TALKING TO THE WRONG GUYS? DIPLOMATIC PARTISANSHIP AND THE LAW

PAUL BEHRENS*

ABSTRACT

Diplomats who actively engage with the opposition of the receiving State frequently court criticism. The case of Western diplomats in Ukraine, who found themselves rebuked by the host government after they had visited protesters during the Maidan protests in 2013, is only one of many examples in this field. Nor are these matters of merely political relevance: prima facie, political partisanship may be considered a violation of the Vienna Convention on Diplomatic Relations. Examples of partisanship were mentioned during the codification history, and one of its emanations—the diplomatic participation in political campaigns—was expressly prohibited in the commentary to the draft which preceded the Vienna Convention.

This article provides a legal analysis of the two main situations in which charges of diplomatic partisanship arise: the discussion of specific topics with particular factions (for instance, matters of State security) and the support of a particular political position in that State. On the other hand, it is acknowledged that there are often interests on the side of the sending State which compel diplomats to engage in conduct of this kind—interests which may likewise find a strong basis in international law. The article examines the interplay of the relevant values and offers solutions which reflect their respective importance and allow for an evaluation of ostensibly partisan behavior in this important area of diplomatic law.

* Reader in Law, University of Edinburgh

INTRODUCTION

That diplomatic agents have to deal with the government of the receiving State is to be expected. Activities of this kind carry their own difficulties,[1] but the general availability of the host government as a point of contact encounters few problems, and the Vienna Convention on Diplomatic Relations (VCDR)—the most comprehensive multilateral treaty on diplomatic relations between States—expressly envisages diplomatic contacts at least with one branch of the government (the Foreign Ministry).[2]

It is a different situation when diplomats feel the need to engage with the opposition or to take sides on particular matters that are under debate in the receiving State. The partisan diplomat poses a challenge to many host governments—not exclusively those of an authoritarian character. Nor could it be said that their concerns about such conduct are invariably unwarranted.

An incident from the pages of recent diplomatic history illustrates the difficulty.

When, in December 2013, thousands of Ukrainians took to the streets to demonstrate against the anti-European course of their government,[3] the U.S. Ambassador to the country, Geoffrey Pyatt, and the U.S. Assistant Secretary for European and Eurasian Affairs, Victoria

---

[1] Such difficulties arise, for example, when diplomats engage in criticism of goverment policy or highlight certain shortcomings of the receiving State. See, for instance, the 2005 case involving the UK High Commissioner in Kenya (Clay) who handed a dossier to the Kenyan government which apparently implicated four government ministers in corruption—an action which triggered harsh criticism in that State. *British Envoy Congenital Liar—Kenyan Foreign Minister*, BBC MONITORING INT'L REP., Feb. 4, 2005; *Roundup: Kenyan Officials Angered By British Envoy's Graft Allegations*, XINHUA GEN. NEWS SERV., Feb. 4, 2005, at 1.

[2] Vienna Convention on Diplomatic Relations art. 41, ¶ 2, Apr. 18, 1961, 500 U.N.T.S. 95 [hereinafter VCDR].

[3] A key reason for the protests was the decision by the Ukrainian government's not to sign an Association Agreement with the European Union and its decision to seek closer links with the Kremlin. Doina Chiacu & Arshad Mohammed, *Leaked Audio Reveals Embarrassing U.S. Exchange on Ukraine, EU,* REUTERS, Feb. 6, 2014, at 5; *U.S. Ambassador to Ukraine Condemns Dispersal of Opposition Demonstration by Police*, KAZAKHSTAN GENERAL NEWSWIRE, Dec. 3, 2013, at 1.

Nuland, visited the protesters in Kiev's Independence Square and reportedly distributed food to them.[4]

On that occasion, the Ukainian President, Viktor Yanukovych, found strong words against conduct of this kind by Western officials. Yanukovych deemed it unacceptable "for someone to be coming here and to be teaching us how to live"[5] and referred to the visits as foreign interference in the internal affairs of Ukraine.[6]

That the demonstrations in Independence Square had far-reaching consequences would be difficult to deny. It is true that historic events tend to have more than one parent—in the Ukrainian case, there were certainly intervening steps between Pyatt's sandwiches and the demise of the Yanukovych government two months later.[7] But it is also true that the actions of the representative of an influential State can serve to embolden factions in the host country, and supportive visits of this kind certainly convey the impression that the demonstrators had won a powerful ally. After Yanukovich's fall, leaders of the opposition were not shy to acknowledge their gratitude to the United States.[8]

Instances like the Pyatt case suggest that it may be easy—at least for diplomats from certain States—to exert influence on developments in the receiving State, often in a manner which their hosts may consider meddling in domestic affairs. However, leaving the assessment of diplomatic partisanship to the views of the host government carries its own risks and may lead to an evaluation which ignores the possible existence of legitimate interests on which diplomatic behavior of this kind can be based. Even prior to Pyatt's visit to Independence Square, the White House had urged the government of Ukraine to "respect their people's right to freedom of expression and assembly" which it

---

4 *Ukraine Protests: Police Pull Back from Camp*, SKY NEWS, (Dec. 11, 2013 23:35 UK), http://news.sky.com/story/1180600/ukraine-protests-police-pull-back-from-camp.

5 *Ukraine's Leader Warns West Off*, HERALD (GLASGOW), Dec. 20, 2013, at 16.

6 *Ukrainian President Slams Foreigners Meddling in their Internal Affairs*, ANADOLU AGENCY, Dec. 19, 2013, at 1; *Yanukovych Criticizes West for Meddling in Ukrainian Political Crisis*, DEUTSCHE WELLE EUROPE, (Dec. 19, 2013), https://www.dw.com/en/yanukovych-criticizes-west-for-meddling-in-ukrainian-political-crisis/a-17307876

7 Victor Yanukovych was forced from power in February 2014. David Blair & Roland Oliphant, *Yulia Tymoshenko Arrives in Kiev as Revolution Forces President from Power*, DAILY TELEGRAPH, Feb. 22, 2014, at 1.

8 *See, e.g., Ukraine Crisis*, RUSSIA & CIS BUS. & INV. WKLY, Feb. 28, 2014 (with reference to Yulia Tymoshenko).

considered "fundamental to a healthy democracy."[9] That, however, is the invocation of values to which the international community accords similar importance as to the sovereignty of independent States.

This meeting of interests is not merely of political significance—it is a meeting of concerns which have found incorporation into the framework of international law. There are indeed restrictions which have been placed on the conduct of diplomatic agents, and they derive their rationale from State sovereignty. Their clearest emanation is the ban on interference in the internal affairs of the receiving State, which is today codified in an article of the VCDR dealing with the duties of diplomatic agents.[10] At the same time, the international community appreciates that certain forms of diplomatic conduct are indispensable for the fulfilment of the diplomatic office. The task of observation, the protection of interests of the sending State and the promotion of friendly relations are examples which are likewise codified in the VCDR.[11] Yet it is clear that the pursuit of these tasks can easily involve diplomatic agents in situations in which the receiving State may perceive that partisan behavior had come into existence.[12]

The same consideration applies at least in some situations in which diplomatic agents act to protect human rights in the receiving State. As the Pyatt incident has shown, this field, too, can trigger diplomatic involvement with the opposition which the host government may consider to fall within the category of partisanship. Yet here too, diplomats and their masters may be able to invoke grounds for the relevant conduct which are firmly rooted in mandates of international law.[13]

This article examines, in Part I, the concept of the "partisan diplomat," analyzes the concerns which arise in this regard from the perspective of receiving States, and reflects on the way in which they found their representation in instruments on diplomatic law. Parts II and III deal with particular aspects of diplomatic conduct which have gained some prominence in this regard: the discussion of sensitive matters with opposition parties and activities which can be interpreted as "taking sides" in the political debate. A significant part of the analysis of these

---

[9] *The White House Regular Briefing. Briefer: Jay Carney*, FEDERAL NEWS SERVICE, Dec. 2, 2013.

[10] VCDR, *supra* note 2, art. 41, ¶ 1.

[11] *Id*. art. 3, ¶ 1.

[12] For a more detailed discussion, see *infra* text accompanying notes 73–83.

[13] On this aspect, see in particular *infra* text accompanying notes 156–62.

situations is informed by the meeting of rules supporting the interests of the receiving State with norms supporting the relevant diplomatic conduct; and it is therefore necessary, in both scenarios, to identify an appropriate mechanism for the assessment of their relationship.

Part IV offers concluding thoughts on the principal issues which have been introduced and returns to the general question which underlies this study: is diplomatic partisanship an unwarranted intrusion or a necessary part of the office of the diplomatic agent?

For the context of this article, particular emphasis has been placed on permanent diplomats in inter-State relations, who are subjected to the regime of the Vienna Convention on Diplomatic Relations. To their colleagues in other positions—ad hoc diplomats, diplomats assigned to international organizations, consular officers—different normative systems apply.[14] That does not exclude the possibility of an analogy where the rules in the various systems show a sufficient degree of parallelism, and to that extent, cases from these fields will be included as illustrations for legal questions which apply to permanent diplomatic representatives as well.

I. THE BANE OF GENERATIONS? DIPLOMATIC PARTISANSHIP AND THE LEGAL REACTION

Diplomatic partisanship is by no means a new phenomenon. The earliest cases in which diplomats evoked concerns in this regard reach back to the very beginnings of permanent diplomacy. One of the most prominent incidents was the 1584 case of the Spanish Ambassador to England, Don Bernardino de Mendoza, who had been associated with the "Throckmorton plot"—a scheme, devised by several conspirators in England, to overthrow the rule of Elizabeth I.[15]

---

[14] *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 [hereinafter VCCR] (consuls); Convention on Special Missions, Dec. 16, 1969, 1400 U.N.T.S. 231 [hereinafter CSM] (ad hoc diplomats); *The Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, Mar. 14, 1975*, 69 AM. J. INT'L L. 730–58 (1975), [hereinafter CRSIO] (diplomats representing their States in international organizations or at conferences) (not yet in force).

[15] For details on the Mendoza case, see SATOW'S GUIDE TO DIPLOMATIC PRACTICE 179, ¶ 21.16 (Lord Gore-Booth ed., Longman Grp. Ltd., 5th ed. 1979) [hereinafter SATOW]; Daniel R. Coquillette, *The English Civilian Writers: 1523–1607*, 61 B.U. L. REV. 1, 55 n.266 (1981); Roger Bigelow Merriman, *The Spanish Embassy in Tudor England*, 65 PROC. MASS. HIST. SOC'Y 392, 393 (1932–1936).

The receiving State could certainly not have been accused of taking the matter lightly—Throckmorton and his co-conspirators were executed, and there appears to have been a general expectation that Mendoza would share their fate.[16] In the end, however, England, acting on the advice of Alberico Gentili, contented herself with ordering Mendoza's expulsion.[17]

That is not to say that Britain always scrupulously abstained from conduct which could have invited accusations of partisanship. In fact, a British diplomat must be held responsible for one of the classic cases in this context: the incident of Lord Lionel Sackville-West, who in 1888 was the British Minister to the United States.

