugee Law. Oxford University Press. 1997, Vol. 9 No. 4. PG. 659 .

¹⁵⁵ Liesa Fernández Carlos R.. La guerra civil española y los derechos humanos: algunas reflexiones desde el tiempo de los derechos. 2009. Pg. 6// <http://www.tiempodelosderechos.es/docs/liesa.pdf> , accessed 06/05/2012.

people, namely, those of Belgium, Norway, the Netherlands, Poland, Rumania and Turkey¹⁵⁶. Another case where few European states were involved was in 1990 when an estimated 6000 Albanians stormed Western embassies seeking for asylum en masse¹⁵⁷. The embassies of Greece, Turkey, Poland and others were involved¹⁵⁸. In the recent time there were cases when diplomatic asylum was sought by Northern Koreans in various embassies and consulates. For example, in 2009 Nine North Koreans entered Denmark's embassy in Hanoi, the capital of Vietnam. After this incident, the negotiations between Danish and Vietnam official started. Danish Foreign Ministry spokesman Ole Brix Andersen said: "We will not send them back to an uncertain destiny"¹⁵⁹. In 2002 two North Koreans sought asylum at U.S. Embassy in Beijing¹⁶⁰. In 2002 15 North Koreans sought asylum in German Embassy, and 25 Northern Koreans sought asylum in embassy of Spain in China.

4. Diplomatic Asylum in the Context of International and Regional Human Right Instruments

In two further chapters we are going to discuss the possibilities of diplomatic asylum and its potential as a way to protect human rights when it is granted on humanitarian considerations.

Diplomatic asylum can be granted on humanitarian considerations when the person finds him/her self in situations dangerous to the life or liberty or physical integrity. The practical examples described in the thesis show that the grant of this kind of protection saved thousands of lives. We consider that diplomatic asylum and its grant on humanitarian basis could be a means to protect persons in situations where there is no other alternative. A person faced with immediate danger is unable to take advantage of the protection afforded by territorial asylum because he has no access to the territory of a foreign State¹⁶¹. When a diplomatic representative grants asylum to a political offender, the diplomatic representative is not obstructing the

¹⁵⁶ Sinha Prakash S. *Asylum and International Law*. Hague: Martinus Nijhoff, 1971. PG. 33

¹⁵⁷ Kola Paulin. *The Search for greater Albania*. London: C Hurst & Co Publishers, 2003. PG. 197

¹⁵⁸ Jacques Edwin E. *The Albanians. An Ethnic History from Prehistoric Times to the Present*. North Carolina: McFarland & Company, Inc., Publishers, 1995. PG. 656 pg.

¹⁵⁹ North Koreans seek asylum at Danish embassy in Vietnam // <http://www.reuters.com/article/2009/09/24/us-korea-north-vietnam-asylum-idUSTRE58N11P20090924> , accessed 23. 02. 2012.

¹⁶⁰ 2 North Koreans Seek Asylum at U.S. Embassy in Beijing // <http://articles.latimes.com/2002/apr/27/news/mn-40327> , accessed 10. 03. 2012.

¹⁶¹ Porcino Peter. *Toward Codification of Diplomatic Asylum* // *New York University Journal of International Law and Politics*. 1975 – 1976, Volume 8.

application of the laws of the country to which he is accredited, but he is merely offering the political offender the protection of International Law¹⁶².

The argument for diplomatic asylum as a mean to protect human rights can be based on humanitarian considerations and a concern for human rights. As we mentioned in the previous part of the work principle of humanity was named by International Court of Justice in Corfu Channel case: "...certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war"¹⁶³. When diplomatic asylum is granted under humanitarian considerations, this kind of protection is coherent with human rights guaranteed, first of all, in the Universal Declaration of Human Rights and the UN Charter.

The UN Charter, Art. 3: 3 provides promotion and encouraging "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"¹⁶⁴. Art. 3 Universal Declaration of Human Rights provides: "Everyone has the right to life, liberty and security of person"¹⁶⁵. The right of life is of paramount importance in human rights law¹⁶⁶. Person who find themselves in the situations dangerous to their lives, for example, in riots, mobs and have no other way to protect themselves, should be granted asylum to protect these rights, especially where there is no other way to protect him/her self. Diplomatic asylum is a valuable means of preventing useless death and deprivation of liberty during political turnovers.