Lord Sackville had received a letter from a U.S. citizen who asked him for advice on the forthcoming presidential elections,[18] in which the incumbent President (the Democrat Cleveland) faced a challenge by the Republican candidate Harrison. Sackville's correspondent represented himself as a naturalized American of English birth, who wanted to know the diplomat's opinion about Cleveland. He had his doubts about the man: the President, who at some time had appeared so "favorable and friendly" towards the "mother land," had now adopted policies which gave ground for concern.[19]

Sackville tried to calm his former countryman. In his reply, the Minister explained that the current political climate was not favorable for the old country: "[A]ny political party which openly favored the mother-country would, at the present moment, lose popularity," he said, adding that the Democrats were, in his opinion, "still desirous of maintaining friendly relations with Great Britain."[20]

This may well have been the end of the matter, if Sackville's correspondent had been who he said he was—one Charles Murchison from Pomona who "privately" sought advice and promised to keep it

---

[16] On that expectation, see SATOW, *supra* note 15.

[17] *Id*.; Merriman, *supra* note 15.

[18] The letter and Sackville's reply are reproduced in Ted C. Hinckley, *George Osgoodby and the Murchison Letter*, 27 PAC. HIST. REV. 359–61 (1958); *Correspondence between Great Britain and the United States, respecting the Demand of the United States' Government for the Recall of Her Majesty's Minister (Lord Sackville) from Washington—1888*, 1889, 81 BRIT. & FOREIGN STATE PAPERS 483, 484 (1888–1889).

[19] On Cleveland's policies, Hinckley, *supra* note 18, at 359–60. Republicans had accused Cleveland of being too favourable to the United Kingdom—accusations which were arguably part of an effort to win over the Irish vote. *See 1888. Harrison v. Cleveland*, HARPWEEK 3, http://elections.harpweek.com/1888/Overview-1888-3.htm.

[20] *Correspondence between Great Britain and the United States*, *supra* note 18, at 483–84.

secret. But Murchison did not exist: the letter had been written by a Californian who had links to his local Republican club.[21]

It did not take long for Sackville's letter to find its way into the press (it was reprinted in the New York Tribune under the headline "The British Lion's paw thrust into American Politics to help Cleveland").[22] Allegations of interference were soon made, but they were raised not only by Cleveland's opponents[23]: U.S. Secretary of State Bayard inquired whether it was "compatible with the dignity, security and independent sovereignty" of the United States to allow a diplomat to "interfere in its domestic affairs by advising persons formerly his countrymen concerning their political course as citizens of the United States."[24]

When Britain showed herself reluctant to recall Sackville, Bayard, acting on the President's instructions, told the Minister that "it would be incompatible with the best interests and detrimental to the good relations of both governments" if he continued in his current position and sent him his passports.[25] (It did not help Cleveland: the 1888 presidential election was decided in favour of Harrison).[26]

A few years after the Sackville case, it was the government of President Cleveland that was at the centre of an incident of diplomatic partisanship. Cleveland had managed to win back the White House in 1893, the same year in which Lili'uokalani, the last Queen of Hawaii, was deposed. Following the overthrow of the Hawaiian monarchy, Cleveland's Secretary of State, Gresham, sent Albert Willis as Minister to Hawaii to examine the feasibility of returning the Queen to the throne.[27]

Cleveland himself did not appear overly scrupled about the mission. In a message to Congress in that year, he stated that he had "instructed Minister Willis to advise the Queen and her supporters of my desire to aid in the restoration of the status" existing before her overthrow, on condition that Lili'uokalani agreed to a general amnesty

---

[21] Hinckley, *supra* note 18, at 365–66.

[22] JOANNE R. REITANO, THE TARIFF QUESTION IN THE GILDED AGE: THE GREAT DEBATE OF 1888 123 (1994).

[23] *The British Minister*, TIMES, Oct. 25, 1888, at 5.

[24] *Lord Sackville*, TIMES, Nov. 1, 1888, at 5.

[25] *The Recall of Lord Sackville*, TIMES, Jan. 14, 1889, at 8.

[26] Cleveland won the popular vote, but did not obtain enough votes in the electoral college.

[27] Lydia Kualapai, *The Queen Writes Back: Lili'uokalani's Hawaii's Story by Hawaii's Queen*, 17 STUD. AM. INDIAN LITERATURES 36, 37 (2005).

for those involved in the establishment of the provisional (republican) government of the State.[28]

In the end, nothing came of this project,[29] but the Cleveland initiative had been enough to cause considerable disquiet within the provisional government of Hawaii. Lydia Kualapai reports that various possible reactions were discussed by the Hawaiian government's Executive Council, ranging from a strengthening of fortifications to a "full-scale military engagement."[30] The case thus stands as an example for situations in which diplomatic partisanship has the potential of creating grave, sustained and far-reaching consequences.

At the time of the Willis incident, efforts had already been undertaken to construct a systematic framework for the entire body of diplomatic law. The first such initiatives were the "draft codes"—projects carried out mainly by scholars of international law, who endeavoured to provide a structured account of the rules in this field. As private initiatives, their immediate authority was limited, but in many regards, their authors relied on existing customary international law: those rules at least which recur in several draft codes have a good chance of being a valid representation of the state of the law in that period.

It is therefore interesting to note that more than one of these codes viewed partisan activities by diplomatic agents with a measure of suspicion. Fiore's draft code of 1890 already banned the use of mission premises "as an asylum for plotting against the government of a friendly state"[31] and stated that diplomatic agents must also "refrain from fomenting any conflict between political parties and abstain from any intrigue to approve or disapprove the acts of the government."[32]

Lord Philimore, whose draft code was published in 1926, showed similar concerns in relation to partisan conduct. His work thus specified that diplomats and the members of their suite "have a duty to

---

[28] *See id*. at 36.

[29] For the general background of this situation, see Office of Hawaiian Affairs, *One hundred years ago, the Kingdom of Hawai'i was betrayed by its ''best friend,'' the United States of America*, in BUSINESS WIRE, *1893 betrayal of Hawai'i stains American honor, says the Office of Hawaiian Affairs*, Jan. 14, 1993; Virginia Price, *Washington Place: Harboring American Claims, Housing Hawaiian Culture*, 16:2 BUILDINGS AND LANDSCAPES: J. OF THE VERNACULAR ARCHITECTURE F. 69, n. 64 (2009).

[30] Kualapai, *supra* note 27, at 40.

[31] PASQUALE FIORE, INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION OR THE LEGAL ORGANIZATION OF THE SOCIETY OF STATES (E.M. Borchard trans., 1918) (1890), *reprinted in* 26 AM. J. INT'L L. 153, 155, ¶ 370 (Supp. 1932).

[32] *Id*. at 161, ¶ 483.

consider the welfare of the country to which they are sent. They must not engage in conspiracies or actions against the Government and well-being of the State . . . "[33]

Two years later, the Havana Convention on Diplomatic Officers was concluded,[34] which, by that date, was "the only general instrument dealing with diplomatic privileges and immunities,"[35] as well as one of the first multilateral treaties which aimed to provide a fairly comprehensive representation of diplomatic law. The treaty thus did contain a section on diplomatic duties[36] but was, on the matter of partisan conduct, far less explicit than Fiore's and Philimore's drafts. Its Article 12 stipulated the general rule that "diplomatic officers may not participate in the domestic or foreign politics of the State in which they may exercise their functions,"[37] without elaborating on the forms of conduct that might fall within the scope of this provision.

When the International Law Commission (ILC), nearly thirty years later, debated the codification of diplomatic law on the international level, the question of interference became once more a topic of discussion,[38] and it was clear from the contributions of various members of the Commission that partisan behaviour was strongly associated with conduct of this kind.[39] The draft article, on which the Commission agreed in 1957, stated that the beneficiaries of diplomatic privileges and immunities "have a duty not to interfere in the internal affairs" of the receiving State[40] and was thus, like Article 12 of the

---

[33] INT'L L. ASS'N, REPORT OF THE THIRTY-FOURTH CONFERENCE, VIENNA, AUSTRIA, 1926, *Proposed Codification of the Law Regarding the Representation of States* (1926) (by Lord Phillimore) [Phillimore's Draft Code], *reprinted in* 26 AM. J. INT'L L. 177, 180, ¶ 34 (Supp. 1932).

[34] Havana Convention on Diplomatic Officers, Feb. 20, 1928, 155 L.N.T.S. 259 [hereinafter Havana Convention].

[35] [1956] 2 Y.B. Int'l L. Comm'n 135, ¶ 38.

[36] Havana Convention, *supra* note 34, arts. 12, 13.

[37] Havana Convention, *supra* note 34, art. 12.

[38] *Diplomatic Intercourse and Immunities*, [1957] 1 Y.B. Int'l L. Comm'n 143, ¶ 55 (Padilla Nervo). For a good overview of the ILC discussions on diplomatic privileges and immunities, see KAI BRUNS, A CORNERSTONE OF MODERN DIPLOMACY 23–36 (2014).

[39] *Cf. Consideration of the Draft for the Codification of the Law Relating to Diplomatic Intercourse and Immunities*, [1957] 1 Y.B. Int'l L. Comm'n 146, ¶ 10 (Yokota); *Diplomatic Intercourse and Immunites*, [1957] 1 Y.B. Int'l L. Comm'n 149, ¶ 34 (Sandström).

[40] *Report of the International Law Commission Covering the Work of its 9th Session,* [1957] 2 Y.B. Int'l L. Comm'n, 133, 142, art. 33.

Havana Convention, couched in rather general terms.[41] But the ILC's commentary on the rule of non-interference provided further elaboration on the concept. It named only one example for interference, but that example referred to a situation of partisanship: diplomatic agents, in the words of the commission, were not to "take part in political campaigns."[42]

In the debates on the commentary, reference had been made to the grave consequences which partisan behaviour carries: the Secretary of the Commission, by way of criticising the prominent position which "political campaigns" occupied in the commentary, pointed out that diplomats might interfere "in much more serious ways as, for example, in fomenting civil war."[43]

Examples of this kind seem far removed from the paradigmatic perception of diplomatic activities whose immediate consequences, in general, do not appear to attain a gravity of this kind.

But only two years after the ILC had adopted its final draft articles, an incident occurred which provided further evidence for the dramatic consequences which diplomatic partisanship can create.

In November 1960, Nathaniel Welbeck, a Ghanaian diplomat in the Republic of the Congo (today the Democratic Republic of the Congo) was expelled from the receiving State.[44] Welbeck had reportedly been instructed by his government to maintain relations with Patrice Lumumba, who had been deposed as head of government in September

---

[41] Unlike the Havana Convention, the rule adopted by the International Law Commission did not make reference to diplomatic participation in "foreign politics" of the receiving State, *Report of the International Law Commission Covering the Work of its 9th Session,* [1957] 2 Y.B. Int'l L. Comm'n 142, art. 33, ¶ 1, U.N. Doc. A/CN.4/SER.A/1957/Add.l. This was a deliberate omission. See, on the preceding debate in particular, *Diplomatic Intercourse and Immunities*, [1957] 1 Y.B. Int'l L. Comm'n 145, ¶ 76 (Fitzmaurice), 146, ¶ 2 (Ago), ¶ 7 (Tunkin), ¶ 11 (Yokota).

[42] *Report of the International Law Commission Covering the Work of its 9th Session,* [1957] 2 Y.B. Int'l L. Comm'n 142, art. 33, commentary, ¶ 2. This example was also used in the final draft articles of 1958, with one minor change: instead of the introductory words "[i]n particular", it was now preceded by the words "for example." *Report of the International Law Commission Covering the Work of its 10th Session*, [1958] 2 Y.B. Int'l L. Comm'n 104, art. 40, commentary, ¶ 2, U.N. Doc. A/CN.4/SER.A/1958/Add.l.

[43] *Diplomatic Intercourse and Immunities,* [1958] 1 Y.B. Int'l L. Comm'n 250, ¶ 27, U.N. Doc. A/CN4/SEILA/1958 (Liang).

[44] There is some uncertainty about the precise diplomatic status of Mr Welbeck. The Times referred to him as an ambassador, *Congo Expels United Arab Republic Ambassador*, TIMES, Dec. 2, 1960, at 10, but if Packham is followed, his office would rather seem to have been that of an ad hoc diplomat. ERIC S. PACKHAM, FREEDOM AND ANARCHY 64 (1995).

of that year.[45] The diplomatic involvement apparently extended to the provision of funds to the former Prime Minister.[46]

In the light of the circumstances, the expulsion order might not have been altogether unexpected. But it was fiercely resisted. Welbeck refused to leave the country, relying for his protection on a small personal security detail, but also on UN forces.[47] When Congolese police and infantry turned up at Wellbeck's house to remove the diplomat, a gun fight ensued which continued throughout the night and resulted in the deaths of several Congolese soldiers.[48]

Incidents of this kind illustrate the concerns of those members of the international community who felt a strong need to promote the rule against diplomatic interference. The "Conference on Diplomatic Intercourse and Immunities," which took place in Vienna from March 2, 1961 to April 14, 1961 and which used, as its basis of discussions, the ILC draft articles, agreed to preserve the rule on this matter which that body had adopted. The ban on interference was thus enshrined in the second sentence of Article 41(1) of the resulting Convention (the VCDR). But the Convention offered no further elaboration on the concept, and it did not contain a specific rule on partisan conduct by diplomatic agents.

That the administration of receiving States would show a certain sensitivity about diplomatic involvement with the opposition, even in situations which are not quite as dramatic as that of Welbeck, cannot be considered surprising. It is, after all, one of the principal aims of the opposition to replace the incumbent government, and the conduct of foreign diplomats can be instrumental in this endeavour—be it through the provision of information on important political matters, be it through the rendering of moral and material assistance, or in other ways.

State practice after the entry into force of the Vienna Convention confirms that receiving States continued to feel unease about diplomatic conduct which could be considered partisan in nature. On occasion,

---

[45] On Welbeck's instructions, see Russell Warren Howe, *Mobutu And Me; "You are sentenced to death by musketry." A Sort-of Affectionate Memoir About How a Corrupt Despot Saved My Life*, WASH. POST, Sept. 14, 1997, at F01.

[46] *Id.*

[47] *Id.*; *Congo Expels United Arab Republic Ambassador*, *supra* note 44.

[48] *Congo Expels United Arab Republic Ambassador*, *supra* note 44; Howe, *supra* note 45; PACKHAM, *supra* note 44.

States voiced a negative reaction even in the absence of any tangible assistance rendered by diplomats to opposition parties.

On 10 January 1983, the Maltese Foreign Ministry sent identical notes to all diplomatic missions, in which it told ambassadors to make sure that diplomats refrained from "contacts of any kind with members of the Nationalist Party"[49]—a party which had won more than 50% of the popular vote in the 1981 election on the island, but had, due to the prevailing electoral system, not been able to form the government, and had refused to take its seats in the legislature.[50]

The position adopted by the Maltese government does not mean that modern international law recognizes restrictions of this kind, nor does it mean that the international community would concur with this position. The reactions by sending States in this case were unusually strong. The United States doubted the validity of the ban, and several diplomatic missions allegedly ignored it.[51] The European Parliament condemned it and called for the cancelling of EC aid to Malta.[52] A joint note of protest was issued by the representatives of Libya, Kuwait, Tunisia and the PLO—an important step, as Malta had endeavoured to be on friendly terms with Arab States.[53] In the end, the Maltese government gave in to the barrage of negative reactions and allowed contacts under certain conditions.[54]

What the Maltese case illustrates is the fact that an assessment which focuses solely on the interests of the receiving State as expressed through its administration, cannot claim to provide a comprehensive understanding of situations of this kind and can thus not offer an adequate legal evaluation. The fact that other considerations must have a bearing on these cases was expressed quite clearly by diplomats affected

---

[49] *Parliamentary Boycott Ended*, FACTS ON FILE WORLD NEWS DIG., Apr. 8, 1983; Henry Kamm, *Malta Takes on the World in Diplomatic War*, N.Y. TIMES, Feb. 20, 1983, at A22. The ban appears to have stood in the context of the government's concerns about "foreign interference"—commentators at the time pointed out that Malta had, in September 1982, passed a "foreign interference act," which made it unlawful for foreigners to engage in "foreign activities" in Malta unless their work did not constitute interference in the internal affairs of Malta. *Malta; Do as Dom Says*, ECONOMIST, Feb. 5, 1983, at 63; Peter Nichols, *Malta Sliding to the East, Opposition Fears*, TIMES, Dec. 2, 1982.

[50] Kamm, *supra* note 49.

[51] Alexander MacLeod, *Malta's Democracy Is Cast in Doubt,* CHRISTIAN SCI. MONITOR, Mar. 1, 1983, at 14.

[52] *Parliamentary Boycott Ended*, *supra* note 49.

[53] Kamm, *supra* note 49.

[54] ''[C]ontacts designed to give an image of the Nationalists as the alternative government'' were still banned. *Id.*

by the ban, who pointed out that it led to their isolation from over half the Maltese population.[55] James Rentschler, U.S. Ambassador to Malta, denied that the measure was based on legitimate grounds, and provided several reasons for that: the fact that it was a diplomatic task to study conditions and developments in the receiving State,[56] but also the inherently discriminatory nature of the decision.[57]

The existence of interests of this kind, which ostensibly diverge from the values which the receiving State seeks to protect, will be discussed below—as will be the appropriate mechanism for the resolution of this meeting of interests.[58]

The far-reaching position adopted by the government of Malta does, at any rate, not seem to command a wider degree of acceptance among the international community. It is rare that a receiving State would go to this extent in its attempts to regulate diplomatic activities, although the case may be indicative for a general distrust of the maintenance of diplomatic contact with political factions outside the government of the State. It is far more common that receiving States refer to a more specific facet of diplomatic behaviour which allegedly justified a negative reaction.

There are two areas of diplomatic conduct in particular in which negative reactions are frequently provided. The first concerns situations in which a certain subject has been made the topic of debate between the diplomatic agent and factions in the receiving State; the second relates to instances in which diplomatic agents were considered to have "taken sides" in a specific political situation.

These fields of activities will be explored in more detail in the following two Parts—as will the grounds which sending States and their representatives were able to invoke in their favour. Where these grounds find a basis in international law, it will be necessary to address a further aspect of the legal assessment: the question of the appropriate method of resolving this meeting of seemingly opposing interests.

---

[55] MacLeod, *supra*, note 51.

[56] *Id*.; Kamm, *supra* note 49.

[57] Kamm, *supra* note 49.

[58] *See infra* text after notes 72 and 148.

II. DIPLOMATIC DISCUSSIONS OF SPECIFIC TOPICS WITH FACTIONS IN THE RECEIVING STATE

The identification of a particular form of diplomatic conduct carries advantages for receiving States which intend to resort to negative reactions against diplomatic agents. It individualizes the allegation and thus increases the probability that other members of the international community will consider the incident a matter between sending and receiving State only and decide not to get involved.

One such individualization which frequently occurs in the field of diplomatic partisanship is the charge that diplomatic agents had not only been in touch with opposition parties but had raised topics with them whose discussion amounted to meddling in internal affairs.

A prominent topic in this context is the relevant party itself, its existence and its manifesto. In 2009 for instance, the U.S. Ambassador to Afghanistan, Karl Eikenberry, was accused by the Afghan President Karzai of "interference," after he had attended a press meeting hosted by one of Karzai's competitors in the forthcoming presidential elections.[59] In this situation, Karzai made clear that he did not, in principle, take exception to the presence of diplomatic observers at meetings of political candidates. What he found objectionable was their attendance when candidates' platforms were discussed or announced.[60]

Eleven years earlier, the new British Consul-General in Hong Kong, Andrew Burns, faced criticism when his office invited candidates for the forthcoming legislative election to an "informal meeting."[61] Here, too, the topic of the gathering appears to have been the platforms of the various parties. The Chinese foreign ministry referred to Burns's conduct as "direct interference" in the affairs of Hong Kong,[62] but criticism came also from some of the candidates themselves: Lau Kong-wah, member of a pro-Chinese party, expressed his surprise at the consulate's interest in his election program and reportedly stated that he considered this a form of interference.[63]

---

[59] *Karzai Protests U.S. Diplomat's Presence at Rival's Meeting*, INDO-ASIAN NEWS SERV., Jun. 29, 2009.

[60] *Id.*

[61] James Pringle, *Invitation by British Angers Beijing*, TIMES, May 8, 1998, at 20; Danny Gittings, *Beijing Offers a Blast From the Past*, S. CHINA MORNING POST, May 10, 1998.

[62] Pringle, *supra* note 61.

[63] *Id.*; *China Lashes Out at Britain for "Interfering" in Hong Kong*, ASSOCIATED PRESS WORLDSTREAM, May 7, 1998.

On other occasions, receiving States took exception when diplomats engaged in conversations on matters which allegedly touched upon the security of the receiving State. In that context stands the case of Glenn Warren, a U.S. political officer, who was expelled from Sudan in 2000 after he had, according to the Sudanese Foreign Minister Ismail, discussed "issues related to Sudanese security and stability" with "non-registered political organizations."[64] The United States offered a different account of events: the meeting, which had taken place between Warren and members of the "Democratic National Alliance," served to discuss the "general political situation" of the receiving State.[65]

But Warren's case was not the only incident in which a diplomat faced negative reactions in the receiving State over the discussion of matters of this nature. In 2008, the U.S. Ambassador to Bangladesh, James Moriarty, triggered calls for his withdrawal, after he had invited political leaders from several parties to a "tea party" at his residence.[66]

In this instance, the topic of the discussions included the state of emergency which the government of Bangladesh had imposed: the ambassador, according to one of the attendees, had inquired about their position on the "lifting of the emergency issue."[67] This initiative caused some disquiet among sections of the society of the receiving State[68] and prompted a former ambassador of Bangladesh to the United Nations to refer to it as a "breach of diplomatic propriety" contrary to the Bangladeshi foreign office's advice "not to indulge in the internal affairs of the country."[69]

---

[64] *U.S. Diplomat Kicked Out of Sudan*, CBS ONLINE (Dec. 7, 2000, 12:22 PM), https://www.cbsnews.com/news/us-diplomat-kicked-out-of-sudan/.