Among other rights listed in the Declaration, Art. 14: 1 provides that (1) everyone has the right to seek and to enjoy in other countries asylum from persecution. From the provisions of Universal Declaration of Human Rights it is clear that the right to seek asylum is provided. Even though Declaration seeks to refer to territorial asylum, Manuel R. García Mora express the view that although there is no explicit provision to this effect, it can be rightly presumed that if a person is "to seek and to enjoy in other countries asylum from persecution," it must be under the protection of the foreign State to which such person resorts. Under this logical assumption, it

¹⁶² García-Mora Manuel R. The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights // Virginia Law Review. Nov., 1951, Vol. 37, No. 7. PG. 962. Available at: <http://www.jstor.org/stable/1069115> Accessed: 19. 12. 2011

¹⁶³ *Corfu Channel Case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 22. Available at : <http://www.icj-cij.org/docket/files/1/1645.pdf> (accessed 10/03/2012)

¹⁶⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. // <http://www.unhcr.org/refworld/docid/3ae6b3930.html> , accessed 17. 03. 2012.

¹⁶⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). // <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> , accessed 17. 03. 2012.

¹⁶⁶ Smith Rhona K. M. Textbook on International Human Rights.Oxford: Oxford University Press, 2007.Pg. 206

would not make any difference whether reference is made to territorial or to political asylum¹⁶⁷. Moreover, this author believes that diplomatic asylum could be a previous phase before territorial asylum: „political asylum¹⁶⁸ may be a means to enjoy territorial asylum provided the right to qualify the offence and the right to demand a safe-conduct for the departure of the refugee are recognized as appertaining to the State that grants asylum. In such a case, it would be extremely difficult to establish a practical difference between the two.¹⁶⁹

The practical examples show that protection granted in embassies can later become a territorial asylum later. This was the case of Indigenous leader Alberto Pizango who sought refuge in the Nicaraguan Embassy in Lima, Peru in 2009. After the safe – conduct from Peru, The Peruvian indigenous leader boarded a flight to Nicaragua, where he has been granted asylum¹⁷⁰. In 2006, for instance, three North Korean defectors who had entered the U.S. consulate in Shenyang were allowed to proceed to the United States¹⁷¹.

The state granting asylum in embassy or consulate is not obliged to assure the person territorial asylum. But the practical examples show that it might happen. Thus, we agree with the opinion expressed by Manuel R. García Mora. In such cases when diplomatic asylum is the initial step for the territorial asylum, art. 14 (1) could also be applied for diplomatic asylum.

The provisions that can be applied basing the protection of a person from immanent danger can also be found in the regional human right instruments. Three principle regional human rights instruments can be identified: the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights.

The African Charter on Human and Peoples' Rights provides in art. 4: every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. Art. 12: 3 provides that every individual shall have the right, when

¹⁶⁷ García-Mora Manuel R. The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights // Virginia Law Review. Nov., 1951, Vol. 37, No. 7. PG. 956. // <http://www.jstor.org/stable/1069115> , accessed 19. 12. 2011.

¹⁶⁸ As it was mentioned in the first chapter, sometimes in the literature “diplomatic asylum” is called “political asylum” The author García-Mora refers to „diplomatic asylum“.

¹⁶⁹ García-Mora Manuel R. The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights // Virginia Law Review. Nov., 1951, Vol. 37, No. 7. PG 950. // <http://www.jstor.org/stable/1069115> , accessed: 19. 12. 2011.

¹⁷⁰ Indigenous leader Alberto Pizango granted safe passage from Peru to Nicaragua // <http://www.peruviantimes.com/17/indigenous-leader-alberto-pizango-granted-safe-passage-from-peru-to-nicaragua/3272/> , accessed 21. 04. 2012.

¹⁷¹ Admitting North Korean Refugees to the United States: Obstacles and Opportunities // <http://38north.org/2011/09/rcohen092011/> , accessed 21. 04. 2012.

persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.¹⁷²

The American Declaration of the Rights and Duties of Man adopted at the Ninth International Conference of American States held in Bogota in 1948, in art. 1 also includes the provision that every human being has the right to life, liberty and the security of his person. Article 27 says that "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements"¹⁷³. This Declaration guarantees not only the right to seek asylum, but also the right to receive it.

Differently then other regional instruments, the ECHR does not contain any provision on asylum. However, Art. 1 which provides Obligation to respect human rights says: „The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention“. In Section I the European Convention on Human Rights provides right to life in Art. 2: 1: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Art. 3 provides prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. It also provides Prohibition of slavery and forced labour (Art. 4), Right to liberty and security (Art. 5), Right to a fair trial (Art. 6),¹⁷⁴ No punishment without law (Art. 7), Right to respect for private and family life (Art. 8), Freedom of thought, conscience and religion (Art. 9), Freedom of expression (Art. 10), Freedom of assembly and association (Art. 11), Right to marry (Art. 12), Right to an effective remedy (Art. 13), Prohibition of discrimination (Art. 14), Derogation in time of emergency (Art. 15), Restrictions on political activity of aliens (Art. 16), Prohibition of abuse of rights (Art. 17), Limitation on use of restrictions on rights (Art. 18). According to the Art. 1, these rights should be secured within the jurisdiction of the contracting parties.

On the scope of jurisdiction the ECHR in the *Bankovic´ and Others v. Belgium and other 16 Contracting States case* said that as to the “ordinary meaning” of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law,

¹⁷² Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). // <http://www.unhcr.org/refworld/docid/3ae6b3630.html> , accessed 02. 04. 2012.

¹⁷³ Organization of American States, *American Declaration of the Rights and Duties of Man*, 2 May 1948. // <http://www.unhcr.org/refworld/docid/3ae6b3710.html> , accessed 17. 03. 2012.

¹⁷⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5. // <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> , accessed 02. 05. 2012.

the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. (59) 61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case. (61) In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. (67). the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State. (73)¹⁷⁵

We have mentioned the case of *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office* in the previous part, where English Court gave ruling on the issue of diplomatic asylum. The Court ruled: Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. <...> The receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending State to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum¹⁷⁶.

¹⁷⁵ *Bankovic and Others v. Belgium and Others*, ECtHR, Decision of 12 Dec. 2001, Appl. No. 52207/99, para 59 – 73. // <http://www.unitn.it/files/download/14918/bankovic.pdf> , accessed 15/ 05/ 2012.

¹⁷⁶ *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office*, [2004] EWCA Civ 1344, United Kingdom: Court of Appeal (England and Wales), 18 October 2004 // <http://www.unhcr.org/refworld/docid/42b048fb6.html> , accessed 21. 05. 2012.para. 88

4. 5. Diplomatic Asylum in the Context of the Principle of Non-refoulement

In this part of the thesis we are going to analyse diplomatic asylum in the context of non – refoulement which is a customary international law according to the United Nations High Commissioner for Refugees¹⁷⁷.

The principle of non – refoulement can be found in the 1951 Convention Relating to the Status of Refugee¹⁷⁸, in the 1967 Protocol Relating to the Status of Refugee¹⁷⁹ and Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁸⁰. The view that the principle of non-refoulement has become a rule of international customary law is based on a consistent practice combined with recognition on the part of States that the principle has a normative character. This conclusion is supported by the fact that the principle has been incorporated in international treaties adopted at the universal and regional levels to which a very large number of States have now become parties¹⁸¹.

We would like to discuss two different hypothetical situations. In the first one, a person finds him/her self in circumstances dangerous to his/her life or freedom in his/her country of origin and asks for diplomatic asylum in other country's legation. In the second situation, a person is in a non – origin country which tries to send him/her back to the country of origin where danger to life or freedom exist. This person asks for diplomatic asylum in the third country's legation.

In the first case, the person is in the territory of his country of origin, but in jurisdiction of the sending State. The majority of the cases described in this master thesis could be an example of such situation: usually a person seeking for asylum in embassy or consulate is in the country of origin. The principle of non refoulmenet defined in Art.33:1 of Refugee Convention: No

¹⁷⁷ UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994 // <http://www.unhcr.org/refworld/docid/437b6db64.html> ,accessed 23. 04. 2012.

¹⁷⁸ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. // <http://www.unhcr.org/refworld/docid/3be01b964.html> , accessed 07. 05. 2012.