[65] *U.S. Diplomat Expelled from Sudan*, CNN ONLINE (Dec. 7, 2000, 6:58 PM), http://edition.cnn.com/2000/WORLD/africa/12/07/sudan.diplomat.03/.

[66] Hasan Jahid Tusher, *U.S. Envoy Discusses Emergency with Bangladeshi Leaders*, BBC WORLDWIDE MONITORING, Jul. 16, 2008 (SOURCE: THE DAILY STAR [BANGLADESH] WEBSITE); Harun ur Rashid, *Diplomatic Norms and Some Local Diplomats*, UNITED NEWS OF BANGL., Aug. 1, 2008.

[67] Tusher, *supra* note 66.

[68] *Foreign Interference in Local Politics Condemned*, THE NEW AGE (BANGL.) (Jul. 17, 2008), http://struggleforliberty.wordpress.com/2008/07/19/foreign-interference-in-local-politics-condemned/.

[69] Rashid, *supra* note 66. See also the 2004 case of the German Ambassador to Iran, Paul von Maltzahn, who faced criticism and allegedly calls for his removal after he had met Grand Ayatollah Ali Montazeri, one of the most influential critics of the Iranian government. Maltzahn and Montazeri reportedly discussed, in Nirumand's words, "some of the most sensitive topics of the Islamic Republic." Bahman Nirumand, *Rüffel aus Teheran—Botschafter Soll Gehen*, TAZ, Mar. 9, 2004. In May 1983, the recall of Yevgeny Shmagin, a second secretary at the Soviet

The argument that diplomatic discussions on these topics fall within the remit of interference cannot be lightly dismissed. In the absence of an authoritative interpretation of Article 41 of the Vienna Convention in this respect, it is in particular the rationale underlying the norm which assists in its construction. If the basis for the rule against interference is seen as rooted in the sovereignty of independent States,[70] the concerns of receiving States become, to a certain degree, understandable.

Talks with oppositional factions both about their own manifestos and strategies and about issues relating to the security of the State can easily be construed as initiatives which affect sovereign rights. In the first case, a claim can be advanced that the relevant conduct touches upon the political independence of the State; in the second, discussions of this kind might even affect that State's territorial integrity—aspects of sovereignty whose recognition under international law is beyond doubt.[71] In the debates in the International Law Commission on diplomatic interference, it was the principle of political independence in particular to which reference was made: ILC member El-Erian emphasized that it was a duty incumbent on diplomatic agents, both in their official and personal capacity, to respect this right of their hosts.[72]

At the same time, it does not appear that a receiving State's claim that its interests in this respect have been affected, would suffice for a comprehensive legal assessment. The fact must be taken into account that sending States and their agents did not always accept the view that they had to refrain from involvement in the matters under debate—and that they sometimes had good reasons for their position.

---

embassy in West Germany, was reportedly requested after Shmagin had attended meetings of the German peace movement where he had made Western disarmament a topic of discussion. However, additional considerations may have contributed to the State reaction: accusations raised against Shmagin and some of his colleagues also included charges of espionage. Tony Paterson, *Four Soviets Exposed as Spies*, UNITED PRESS INT'L, May 18, 1983.

[70] *Cf.* G.A. Res. 36/103, pmbl., ¶ 5 (Dec. 9, 1981) (for this understanding of the foundations of interference in general).

[71] The high value accorded to these rights is evident, for example, from the Friendly Relations Declaration, G.A. Res. 2625 (XXV), U.N. Doc. A/5217 (Oct. 24, 1970), Annex, prmbl., ¶ 15; Art 2 of the UN Charter, dealing with principles, states in its fourth paragraph that members shall refrain from the threat or use of force, inter alia, "against the territorial integrity or political independence" of any State (U.N. Charter, art. 2(4)). *See also* Organization for Security and Cooperation in Europe [OSCE], Conference on Security and Co-operation in Europe: Final Act, IV (Aug. 1, 1975), 14 I.L.M. 1294 [hereinafter Helsinki Accords].

[72] *Consideration of the Draft for the Codification of the Law Relating to Diplomatic Intercourse and Immunities*, [1957] 2 Y.B. Int'l L. Comm'n, 148, ¶¶ 23, 24 (El-Erian).

The interests which diplomatic agents pursue are frequently recognized in international law as well, and the resulting situation presents itself therefore not so much as a straightforward infringement of rights of the receiving State, but as a meeting of divergent norms.

For one, the Vienna Convention recognizes the fact that there are specific functions which diplomatic missions traditionally fulfill (Article 3(1)) and stipulates that the receiving State shall "accord full facilities for the performance of the functions of the mission" (Article 25).

These tasks embrace the function of observation—or, in the words of Article 3(1)(d), "ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State." And reference to that task has indeed been made in situations of this kind.

In the 1998 case of Andrew Burns,[73] the sending State did not accept the charges of interference which were raised against the Consul-General. Burns himself stated that it was part of his job to follow the forthcoming elections,[74] and a spokesman for his office made direct reference to the observation task when he stated that the consulate-general was "merely informing" itself about the election and that the intention was only to "listen to what they [the candidates] have to say."[75]

On the other hand, if observation is the function on which the diplomatic agent seeks to rely, the argument may be advanced that this task can be fulfilled without active political participation, so that it would extend to the reception of information but not, for example, to diplomats taking part in the relevant discussions.

That is the position which Malaysia took in 2001, when she criticized several foreign diplomats after they had attended a meeting by the National Justice Party (Parti Keadilan Nasional, an opposition party).[76] On this occasion, Rais Yatim, Minister in the Prime Minister's Department, made clear that the distinction mattered to him: "I wish to stress here," said the minister, "that it is not wrong for a diplomat to accept an invitation by a political party to listen to speeches but they should not take an active part in the function or be partisan."[77]

---

[73] *See supra* text accompanying note 61.

[74] Gittings, *supra* note 61.

[75] Pringle, *supra* note 61. The function of observation is recognised under consular law, too. VCCR, *supra* note 14, art. 5(c).

[76] *Meddling Diplomats Can Be Ordered to Leave*, MALAYSIAN GENERAL.NEWS, Apr. 6, 2001.

[77] *Id.*

It is a view which, in light of a literal reading of Article 3(1)(d), may appear seductive. It is, however, also a view which very much removes the understanding of the diplomatic office from the real demands it faces on a daily basis. Diplomatic observation, it appears, relies on a host of other activities, and agents will often have to resort to preliminary and ancillary acts if information is to be obtained. Some sources feel more at ease if the flow of information goes in both directions and may indeed make this a condition for sharing their knowledge.[78] In other instances, the details of some developments are only accessible to diplomats if they participate in the developments themselves. If observation activities were limited to the mere reception of information, the underlying function would be reduced to a meaningless exercise: in that case, even the purchase of a newspaper could not be embraced by the relevant task. Neither can it be assumed that the drafters of the Vienna Convention envisaged such a narrow remit of the norm, nor has the function been limited to that degree in customary law. The rule of Article 26 (freedom of movement) corroborates the view that preliminary and ancillary acts are included in the task: the rationale for the freedom of movement is at least in part to be seen in the fact that it is a necessary aspect of the function of observation.[79]

The discussion of political issues with the opposition—even matters relating to State security—finds further grounds in other functions enshrined in the Vienna Convention, principally the protection of the interests of the sending State and its nationals (Article 3(1)(b)) and the function of representation (Article 3(1)(a)). Today's opposition may be tomorrow's government, and diplomatic agents who have to wait with the debate of salient political issues until a certain faction has attained a position of power face considerable and possibly irreversible disadvantages. They may in particular not have been able to correct prejudices which the opposition harbours with regard to the external policies of the receiving State; and the sending State might be deprived of an opportunity to adjust its own policies in order to reach a compromise with the potential future government of the receiving State.

---

[78] John le Carré was not far off the mark when he noted that "[s]ometimes, in order to obtain a confidence, it is necessary to impart one." JOHN LE CARRÉ, THE HONOURABLE SCHOOLBOY 99 (1994).

[79] *See* EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 205 (3d ed. 2008).

The last function to which the Convention makes reference—that of the promotion of friendly relations between the sending State and the receiving State (Article 3(1)(e))—is of similar significance in this context. It is a function which enjoys a large remit: it does not limit "friendly relations" to the government of the receiving State, but speaks of the State as such, and there is evidence that sending States are keen to base even contact with the opposition on this particular task.[80]

It is also a function which allows for informative activities: the fostering of friendly relations clearly embraces an aspect which some commentators have termed the "public relations" task.[81] Richtsteig refers to the intentions of the drafters of the VCDR who would have allowed diplomatic agents also to "disseminate information about their home country, including that country's views on foreign affairs,"[82] and there is, prima facie, no reason why this should not extend to political discussions with the opposition, especially when this is required to rectify an image of the sending State which the government of the receiving State may have promoted.[83]

The fulfilment of diplomatic functions therefore extends to a wide range of activities and can thus form a basis even for diplomatic conduct which the receiving State may consider partisan in nature. However, even in the absence of functions of this kind, the sending State may have grounds for the adoption of particular actions—grounds whose basis in international law may be as solid as that from which the interests of the receiving State arise. As agents of their State, diplomats will be able to partake of these justifications, but they will also be bound by the limitations which international law imposes on the State.

The significance of these bases becomes particularly apparent when a receiving State alleges interference in matters over which it cannot in fact claim exclusive ownership. A situation of this kind exists in particular when the relevant matter is an obligation which that State

---

[80] *See* Ko Shu-ling, *Paraguay Reaffirms Relations with Taiwan*, TAIPEI TIMES, Aug. 20, 2002.

[81] GERHARD VON GLAHN, LAW AMONG NATIONS, 518 (6th ed. 1992).

[82] MICHAEL RICHTSTEIG, WIENER ÜBEREINKOMMEN ÜBER DIPLOMATISCHE UND KONSULARISCHE BEZIEHUNGEN. ENTSTEHUNGSGESCHICHTE, KOMMENTIERUNG, PRAXIS 23, art. 3 (1994).

[83] This aspect of diplomatic activity might fall within the scope of more than one function. *Cf.* RICHTSTEIG, *supra* note 82, at 21, art. 3 (on the right to *Gegendarstellung* from the German perspective and in the context of art 3(1)(b)). *See also* THEOPHILE FUNCK-BRENTANO & ALBERT ÉMILE E. SOREL, PRECIS DU DROIT DES GENS 70 (1877).

owes erga omnes—that is, to "the international community as a whole."[84] With regard to the rights affected by erga omnes obligations, the International Court of Justice (ICJ) emphasized that "all States can be held to have a legal interest in their protection."[85]

Reference to erga omnes norms is typically (though not exclusively) made when human rights are involved—particularly where they have been subjected to severe threat. Protection from slavery, racial discrimination,[86] the prohibition of torture,[87] and the outlawing of genocide[88] have all been accepted as norms carrying erga omnes character. Furthermore, given the connection between international crimes and serious human rights violations,[89] there is good reason to follow those writers on international criminal law who suggest that the suppression of international crimes should be an obligation of erga omnes character as well.[90]

---

[84] Barcelona Traction, Light & Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5).