¹⁷⁹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267. // <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html> , accessed 07. 05. 2012.

¹⁸⁰ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. // <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> ,accessed 07. 05. 2012.

¹⁸¹ UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994. // <http://www.unhcr.org/refworld/docid/437b6db64.html> , accessed 07. 04. 2012.

Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. It could be understood that that a person who is already in another country could not be returned to the dangerous situation existing in his country of origin, in other word, the principle of non-refoulement could be applied if the person is outside his/her country of origin. In the case of diplomatic asylum, a person request for asylum in the embassy, but he/she is still in the territory of his her country. Thus, we think that the principle of non refoulement could not be applied in such situation. If the head of the mission still grant asylum because of the high risk that outside the embassy the given person will be deprived of his life or freedom, the protection would be granted on the humanitarian reasons, but the non – refoulement could not be applied.

In the second situation the person would be in the territory of the other then his country of origin State and in embassy of the third State, thus, in the jurisdiction of the third State. The similar to our hypothetical situation was the case happened in Australia in British consulate in 2002 when two Afghan children walked into a British consulate in Australia to claim asylum, but were rejected. Children of 12 and 13 years left their country of origin and sought asylum in Australia. They were detained in the detention centre in Australia when they escaped and travelled three weeks till they reached British Consulate in Melbourne. The decision of British government to reject those children was criticized by lawyers and Amnesty International¹⁸². Even though in this real case Australia was not willing to send the children back to their country of origin, this case was analyzed by English Court where it was asked to answer to the questions whether applicants were under real threat of being subjected to inhuman and degrading treatment by being returned to detention camp according to Article 3 of the ECHR, and whether there was a risk of indefinite and arbitrary detention according to Article 5 of the ECHR¹⁸³.

Going back to the hypothetical situation, the given person is outside his country of origin and in the territory of the other State. We believe that by refusing the protection in the embassy and knowing that the receiving State will send him/her to the country of origin where the danger to life and freedom exist, the head of the mission would act contrary to the art. 33:1 of the Refugee Convention. Thus, in the second situation principle of non refoulement could be applied.

¹⁸² Afghan boys denied asylum // <http://www.telegraph.co.uk/news/1401767/Afghan-boys-denied-asylum.html> , accessed 04. 05. 2012.

¹⁸³ *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office*, [2004] EWCA Civ 1344, United Kingdom: Court of Appeal (England and Wales), 18 October 2004 // <http://www.unhcr.org/refworld/docid/42b048fb6.html> , accessed 21. 05. 2012.

It would be also worth to mention what the opinions of the legal writers regarding the diplomatic asylum and principle of non refoulement are. In general, legal writers argue what is the scope of this principle. The strict sense of the principle of non – refoulement is the dominant one. It is considered to be applicable only to refugees and outside the territory of country of origin. However, the understanding of the principle of non - refoulement in it wider sense also exist.

Thomas Gammeltoft-Hansen overview this wider scope: „with respect to the refoulement prohibition, States are responsible for conduct in relation to any refugee subject to or within their jurisdiction. While the notion of jurisdiction primarily refers to a State’s territory, it does also cover situations in which States exercise effective control beyond their borders, such as on the high seas or within foreign territory. This position is supported by reference to the broader incorporation of the non-refoulement principle in universal and regional human rights instruments that clearly oblige States even where jurisdiction is established extraterritorially“.¹⁸⁴ Rephrasing the quotation, if the principle of non – refoulement is understood in its wider sense, it could be applied not only in State’s territory, but to places where it’s jurisdiction exists. The embassy would also be an example of such a jurisdiction.

Lauterpacht and Bethlehem, regarding diplomatic asylum in the context of human rights, writes: „The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of non refoulement will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on refoulement to territory where the person concerned would be at risk“¹⁸⁵.