[85] *Id*. *See also* Int'l Law Comm'n, Rep. of the Study Grp. (2006), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 37, U.N. Doc. A/CN.4/L.702 [hereinafter Study Group on Fragmentation]; Otto Spijkers, *What's Running the World: Global Values, International Law, and the United Nations*, 4 INTERDISC. J. HUM. RTS. L. 77, 88 (2009); Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUR. J. INT'L L. 125, 165-66 (2010).

[86] The ICJ stressed the link to human rights protection when it explained the derivation of erga omnes obligations "for example . . . from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." *Barcelona Traction*, *supra* note 84, at 32, ¶ 34. On freedom from slavery, see International Covenant on Civil and Political Rights, art. 8, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights, art. 6, ¶ 1, Nov. 21, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]. On freedom from racial discrimination, see Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Apr. 11, 2000, E.T.S 177; American Convention on Human Rights, art. 24, art. 1, ¶ 1, Nov. 21, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

[87] *Cf.* International Criminal Tribunal for the Former Yugoslavia [ICTY] on the erga omnes character of the prohibition of torture. Prosecutor v. Anto Furundžija, IT-95-17/1-T, Judgment, ¶ 151 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998). On freedom from torture as a human right, see ICCPR art. 7; ACHR art. 5, ¶ 2; ECHR art. 3.

[88] Barcelona Traction, *supra* note 84, at 32, ¶ 34.

[89] *Cf.* Prosecutor v. Brđanin and Talić, IT-99-36-T Decision on Motion by Radoslav Brđanin for Provisional Release, (Int'l Crim. Trib. For the Former Yugoslavia July 25, 2000), n.61; *see also* Prosecutor v. Blagojević and Jokić, IT-02-60-T, Judgment, ¶ 815 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Momir Nikolić, IT-02-60/1-S, Sentencing Judgment, ¶ 59 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003); Prosecutor v. Alfred Musema, ICTR-96-13, Judgment, ¶ 986 (Jan. 27, 2000); Prosecutor v. Rutaganda, ICTR-96-3, Judgment, ¶ 456 (Dec. 6, 1999).

[90] *See* Larissa van den Herik, *A Quest for Jurisdiction and an Appropriate Definition of Crime. Mpambara before the Dutch Courts*, 7 J. INT'L CRIM. JUST. 1117, 1129 (2009); *see also* Payam

This has a direct impact on the assessment of diplomatic involvement in these areas: diplomatic agents who, for instance, discuss "sensitive" matters with the opposition, can invoke a powerful basis for their conduct, if they did so in an attempt to assist in the realization of erga omnes obligations of the receiving State. But the invocation of such grounds in situations in which the government of the receiving State is reluctant to fulfil its obligations, will almost unavoidably convey the impression that diplomatic agents have "taken sides" on a particular topic; and this particular scenario will therefore be discussed in more detail in Part III.[91]

The fact that the discussion of certain topics with the opposition may correspond to a legitimate aim on the side of the sending State, while at the same time impacting on a legitimate interest of the receiving State, causes a considerable difficulty for the legal assessment of the relevant diplomatic conduct and creates a dilemma for diplomatic agents wishing to pursue a lawful course of action in situations of this kind.

The Vienna Convention itself does not offer a solution to this meeting of interests. It does not, for instance, establish a hierarchy for cases in which two of its rules have an impact on the same situation, or in which its norms meet with other norms of international law.[92] Nor is it quite clear whether a hierarchical solution—one, which subordinates one set of rules under another—would be an adequate method for the resolution of cases of this kind. The difficulties which arose when Malta attempted a subordination of this kind[93] survive even in situations where the receiving States seeks to ban "only" the discussion of certain topics with the opposition. The fact remains that these are hardly situations in which a superior interest meets an inferior one. When the sovereign rights of the receiving State encounter the interests of the sending State in the promotion of friendly relations or of erga omnes rights, there can

---

Akhavan, *Whither National Courts? The Rome Statute's Missing Half*, 8 J. INT'L CRIM. JUST. 1245, 1260 (2011), *with reference to* M.C. BASSIOUNI AND E.M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW, 24 (1995); *see also* Lisa Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence*, 43 J. MARSHALL L. REV. 635, 648 (2010).

91 *See infra* text accompanying notes 155–67.

92 Certain other multilateral treaties include such hierarchical rules. *Cf.* U.N. Charter, art. 103.

93 By subordinating the exercise of diplomatic functions to the asserted right of the receiving State to be free from interference. *See supra* note 49 and accompanying text.

be little doubt that the interests on both sides are accorded a high value by the international community.[94]

What is required is not subordination, but a mechanism which allows the core contents of the individual interests to survive. A more detailed and case-based analysis can achieve this result by allocating a weight to the relative interests, corresponding to the position they occupy in the circumstances of the individual case, and by taking into account the impact which the diplomatic measure has in a specific situation.

These are features not of a hierarchical but of a mediating approach. An approach of this kind has a better hope of commanding support among States and among international courts and institutions which largely prefer conciliatory methods to confrontational ones,[95] and it would also be better aligned with the view suggested by the ILC when it stated that the meeting of rules of international law "should be resolved in accordance with the principle of harmonization . . . ."[96]

Dogmatically, harmonization is best considered a technique of interpretation which takes into account the contents of the rules that have an impact on a particular situation[97] and thus avoids the assumption of a normative conflict.[98] One of its chief emanations—and one which is of considerable importance where mediation between norms of equal validity is required—is the mechanism of proportionality. Proportionality

---

[94] *Cf.* also, on the promotion of friendly relations U.N. Charter, art. 1, ¶ 2.

[95] *See* Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 71 (2009).

[96] Study Group on Fragmentation, *supra* note 85, at 25.

[97] Study Group on Fragmentation, *supra* note 85, at 8, ¶ 4. *See also* Milanovic, *supra* note 95, at 73.

[98] See Milanovic, *supra* note 95, at 98 on the presumption against norm conflict in international law. Harmonization derives its support from the practice of international courts. *See, e.g.*, Al-Adsani v. U.K., App. No. 35763/97, 34 Eur. H.R. Rep. 273, ¶ 55 (2002); Loizidou v. Turkey, App. No. 15318/89, 23 Eur. H.R. Rep. 513, 526, ¶ 43 (1997); Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment 2003 I.C.J. 161, 182 ¶ 41 (Nov. 6) [hereinafter Oil Platforms Case]. But the principle is also supported in the literature. *Cf.* Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 427, 428 (1953). Sadat-Akhavi had suggested a similar non-confrontational method which he termed the "reconciliation of norms." In his view, a differentiation between "interpretation" and "reconciliation" has to be made. SEYED-ALI SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES 25–28; 34–43 (2003). But the method of finding a way which reconciles apparently conflicting rules appears to be the adoption of an understanding which allows co-existence—this, however, is a task of interpretation. *See also* Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Vassilis Tzevelekos, *The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 MICH. J. INT'L L. 621, 624, 631, 644 (2010) (with further references).

has been well established as one of the general principles to which Article 38(1)(c) of the ICJ Statute makes reference[99]—it fills the gaps of the law[100] and provides a default position which applies unless States have specifically opted for a deviating regulation. Its presence has thus been recognized in fields as diverse as trade law and the use of force, human rights law and the law of the sea, but also in those instances of diplomatic law where the rule of non-interference meets with norms which permit the diplomatic conduct in question.[101]

The identification of the particular elements which constitute the mechanism of proportionality is a more difficult task. Various tests have been suggested in the literature[102] and in the courts as aspects of the assessment which proportionality requires,[103] but on the basis of their common features it is possible to refer to three necessary stages which are included in that evaluation: the identification of the relevant interests that have an impact on the particular case, the identification of the relevant measures that are involved, and the performance of a comparative analysis.

Mention of the relevant interests on the side of the sending and the receiving State has already been made above,[104] but proportionality goes further: it requires an assessment which takes into account the parameters of the particular situation in which rights and obligations are claimed. That includes a reflection on future developments as long as they are foreseeable,[105] such as the threats to which the rights which a diplomatic agent strives to protect, may be subjected in the future.

---

[99] *See* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 716 (2008); Riccardo P. Mazzeschi, *Book Review*, 13 Eur. J. Int'l L.1031, 1035 (2002) (*reviewing* ENZO CANNIZZARO, IL PRINCIPIO DELLA PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE [*The principle of proportionality in international Law*] (2000)).

[100] *Cf.* Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L. J., 371, 404 (2007).

[101] For the general applicability of proportionality in these fields, see Paul Behrens, *Diplomatic Interference and Competing Interests in International Law*, 82 BRIT. Y.B. INT'L L. 226, 227 (2012).

[102] *Cf.* Andenas & Zleptnig, *supra* note 100, at 382, 388; Han Xiuli, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 CHINESE J. INT'L L. 635, 636 (2007).

[103] *Cf.* R (Q and Others) v. Sec'y of State for the Home Dep't, [2003] 3 WLR 365, ¶ 32; Bartik v. Russia, 2006-XV Eur. Ct. H.R. 11, ¶ 46 [hereinafter Bartik]; Alan Robert Matthews v. The Ministry of Defence, [2002] EWHC (QB) 13, ¶ 35 (Eng.) [hereinafter Alan Robert Matthews].

[104] *See supra* notes 71, 84.

[105] Foreseeable factors are included in several fields where proportionality applies. For instance, where self-defence by States is concerned, the aim pursued is not the achievement of equivalence

The relevant measure must show some form of connection to the aim which it pursues[106]: at the very least, the means employed must in general be capable of achieving it. It is a requirement which is not all too difficult to fulfil where diplomatic functions—in particular those of observation and the promotion of friendly relations—are concerned: a link between these tasks and the discussion of political issues with the opposition can easily be established. Where diplomats adopt this kind of conduct to assist in the realization of erga omnes obligations incumbent on the receiving State, the link may be less apparent.[107]

Of the three stages of the examination of proportionality, the last one—the comparative analysis—is by far the most complex. There are two approaches to this examination which make frequent appearances in case law and literature: the test of the "least restrictive means" and that of the "cost-benefit analysis."

The test of the least restrictive means inquires whether, in a given situation, alternative measures had been available which would have achieved the same objective, but imposed less of a burden on the affected interest. Two measures then are being compared, but the affected interest continues to play a role in this examination, which presupposes an understanding of the impact which that interest experienced.

It is at that stage that the Malaysian criticism of diplomats who participated in a meeting of the National Justice Party[108] is again of some significance. If the diplomatic aim in this case is understood as the gathering of information, the distinction offered by Minister Rais Yatim would emphasise the existence of various options to achieve that goal:

---

for a past injury, but the protection of the State from the attack for the future. The identified interest is therefore best described as the security of the State in the future. For proportionality in Article 2.2 of the TBT Agreement, the identification of the "legitimate objective" also has to take into account future risks ("the risks non-fulfilment would create"). Technical Barriers to Trade Agreement, art. 2.2, Apr. 15, 1994, 1868 U.N.T.S 120 [hereinafter TBT Agreement].