It would also be worth to mention that the principle of non-refoulement is also considered to apply in a human rights context to prohibit the forcible sending, or returning or in any other

¹⁸⁴ Gammeltoft-Hansen Thomas . Access to Asylum: International Refugee Law and the Globalisation of Migration Control // Cambridge University Press, 2011. Pg. 46

¹⁸⁵ Lauterpacht E. and Bethlehem D.. 'The Scope and Content of the Principle of Non-refoulement' in E. Feller, V. Türk, and F. Nicholson (eds) 'Refugee Protection in International Law' . UNHCR's Global Consultations on International Protection. Cambridge: Cambridge University Press, 2003. Para 114. // <http://www.unhcr.org/419c75ce4.html> , accessed 10. 04. 2012.

way transferring a person to a country where he or she may face torture. The iteration of the principle in a human rights context makes it applicable to all persons and not only to refugees or asylum seekers. This has been affirmed by numerous international instruments, including Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 13 (4) of the Inter-American Convention to Prevent and Punish Torture. The jurisprudence of the European Court of Human Rights recognises that the principle applies equally to torture and cruel, inhuman or degrading treatment and punishment, as has the United Nations Human Rights Committee¹⁸⁶. Thus, in its wider sense, the principle of non – refoulement could be applied not only to refugees, but also to the seekers of diplomatic asylum if outside the embassy he/she faces, for ex.: a risk of death, torture or deprivation of life or freedom. Already mentioned Susanne Riveles writes: „Inherent in non refoulement is the idea of a temporary stay until safe conduct to a third country can be worked out. This idea is crucial to diplomatic asylum“¹⁸⁷.

The strict understanding of the principle of non – refoulement is the leading one in public international law. The principle of non-refoulement in its strict sense could be applied in case of request of diplomatic asylum, in situation where a) the person is outside his country of origin and b) in case of eviction, he/ she would face danger to the life or freedom in the country of origin. The principle of non – refoulement theoretically could be a basis not to reject a person seeking asylum in embassy and in certain situations it could be a mean to protect essential rights.

After looking to the universal and regional instruments of human rights, analysing diplomatic asylum in the context of non-refoulement we could conclude that diplomatic asylum could be a way to protect individual from the danger life or freedom, especially in situations when no other alternative is possible. We believe that the attention to human right issues is growing more and more. International law is a dynamic and changing, thus diplomatic asylum as a mean to protect human rights could have impact in developing international law.

¹⁸⁶ Non-Refoulement under Threat. Proceedings of a Seminar Held Jointly By The Redress Trust (REDRESS) And The Immigration Law Practitioners' Association (ILPA). 16 May 2006, Matrix Chambers, London // <http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf> , accessed 11. 05. 2012.

¹⁸⁷ Riveles Sussane. Diplomatic Asylum as a Human Right: The Case of the Durban Six // Human Rights Quarterly. The Johns Hopkins University Press. Feb., 1989, Vol. 11, No. 1. PG. 152. // <http://www.jstor.org/stable/761937>

Conclusions

1. Historically the status of diplomatic asylum in public international law has changed: from legal institute it became non – recognizable as a part of international law by majority of States with exception to Latin America region. Changes among theories of immunities had an impact on the issue. Diplomatic asylum lost its importance in international law when the theory of functional necessity became the dominant one. Diplomatic asylum is a form of asylum in States which recognize it.
2. Vienna Conventions on Diplomatic and Consular Relations literally do not provide possibility to grant diplomatic asylum in embassies or consulates. Diplomatic asylum evoked collision of two values, inviolability of premises and non interference into internal affairs. However, such a grant would not be contrary to provisions of Conventions because:
 - a) Both Conventions contain not terminative list of functions of diplomatic or consular mission
 - b) Both Conventions provide a possibility for sending and receiving States to conclude special agreements that enables States to agree on diplomatic asylum.
 - c) Vienna Convention on Consular Relations provides possibility for the sending State to perform other functions that are not explicitly prohibited by receiving State.
3. Latin American Conventions are the only legal instruments regulating the issue of diplomatic asylum. In this region diplomatic asylum is a legal institute and it is granted according to the provisions of conventions. These instruments could be held regional international law instruments due to the fact that they are concluded among Latin America States and because some of them, in particular, Convention on Asylum signed in Havana 1928 and Convention on Political Asylum signed in Montevideo 1933, were taken into account by the ICJ as sources providing rights and duties of the States.
4. In relation with Vienna Conventions on Diplomatic and Consular Relations, The Latin America Conventions could be considered as an example of special agreements concluded between parties of Vienna Conventions. It could be said that for Latin America States the conventions are "*lex specialis*" which regulates the specific issues of diplomatic asylum not literally regulated by Vienna Conventions (*lex generalis*).
5. The decision of the ICJ in *Asylum* and *Haya de la Torre cases* expresses the dominant position to diplomatic asylum in public international law: diplomatic asylum derogates from the sovereignty of the State. However, a number of practical examples show that diplomatic asylum is still granted in embassies and consulates on humanitarian considerations. The will of the sending State to grant diplomatic asylum on humanitarian

consideration raises problematic question of values: what should prevail, human rights or sovereignty of the State. From the decisions taken by the ICJ and national court and separate practical cases, it could be said that the answer to the question depends on the situation and on relations between sending and receiving States. Thus, diplomatic asylum can be granted on a case – by - case basis.

6. Resuming positions of the various States and its practice, it could be said that there is no uniform position to the issue. It varies from non – recognition, recognition on humanitarian considerations to recognition as a legal institute. However, practice of the States shows a tendency that, in general, States tolerate granting diplomatic asylum on humanitarian considerations. In the cases of diplomatic asylum, the principle of humanity, acknowledged by the ICJ, is applied in practice.
7. Diplomatic asylum granted according to provisions of Latin America Conventions or humanitarian reasons, is a means to protect persons from urgent danger. This kind of asylum could be applied when no other alternative is possible for a person facing a risk of deprivation of life or safety.
8. The principle of non-refoulement could be applied in a case of request of diplomatic asylum, in situation where a) a person is outside his country of origin and b) a person would face danger to the life or freedom if evicted from the embassy or consulate and returned to the country of origin. The principle of non – refoulement theoretically could be a basis not to reject a person seeking asylum in embassy.

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SUMMARY

Every state may face a bid for protection in embassies or consulates from persons looking for a shelter in dangerous situations to their lives and safety. Even though diplomatic asylum is more peculiar to Latin America region, no State is prevented from such seekers. Practical examples show that diplomatic asylum helped to safe thousands of people in countries where instability of governments exist, during wars or in situations where no other alternative of protection was available. Grant of diplomatic asylum is a problematic issue because it raises question which value should prevail: inviolability of premises or non interference into internal affairs, protection of human rights or sovereignty of State.

This master thesis attempts to find out what is the current position of diplomatic asylum in the context of public international law and on what grounds it could be granted in embassies and consulates. For this aim, the thesis is focused on the evolution and main features of diplomatic asylum, on its relation with regional and universal international law instruments, on dominating positions to diplomatic asylum in the case law.

International treaties, state practice and various positions of legal writers were analyzed in order to reveal grounds for granting diplomatic asylum. In the States where diplomatic asylum is recognized, it is granted according to the existing legal regulation. In the States where diplomatic asylum is not considered as legal institute, it is granted on humanitarian considerations in order to protect people.

The thesis concludes that different attitudes to diplomatic asylum exist regarding international law. For a group of State it is an institute of regional international law while other states tolerate it purely on humanitarian considerations. Despite different approaches of diplomatic asylum in the international law, it can be a means to protect life or safety of a person.

SANTRAUKA

Kiekviena valstybė savo ambasadose ar konsulatuose gali sulaukti asmenų prašančių prieglobsčio dėl gresiančio pavojaus gyvybei ar saugumui. Nors diplomatinis prieglobstis yra būdingesnis Lotynų Amerikos regionui, nė viena valstybė nėra apsaugota nuo tokio prašymo. Praktiniai pavyzdžiai rodo, kad diplomatinis prieglobstis padėjo išgelbėti tūkstančius gyvybių ten, kur vykdavo dažna politinės valdžios kaita, per karus, ar tokiose situacijose, kur nebuvo galima rasti jokios kitos apsaugos. Diplomatinio prieglobsčio suteikimas yra problematiškas klausimas, kadangi nėra aišku, kam turėtų būti teikiama pirmenybė: atstovybės patalpų neliečiamybei ar nesikišimo į valstybės vidaus reikalus principui, žmogaus teisių apsaugai ar valstybės suverenitetui.