[106] It must show a "rational connection" to the objective, *Alan Robert Matthews*, *supra* note 103, or the measure must be "appropriate" to fulfill the function, *Bartik, supra* note 103. *See also* Case C-240/95, Criminal Proceedings against Rémy Schmit [1996] E.C.R. I-3179, ¶ 24 [hereinafter Rémy Schmit]. Reference is also made to the "suitability" of the measure for the purpose. *See* Xiuli, *supra* note 102, at 636. There does not appear to be much of a difference in the practical application of these parameters. Andenas & Zleptnig, *supra* note 100, at 388, with reference to Rémy Schmit.

[107] On the application of the tests of proportionality to the diplomatic involvement in obligations which the receiving State owes erga omnes, see in particular *infra* text accompanying notes 172–83.

[108] *See supra* note 76.

listening to speeches, for one, as an alternative to "active participation," and as a method which would appear less intrusive to the government of the receiving State.

This case, however, also illustrates the danger of applying the "least restrictive means" test in an unbridled fashion. Less intrusive alternatives can often be found, and as a consequence of this consideration, diplomatic agents might be requested by some receiving States to stay away from party events altogether and receive their information through newspapers or the internet. This places a powerful weapon in the hands of governments which might not always be as concerned with the legal assessment of the situation as with their own political agendas.

International law however recognizes a corrective mechanism for this test of proportionality, which imposes a cap on calls for less intrusive means. It consists of the fact that the alternative measure must be at least of equal efficiency to achieve the objective which the relevant debate with the opposition pursues.[109]

The precise understanding of "efficient measures" can ultimately be determined only on the merits of the individual case and in light of the particular goal of the diplomatic action. In many cases, that assessment may favour the diplomatic agent. If the aim, for instance, is the promotion of friendly relations or the protection of interests of the sending State, a good case can be made for the necessity of personal discussions even of sensitive issues; less intrusive, but equally effective alternatives may simply not exist. The gathering of information, on the other hand, will not always benefit from personal discussions of these topics. Diplomatic involvement in party debates may change the way in which the opposition responds to particular matters. If the aim is the observation of that faction's position unaffected by external influence, diplomatic interaction with the party may thus prove counterproductive. A more passive role may then be not only a less intrusive, but also a more effective way to pursue the stated aim.

In considerations of proportionality, the "least restrictive means" test is often joined by another examination—that of the "cost-benefit analysis"[110] (also called "proportionality stricto sensu" or "true

---

[109] On the acceptability of this restriction in various branches of international law, see Behrens, *supra* note 101, at 235.

[110] *Cf.* Andenas & Zleptnig, *supra* note 100, at 388.

proportionality").[111] Cost-benefit analysis—a test which has been accepted in various branches of international law[112]—calls for a relationship of proportionality between the advantage gained (or expected to be gained) and the negative effects which the measure generates.

That is more than a mere comparison of the competing interests themselves,[113] for an assessment of this kind would presuppose a hierarchical relationship between the norms concerned and thus re-introduce the challenges which accompany this approach.[114]

What cost-benefit analysis must involve, is a more detailed consideration: an analysis which explores the way in which the diplomatic activity has shaped the relevant interests. That means, on the one hand, the identification of the negative impact of the measure on the affected interest and, on the other, the identification of the benefit which the decision is expected to carry.[115]

What the analysis also includes is an understanding of the diplomatic measure within the framework of its situational parameters. That means that issues such as the gravity of the danger to which the interests are exposed, an existing urgency which may call for diplomatic action, and the damage caused if no measure were taken, must have an impact on the assessment.

If, for instance, a diplomatic agent discusses sensitive matters with an opposition party which is likely to win forthcoming elections, he may well wish to base this conduct on the task of protecting the interests of the sending State. The need to resort to these actions may be very real—especially if such measures can correct a misleading impression which the opposition has of the sending State. Given the fact that elections are pending, the issue may be of great urgency as well; forcing a diplomat to refrain from these debates may cause irreparable damage to the sending State.

---

[111] Xiuli, *supra* note 102, at 637.

[112] *Cf.* Behrens, *supra* note 101, at 237.

[113] *But see* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 392, art. 35, ¶ 1389 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY] (arguably supporting a different direction in international humanitarian law).

[114] *Cf. supra* note 94.

[115] *See* Andenas & Zleptnig, *supra* note 100, at 390 (arguing that the "effects of a measure" must not be "disproportionate or excessive in relation to the interests affected").

But it would be wrong to conclude that the evaluation of debates with the opposition will therefore inevitably favour the diplomatic agent. The ghost of Don Bernardino de Mendoza still walks the corridors of foreign offices, and the fear of diplomats who are plotting the overthrow of the government is all too present. It arose in August 2000, when the U.S. diplomats Burgess and Moran were expelled from the Democratic Republic of the Congo after they had allegedly suggested to opposition leaders the toppling of President Kabila;[116] it made another appearance a few months later in the case of Glenn Warren, who found himself accused of discussing sabotage against "vital installations" of Sudan,[117] and it also played a crucial role in the 2008 expulsion of the U.S. Ambassador to Venezuela, whom President Chavez had accused of assisting a plot against his life.[118] In all these cases, the allegations were strongly rejected by the sending State, but these situations emphasize the concerns which receiving States harbour in this regard—or, at least, their search for allegations against diplomatic agents, which could meet with approval by the international community.

It would certainly be difficult to find a member of the international community who would disagree with the assessment that the allegations in these cases, if proven to be true, would amount to unacceptable diplomatic conduct. In the language of cost-benefit analysis: the disturbance which diplomatic activities of this kind cause to the internal workings of the receiving State would be so severe that the expected benefit, even if it consisted in the promotion of interests of the sending State, stands in no acceptable relation to it.

What the variety of cases in which diplomats discussed political topics with members of the opposition illustrates is that both the ban on such debates when they touch subjects which the receiving government considers sensitive, and an unbridled freedom to engage in these activities can lead to abuse and trigger grave consequences. The Eikenberry case[119] is one extreme—if diplomatic agents really had to excuse themselves whenever a party platform is being discussed, their task of observing political developments in the receiving State would be

---

[116] Stephanie Walters, *Kinshasa Expels US Diplomats*, BBC ONLINE, (Aug. 19, 2000, 23:33 GMT), http://news.bbc.co.uk/1/hi/world/africa/888131.stm.

[117] *See supra* text accompanying note 64; *U.S. Diplomat Kicked Out of Sudan*, *supra* note 64.

[118] Christopher Toothaker, *2 Arrested in Alleged Assassination Plot*, Associated Press, Sept. 25, 2008.

[119] *See supra* text accompanying note 59.

limited to an intolerable degree. Willis' involvement with the affairs of Hawaii stands at the other end of the range[120]—it is an incident which serves as an illustration for diplomatic discussions which carry the potential of wide-ranging and irreversible changes in the receiving State, including the toppling of its government.[121]

Given the gravity of these consequences, the solution to the meeting of the divergent interests which sending and receiving States pursue can hardly lie in the absolute prioritization of one interest over the other. What is required is a mechanism which takes into account the particular parameters of the situation in which the relevant interests find themselves. Recourse to the general principle of proportionality allows for a detailed consideration of these aspects, but the tests embodied in the principle also call for a reflection on the diplomatic measure in question, by examining less intrusive alternatives to its adoption and by comparing the impact of the diplomatic conduct to the effects which would arise if the relevant action were not adopted.

The result is an assessment of the diplomatic measure which offers a more precise understanding of its consequences and the context in which it exists, but it is also an assessment which eschews the establishment of an absolute hierarchy—with all of its potentially destructive consequences—in favour of a mediating approach, which allows the core character of each legitimate interest to survive.

III. TAKING SIDES IN THE POLITICAL AFFAIRS OF THE RECEIVING STATE

On the face of it, the discussion of certain topics with the opposition in the receiving State does not mean that a diplomatic agent has already lent his support to a particular faction—even though the boundaries, as some of these cases have shown, can become blurred. But there have been instances in which diplomats adopted forms of conduct which, in the eyes of the accrediting government, gave a clear indication that they favoured a party in the receiving State. It may not be entirely surprising that diplomats have, in these situations, often encountered negative reactions within that State.

---

[120] *See supra* text accompanying note 28.

[121] Two years after Willis' talks with Queen Lili'uokalani, the royalist party did attempt a rebellion, which was, however, unsuccessful and resulted in the (temporary) arrest of the Queen. Kualapai, *supra* note 27, at 41, 42.

In the discussions of the International Law Commission, this scenario made its appearance and served indeed as one of the first examples for the violation of the rule of non-interference. Shortly after the Mexican ILC member Padilla Nervo had introduced the draft article containing this rule, his colleague Kisabúro Yokota emphasized that it was an "unwarranted interference" for an ambassador "to encourage or subsidize a political party in the receiving State."[122]

And situations have indeed emerged in which diplomatic agents were accused of taking sides in the political playing field of the receiving State. In 1984, for instance, the U.S. Ambassador to El Salvador, Thomas Pickering, was accused of favouring the Christian Democrat candidate in the presidential elections in that country over his right-wing rival.[123] The case gained particular significance due to the fact that criticism of Pickering arose both within the receiving and the sending State. In El Salvador, the vice presidential candidate Hugo Barrera called for the immediate replacement of the diplomat;[124] in the United States, Senator Jesse Helms demanded Pickering's withdrawal,[125] reportedly stating that "[t]he U.S. is supposed to be neutral down there and should cling to that."[126]

---

[122] *Summary Records of the Ninth Session*, [1957] 1 Y.B. Int'l L. Comm'n 146, 147, ¶ 10 U.N. Doc. A/CN.4/SER.A/1957 (Yokota).

[123] Henry Gottlieb, *Helms Asks Reagan to Fire Ambassador to El Salvador*, ASSOCIATED PRESS, May 2, 1984.

[124] Joseph B. Frazier, *Helms, Candidate Charge U.S. Interference as Campaign Winds Down*, ASSOCIATED PRESS, May 3, 1984.

[125] *Moderate, Rightist, Both Claim Salvador Election Victory*, FACTS ON FILE WORLD NEWS DIG., May 11, 1984.

[126] Frazier, *supra* note 124. Helms' reaction was the more remarkable as the senator did not, as a general rule, object to involvement of U.S. organs abroad. *Cf.* THE FUTURE OF U.S.-U.N. RELATIONS: A DIALOGUE BETWEEN THE U.S. SENATE COMMITTEE ON FOREIGN RELATIONS AND THE U.N. SECURITY COUNCIL: VISIT OF THE U.S. SENATE COMMITTEE ON FOREIGN RELATIONS TO THE UNITED NATIONS, S. DOC. NO. 106-777 (2000) (remarks of Sen. Jesse Helms, Chairman, Comm. on Foreign Relations). The Pickering case is not the only instance in which (alleged) diplomatic support for a faction in the receiving State met with a negative reaction. Compare the 1988 case of Mason Hendrickson, first secretary at the US embassy in Singapore, who allegedly encouraged lawyers in the receiving State to run against the ruling party. Roger Matthews, *Singapore Slaps the Hand that Feeds It*, FIN. TIMES, May 23, 1988, at 3; Nick Cumming-Bruce, *Expelled Envoy in New Row*, GUARDIAN, May 21, 1988. In 2008, the US ambassador to Bolivia, Philip Goldberg, was expelled after he had been accused of lending his support to opposition figures. Philippe Zygel, *US Ambassador Warns of "Serious Consequences" for Bolivia*, AGENCE FRANCE PRESSE, Sept 14, 2008. Compare also the case of the US Ambassador to Israel, Martin Indyk, who attracted criticism when, in 1996, he allegedly "crafted" President Clinton's strategy to support Shimon Peres, the candidate of the Labor Party in the general election in that year.

Yokota's second concern—that diplomatic agents might funnel funds to parties in the receiving State—has likewise found its reflection in incidents in diplomatic relations. One of the most prominent cases concerned the Soviet ambassador to New Zealand, Vsevolod Sofinsky, who was expelled from the country in January 1980.[127] The background of this expulsion was the alleged financing of the small Socialist Unity Party by the Soviet Union.[128] Robert Muldoon, then Prime Minister of New Zealand, did not conceal the fact that he believed in the personal involvement of the ambassador[129] and made direct reference to the diplomatic duty of non-interference.[130] It was by far not the only case in which allegations of this kind were made by receiving States.[131]

At times, the host government went further and accused diplomats on its territory not only of favouring particular parties, but of creating opposition where none had existed before or of taking a proactive role in its organization. In a case which occurred in March 2013, Venezuela expelled two American air attachés over conduct of this kind: the diplomats had allegedly met with Venezuelan military officials,[132] and had, according to the Venezuelan Foreign Minister, encouraged them to engage in "destabilizing projects."[133] On this occasion, the Minister made direct reference to the duty of non-interference.[134] Other incidents indicate that the "fostering of dissent" and

---

Sharon Samber, *Roller Coaster Diplomatic Career of Ambassador Martin Indyk Plummets Again*, JEWISH TELEGRAPHIC AGENCY, Sept 29, 2000.

127 *Soviet Ambassador Expelled*, FACTS ON FILE WORLD NEWS DIG., Feb. 8, 1980.

128 *New Zealand Boots Soviet Ambassador*, ASSOCIATED PRESS, Jan. 23, 1980.

129 *Soviet Ambassador Expelled*, *supra* note 127.

130 *New Zealand Boots Soviet Ambassador*, *supra* note 128.

131 For an earlier case, see the expulsion of, reportedly, 40 Soviet officials and diplomats from Bolivia in 1972, amid allegations that the S.U. embassy was financing rebel movements in the country. Richard Wigg, *Soviet Poet "Expelled" After Visit to Bolivia*, TIMES, Apr. 1, 1972; 60 N.Y. TIMES INDEX 236 (1972) ("Bolivian Govt orders 119 Soviet aides to leave in 7 days, implying that USSR Embassy is financing leftist rebel movements"). In a 2007 case, Bolivia accused the U.S. embassy of financing parties of the opposition. Martin Arostegui, *Morales Puts U.S. Diplomat in Sights; Says Envoy Funds Rivals*, WASH. TIMES, Nov. 28, 2007. In November 1998, allegations arose that diplomats from Australia, Britain, Canada and the US had offered money to the opposition in that State, prompting the deputy Prime Minister to state that diplomats found engaging in these activities would "not be allowed to serve in Malaysia." *Malaysia Accuses Diplomats*, BBC ONLINE, (Nov. 24, 1999, 14:00 GMT), http://news.bbc.co.uk/1/hi/world/asia-pacific/534847.stm (paraphrasing by BBC).

132 Juan Carlos Lopez & Catherine E. Shoichet, *U.S. Expels 2 Venezuelan Diplomats*, CNN WIRE, Mar. 11, 2013.

133 *Id*.

134 *Id*.

the "organisation of opposition" count among the most prominent accusations which are levelled at diplomatic agents in this context.[135]

At the other end of the scale are cases in which meetings between diplomatic agents and members of the opposition had been enough to trigger suspicion of partisanship, and sometimes negative reactions by the receiving State. While the extreme position adopted by Malta in 1983[136] is not shared by many receiving States, a particular context may change the assessment dramatically.

If, for instance, a diplomatic agent seeks contact with members of the opposition in the middle of an electoral campaign, even seemingly innocuous talks can send out a powerful message and can therefore be expected to affect the sensibilities of the government of that State. Participation in electoral campaigns is, in fact, a classic example of conduct which prima facie falls within the concept of interference. It was mentioned as such by the ILC's Special Rapporteur Sandström in the Commission's debates on the relevant rule, when he remarked that an ambassador "obviously" had the duty not to take part in campaigns of this kind.[137] It also provided the only example of interference which was eventually incorporated into the Commission's commentary on the draft article.[138] Commentators on diplomatic law have lent further support to this categorization of participation in campaigns: Sen, for one, refers to the principle of non-interference as encompassing the "[r]endering of aid or active assistance . . . in favour of a party in the national elections."[139]

And there is evidence that "mere" discussions, and even the very presence of a diplomat at party events will in this context often be seen

---

[135] In 1981, for instance, the Soviet Ambassador to Egypt, Vladimir Polyakov, was among several Soviet diplomats to be expelled from the country amid allegations that they had "cause[d] troubles on the internal front, distort[ed] democracy and incite[d] sedition and conflicts among Egyptians." David B. Ottaway, *Top Soviets Expelled by Egypt*, WASH. POST, Sept. 16, 1981. In 1987, Tunisia went so far as to sever diplomatic relations with Iran, accusing the Iranian embassy of propagating "religious sedition" and of "masterminding fundamentalist violence aimed at overthrowing the government." *Tunisia Breaks Relations with Iran*, ASSOCIATED PRESS, Mar. 26, 1987; Ed Blanche, *From AP Newsfeatures*, ASSOCIATED PRESS, Feb. 7, 1988 (paraphrasing by sources). In 2006, Paul Trivelli, the U.S. Ambassador to Nicaragua, was accused of trying to unite the Liberals in that country against the left-wing Frente Sandinista de Liberación Nacional. *Nicaragua: Chávez Accused of Interfering in Elections*, LATINNEWS DAILY, Apr. 26, 2006.

[136] *See supra* note 49.

[137] *Summary Records of the Ninth Session*, *supra* note 122, at 149, ¶ 34.

[138] See *supra* text accompanying note 42.

[139] BISWANATH SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 90 (3d rev. ed. 1988).

as amounting to "participation." A particular sensitivity in this regard has been demonstrated by several receiving States around the world and across political and ideological divides. In 1977, for instance, the French President Valéry Giscard d'Estaing took exception to the fact that members of the American embassy in France had met with Jean Kanapa, a member of the political bureau of the French Communist Party—a meeting which the President appeared to have seen in the context of the municipal elections which took place in France that year.[140] On that occasion, Giscard d'Estaing emphasized the fact that he himself had refused to see leaders of the U.S. Democratic Party during an election campaign in America.[141] And in 2008, the U.S. Ambassador to Algeria, Robert Ford, was criticized by the country's Prime Minister after he had met with political parties—again in the context of elections in the receiving State.[142]

The fact that cases of this kind frequently meet with criticism from receiving States[143]—and from States with various political background and constitutional systems—might suggest that modern customary law contains an outright ban on diplomatic participation in elections abroad. Evidence for the relevant State practice in the field can certainly be adduced.[144]

---

[140] Charles Hargrove, *French Leftist Views Put Across to US Diplomats*, TIMES, Apr. 6, 1977; *Giscard Scores U.S. Talks with Left; Other Developments*, FACT ON FILES WORLD NEWS DIG., Apr. 9, 1977.

[141] Hargrove, *supra* note 140.

[142] *Algerian Paper Says US "Interferes" in Country's Politics*, BBC ONLINE, Feb. 29, 2012. See also the 1981 case of William Shannon, the U.S. Ambassador to Ireland, who was criticized after he had been seen on the campaign bus of an opposition party in the runup to that country's elections. Charles Haughey, the Irish Prime Minister, stated that the ambassador had "put his foot in," and that his own party would not have "contemplate[d] having him take part in our campaign or being associated with us in any way." *U.S. Ambassador in Controversy Over Irish Elections*, ASSOCIATED PRESS, May 27, 1981.

[143] Frequently, but not always. See *infra* at note 152.

[144] See also, in addition to the aforementioned cases, the 1984 case of the US Ambassador to Nicaragua, Bergold, who was accused of trying to persuade members of certain parties to drop out of forthcoming elections, *Nicaragua: U.S. Ambassador Accused of Interfering in Domestic Affairs*, IPS-INTER PRESS SERVICE, Oct. 25, 1984; a case arising in Poland in 1989, when the government accused diplomats of various Western countries of "actively participat[ing] in various meetings and events staged by the Opposition," John Tagliabue, *US Diplomats Accused of Meddling in Campaign*, SYDNEY MORNING HERALD, Jun. 1, 1989. When, in 2002, Nauru decided to recognize the People's Republic of China rather than Taiwan, the participation of a Taiwanese diplomat in a by-election in Nauru had reportedly been the reason behind this change of policy. The President of Nauru was quoted as stating that the diplomat in question had been "more interested in seeing and being seen talking with the opposition" (than meeting the ministerial candidate in the by-election). *Mofa Dismisses Interference Charge by Nauru President*, CHINA POST, Aug. 20, 2002.

But the question may justifiably be asked whether such reactions are truly based on *opinio iuris*, or if they may have been influenced by considerations of political convenience. After all, not all involvement in elections irks the host government: a case has yet to be reported in which the government of a receiving State objected to partisanship in favour of the governing party (or to the detriment of an opposition party).

A more convincing case for the existence of customary law in this context could be made on the basis of negative reactions which sending States gave to their own diplomats, or of measures which they adopted to prevent their diplomats from participating in the elections of the receiving State. A State who resorts to these actions stands to gain little from it, and the considerations underlying these measures might well pertain to a legal evaluation.

And cases like this have come into existence. In March 1964, the American Secretary of State Rusk wrote to his Ambassador in Malaysia, telling him that Malaysian employees of the embassy had to resign their posts if they wanted to take part in "partisan political activities" (in the context of forthcoming elections in that State).[145] Rusk pointed out that officials of the Malaysian government who wanted to engage in activities of this kind had to resign their office and that the U.S., "being a foreign State, should exercise even more caution in such matters than the host State."[146]

A few days later, the U.S. Ambassador to Lebanon, Meyer, warned embassy employees not to take any action suggesting that the government of the U.S. took sides in the forthcoming general elections in that State. "In other words," wrote Meyer, "a strict attitude of non-involvement by this Embassy must be maintained throughout the election period."[147]

But sending States do not always show this degree of circumspection where diplomatic activities in the context of elections are concerned—at times, they are indeed keen to defend their agents' conduct in circumstances of this kind.[148] In this regard, the fact must be taken into account that the sending State and its agents may have legitimate grounds which could offer a basis for the relevant diplomatic

---

[145] MARJORIE M. WHITEMAN, 7 DIGEST OF INT'L L. 144 (1970).