Šiuo magistro darbu siekiama išsiaiškinti diplomatinio prieglobsčio svarbą tarptautinės teisės kontekste, kokie yra galimi pagrindai šiam prieglobsčiui suteikti. Šiam tikslui pasiekti, didelis dėmesys skiriamas diplomatinio prieglobsčio vystymuisi ir pagrindiniams bruožams, jo santykiui su regioniniais ir visuotiniais tarptautinės teisės dokumentais, dominuojančia pozicija teismų praktikoje.

Pagrindams diplomatiniam prieglobsčiui rasti buvo analizuojamos tarptautinės sutartys, šalių praktika ir skirtingos autorių nuomonės. Tose šalyse, kur diplomatinis prieglobstis yra pripažįstamas, jis yra suteikiamas pagal esamą teisinį reguliavimą. Kitose šalyse, nepripažįstančiose diplomatinio prieglobsčio kaip teisinio instituto, jis yra suteikiamas remiantis humanitariniais pagrindais tiems, kuriems reikalinga neatidėliotina apsauga.

Magistrinis darbas baigiamas išvada, kad tarptautinėje teisėje nėra vieningo požiūrio į diplomatinį prieglobstį. Kai kuriose valstybėse jis suprantamas, kaip tarptautinės teisės dalis, kitose suteikiamas vien tik remiantis humanitariniais pagrindais. Nepaisant skirtingų požiūrių, diplomatinis prieglobstis gali būti būdas apsaugoti žmogaus gyvybei ar saugumui.

ANNOTATION

The master thesis attempts to analyze relevant international law sources and to find out the grounds to grant diplomatic asylum in embassies and consulates. The first part deals with notion and historical development of diplomatic asylum. The second part of the thesis analyzes the issue of diplomatic asylum in relation with Vienna Conventions on Diplomatic and Consular Relations and Conventions concluded in Latin America region. The third part of the thesis is concerned with dominant attitude in the case law. For this purpose, decisions of the ICJ and national courts are analyzed. The fourth part deals with diplomatic asylum granted on humanitarian considerations. Diplomatic asylum is presented as a means to protect human rights.

ANOTACIJA

Magistriniame darbe stengiamasi analizuoti diplomatinio prieglobsčio temą remiantis susijusiais tarptautinės teisės šaltiniais ir siekiant išsiaiškinti pagrindus tokiam prieglobsčiui suteikti.

Pirmoji darbo dalis yra skirta diplomatinio prieglobsčio apibrėžimui ir istoriniam vystymuisi.

Antroje dalyje diplomatinis prieglobstis analizuojamas kartu su Vienos konvencijomis dėl diplomatinė ir konsulinių santykių, Lotynų Amerikos konvencijomis. Trečioji dalis yra skirta

išsiaiškinti dominuojančiai pozicijai teismų praktikoje. Šiam tikslui pasiekti analizuojami

pasirinkti Tarptautinio Teisingumo Teismo ir nacionalinių teismų sprendimai. Ketvirtoji dalis yra

skirta aptarti diplomatinio prieglobsčio suteikimą remiantis humanitariniais pagrindais.

Diplomatinis prieglobstis yra pristatomas kaip galima priemonė žmogaus teisėms apsaugoti.

Examples of Asylum Sought in Embassies and Consulates: 2002 - 2012

DATE	THE CASE	STATES INVOLVED	LINK OF INTERNET SOURCE	OUTCOMES
2012	Blind Chinese dissident Chen Guangcheng took refuge at the USA mission for six days and pleaded for asylum in USA	Embassy of USA. National of China. Territory of China.	http://www.dailymail.co.uk/news/article-2138808/Chen-Guangcheng-pleads-asylum-U-S-tensions-rise-Secretary-States-visit.html?ito=feeds-newsxml	The case is still in process.
	Asylum granted in Panama's embassy for Ecuadoran newspaper publisher Carlos Eduardo Perez Barriga	Embassy of Panama. National of Ecuador. Territory of Ecuador.	http://outcomemag.com/world/2012/02/16/panama-grants-asylum-to-ecuador-newspaper-publisher/	Asylum was granted.
2011				
2010	Two Northern Koreans seek asylum in South Korean consulate In Russia	Consulate of South Korea. Nationals of Northern Korea. Territory of Russia.	http://www.iexaminer.org/news/n-koreans-seek-asylum-souths-consulate/	Information is not available.
2009	Nicaragua grants diplomatic asylum to Alberto Pizango in Peru.	Embassy of Nicaragua. National of Peru. Territory of Peru.	http://www.rpp.com.pe/2009-06-08-nicaragua-concedio-asilo-diplomatico-a-lider-indigena-alberto-pizango-noticia_186828.html	Asylum was granted.
	Manuel Zelaya granted asylum in embassy of Brazil in Honduras	Embassy of Brazil. National of Honduras. Territory of Honduras.	http://www.economist.com/node/14506334	Asylum was granted.
	Enrique Flores Lanza granted diplomatic asylum in the embassy of	Embassy of Argentina. National of Honduras. Territory of Honduras.	http://m24digital.com/en/2009/07/02/honduras-argentina-grants-asylum-to-zelayas-officer/	Asylum was granted.

	Argentina in Honduras			
	Nine North Koreans seek asylum in the embassy of Denmark in Vietnam	Embassy of Denmark. Nationals of North Korea. Territory of Vietnam	http://www.reuters.com/article/2009/09/24/us-korea-north-vietnam-asylum-idUSTRE58N11P20090924	Information is not available.
2008	The Vatican grants asylum to Nixon Moreno	Diplomatic mission of Vatican. National of Venezuela. Territory of Venezuela.	http://cathnews.com/article.aspx?aeid=9080	Asylum was granted.
2007				
2006	Four North Koreans seek asylum at US consulate in China	Consulate of US. Nationals of Northern Korea. Territory of China.	http://www.taipeitimes.com/News/world/archives/2006/05/21/2003309300 http://www.france24.com/en/node/4905398	North Korean asylum-seekers left Denmark's embassy and left for Seoul, South Korea.
2005	The Brazilian government grants the diplomatic asylum to Lucio Gutierrez	Embassy of Brazil. National of Ecuador. Territory of Ecuador.	http://www.freerepublic.com/focus/f-news/1387912/posts	Asylum was granted.
2004	44 North Koreans have stormed the Canadian embassy in Beijing for asylum	Embassy of Canada. Nationals of Canada. Territory of China.	http://www.voanews.com/english/news/a-13-a-2004-09-29-1-44.html http://news.bbc.co.uk/2/hi/asia-pacific/4119839.stm	North Koreans who sought asylum in Canada's embassy in Beijing have left for a third, undisclosed country.
2003	Carlos Ortega granted diplomatic asylum in Costa Rican embassy in Venezuela.	Embassy of Costa Rica. National of Venezuela. Territory of Venezuela	http://articles.latimes.com/2003/mar/16/news/adfg-venez16	Asylum was granted.
2002	Two Northern Koreans sought asylum in US embassy in China.	Embassy of US. Nationals of North Korea. Territory of China.	http://articles.latimes.com/2002/apr/28/news/mn-40495	Two North Korean asylum seekers left for Seoul, South Korea.
	Five Northern Koreans sought asylum in Japanese	Embassy of Japan. Nationals of North Korea. Territory of China.	www.japantimes.co.jp/text/nn20020509a1.html	Five Northern Koreans were detained by Chinese authorities.

	embassy in China.			
	15 North Koreans sought asylum in German Embassy.	Embassy of Germany. Nationals of North Korea. Territory of China.	http://www.voanews.com/english/news/a-13-a-2002-09-03-23-15-66829127.html	No information available.
	Pedro Carmona granted asylum in the Colombian ambassador's residence in Caracas, Venezuela	Residence of ambassador of Colombia. National of Venezuela. Territory of Venezuela.	http://news.bbc.co.uk/2/hi/americas/2009907.stm	Asylum was granted.
	Two Afghan children walked into a British consulate in Australia to claim asylum and were rejected.	Consulate of Great Britain. Nationals of Afghanistan. Territory of Australia.	http://www.telegraph.co.uk/news/1401767/Afghan-boys-denied-asylum.html	Claims for asylum in the consulate were rejected and the children taken away by federal police.
	25 Northern Koreans sought asylum in embassy of Spain in China.	Embassy of Spain. Nationals of North Korea. Territory of China.	http://news.bbc.co.uk/2/hi/asia-pacific/1871988.stm http://worldnewssite.com/News/2002/March/2002-03-15-11-North.html	The group left the Spanish Embassy in and was expected to leave for a third country