[146] *Id*.

[147] *Id*. at 143.

[148] *See*, *e.g.*, *infra* note 174 and accompanying text.

conduct. To a degree, the same considerations to which reference has been made above apply in this context.

Sending States who came to the defense of their agents abroad have frequently made reference to the fulfilment of diplomatic tasks which in their view necessitated the activity in question. The function of observation occupies a prominent place in this regard, and it is indeed not difficult to establish the link between this task and diplomatic conduct in this field. If, as Oppenheim maintains, it is a diplomat's task to "watch political events and political parties with a vigilant eye,"[149] then his office must embrace the opportunity to observe the actors on the political plane. And sending States are aware of this link between function and activity. When Poland in 1985 expelled two American officials—a first secretary and a consul—on charges of taking an active part in a May Day demonstration, the U.S. embassy put up a staunch defense of their conduct and stated that the agents had performed "normal diplomatic functions as observers repeat observers of events."[150]

On occasion, even the receiving State emphasizes the significance of the diplomatic task of observation in this context. In the runup to the British general elections in 2001, the British Foreign Office took this position when an election agent in Bradford had complained about the conduct of the Pakistani High Commissioner, who had allegedly "asked people to support . . . the Conservative candidate."[151] The Foreign Office promised to investigate the issue, but noted also that "[i]t is usual for foreign diplomats to attend and observe political meetings, it's part of their job. The fact that he has been at these meetings is not a problem at all."[152]

Diplomatic conduct in this field could, in theory, be based on any of the other recognized functions as well. In practice, however, it is much rarer that reference to the other tasks is made. The invocation of the protection of interests in particular is a double-edged sword: it is

---

[149] LASSA OPPENHEIM, INTERNATIONAL LAW A TREATISE VOL. 1—PEACE 787 (H. Lauterpacht ed., 1967).

[150] Matthew C. Vita, *International News*, ASSOCIATED PRESS, May 3, 1985. See also, for a case involving two British diplomats who participated in a demonstration in Romania in 1989 (and for the reasons advanced by them for this activity), Martin White, *Why We Joined Student Protests, by Britons*, PRESS ASSOCIATION, Dec. 26, 1989. For a 1997 case involving a US diplomat in Belarus who had attended a demonstration against the Belarusian President Lukashenko and the American reference to the task of observation in that regard, see Robert Kilborn et al., *The News in Brief*, CHRISTIAN SCI. MONITOR, Mar. 28, 1997.

[151] Sarah Walsh, *Foreign Office Probes Commissioner's Visit*, THIS IS BRADFORD, Jun. 6, 2001.

[152] *Id*.

difficult for a sending State to claim that this task allows involvement on the side of the opposition, while avoiding the stigma of selfishness and maintaining the pretense of neutrality.

The maintenance of friendly relations, too, is not regularly invoked as a basis for diplomatic conduct in this field. But when, in 2002, a Taiwanese diplomat was criticized for meeting members of the opposition in Nauru,[153] Katharine Chang, a spokeswoman for the Taiwanese Ministry of Foreign Affairs, stated that it was the task of a diplomat to "make friends with everyone," and that being friendly to members of the opposition could thus not amount to interference in the internal affairs of the receiving State.[154]

In addition to diplomatic functions, it will often be possible for sending States and their agents to meet allegations of partisan conduct with the claim that the relevant behaviour had been based on rights which accrue to that State under international law—including rights deriving from erga omnes obligations of the receiving State.[155] It is a situation which carries particular significance in cases in which diplomats are accused of having taken sides in the politics of the receiving State.

An erga omnes interest which has gained importance in this respect is the right to self-determination, which finds a solid foundation in international law.[156] That self-determination carries erga omnes character, has been confirmed in several decisions by the ICJ,[157] and that invites the possibility that diplomatic agents could rely on it when engaging in conduct which appears to support a particular party in the receiving State. The boundaries of the right are drawn wide—both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights refer in this regard to

---

[153] Ko Shu-ling, *supra* note 80.

[154] *Id*.

[155] *See supra* text after note 83.

[156] U.N. Charter art. 1, ¶ 2, naming the purposes of the United Nations, refers to the objective of developing friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples." The right was codified in the ICCPR, *supra* note 86, art. 1, ¶ 1 ("All peoples have the right of self-determination."). The same wording appears in the International Covenant on Economic, Social and Cultural Rights art. 1 ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[157] East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102, ¶ 29 (June 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 199, ¶¶ 155-56 (July 9) [hereinafter *Wall Opinion*].

a people's right to "freely determine their political status and freely pursue their economic, social and cultural development."[158] What is more, its realization presupposes the existence of other human rights,[159] including the "classic" political rights—chief among them, the right to vote and to stand in elections;[160] but presumably also freedom of assembly and association and freedom of expression.[161]

In the light of this, the link between self-determination and diplomatic support to a faction in the receiving State might not be altogether difficult to establish. But the traditional view in the literature was cautious with regard to conduct of this kind.[162] The rationale for the concerns of receiving States in this regard becomes particularly clear when the supported faction is not a lawful party but is composed of underground activists, dissidents, or revolutionaries.

And yet, the endorsement of parties may be the very conduct which is indicated by the need to support a people in the realization of the right to determine their own political fate—a need which was underlined by numerous General Assembly Resolutions calling for the rendering of "moral and material assistance" by all States to peoples striving for self-determination[163] and for the provision of "all necessary measures" to facilitate its implementation.[164]

Even support of unlawful factions cannot automatically be perceived as falling outside the scope of diplomatic assistance towards this aim. The criminalization of inconvenient movements is a popular

---

[158] ICCPR and ICESCR refer in this regard to a people's right to "freely determine their political status and freely pursue their economic, social and cultural development." ICCPR, *supra* note 86, art. 1, ¶ 1; ICESCR, *supra* note 156, art. 1, ¶ 1.

[159] *See* THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 98 (1997).

[160] ICCPR, *supra* note 86, art. 25; ACHR, *supra* note 86, art. 23. *See also* First Protocol to the European Convention on Human Rights art. 3, March 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol 1 to ECHR]. For a critical view, see Daniel Thürer, *Self-Determination*, ENCYCLOPEDIA OF PUBLIC INT'L L., VOLUME 4, 364, 367 (Rudolf Bernhardt, ed., 2000).

[161] *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 32, ¶ 55 (Oct. 16) [hereinafter Western Sahara Opinion]; Socialist Party and Others v. Turkey, 1998-III Eur. Ct. H.R. 24, 24−25, ¶ 45 (1999).

[162] *See* JEAN SALMON, MANUEL DE DROIT DIPLOMATIQUE 129, ¶ 199 (1996); ERIC CLARK, CORPS DIPLOMATIQUE 74 (1973). In the ILC debates, Ago voiced the view that diplomatic endorsement of factions would be an "improper action." [1957] 1 Y.B. Int'l L. Comm'n 149, ¶ 36. *See also supra* note 122 and accompanying text (concerning Yokota remarks).

[163] *Cf.* G.A. Res. 2105 (XX) (Dec. 21, 1965); G.A. Res. 2649 (XXV) (Nov. 30, 1970); G.A. Res. 3070 (XXVIII) (Nov. 30, 1973); G.A. Res. 3163 (XXVIII) (Dec. 14, 1973); G.A. Res. 3328 (XXIX) (Dec. 12, 1974).

[164] G.A. Res. 2160 (XXI), ¶ 2b (Nov. 30, 1979). *Cf.* also G.A. Res. 31/33 (Nov. 30, 1966); G.A. Res. 2649 (XXV) (Nov. 30, 1970).

instrument in the hands of authoritarian governments, and it often enough affects an oppressed people seeking the realization of self-determination. Not only will measures of this kind regularly be themselves in violation of international law, but sending States have in the past demonstrated that they did not feel obliged to refrain from the promotion of factions of this kind. The case of the African National Congress in South Africa is an example—a group which was for a long time banned by the ruling government and which during that period did depend on moral, but also material assistance from the outside to continue its endeavours to achieve self-determination for the black majority.[165] In the light of this, it would be difficult to speak of a customary rule excluding assistance towards unlawful factions from the remit of support of a people in its struggle to realize this right—it does not appear possible to adduce evidence for consistency of State practice as an indispensable element of that source of international law.[166]

On the other hand, self-determination is a group right, and its beneficiaries are entities which fulfill the criteria of a "people."[167] If the diplomatic support therefore concerns only a select few individuals, it might be difficult to invoke self-determination as a basis for that action—unless the individuals were targeted by the receiving State precisely because of their relevance for the group as a whole (its leaders, say, or prominent journalists, etc.).

The fact also requires consideration that the territorial integrity of the State from which self-determination is sought is likewise recognized in international law and frequently affirmed by the same instruments which emphasize the principle of self-determination.[168]

---

[165] *See* Tony Leon, *Attitude for Gifts*, BUS. DAY (SOUTH AFRICA), Oct. 10, 2005; Oagile Key Dingake, *Botswana: Political Party Funding Helps Level Playing Field*, AFRICA NEWS, Dec. 15, 2006.

[166] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98, ¶ 186 (June 27). States who support unlawful factions may well violate the first sentence of VCDR art. 41, ¶ 1, that is, the obligation to "respect the laws" of their hosts. The question whether this duty covers cases in which local law is incompatible with the receiving State's obligations under international law can be expected to be of increased relevance in the future. *See also* [1957] 1 Y.B. Int'l L. Comm'n 146, ¶ 5 (Tunkin).

[167] *See supra* note 71, art. 1, ¶ 1; ICCPR, *supra* note 86, art. 1, ¶ 1; Friendly Relations Declaration, *supra* note 71, 5th Principle. See also Reference re Secession of Quebec, [1998] 2 S.C.R., ¶¶ 123–125 (Can.) [hereinafter Secession of Quebec], on the definition of "people." *See also* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 4, 5 (1996).

[168] *See supra* note 71.

Given the existence of these diverging interests, there is good reason to accept certain limitations on self-determination and indeed the conclusions of the "remedial school," which distinguishes between external and internal self-determination and would, outside the context of colonial or foreign oppression, require that peoples primarily strive to fulfill their right to self-determination internally. A right to secession therefore exists only if internal self-determination has been denied to them.[169]

This distinction has occasionally played a role in cases involving diplomatic support for particular factions. In an instance arising in 1987, the demands of a speaker of the Australian Aborigines for an independent republic were seen in connection with the "subversive activities" in which the Libyan mission to Australia had allegedly engaged. The Australian Prime Minister severed diplomatic relations with Libya and gave diplomatic staff ten days to leave the country.[170] It would be difficult to consider the Australia of the 1980s as a State which, through "subjugation, domination or exploitation"[171] denied the right to internal self-determination to her indigenous peoples, and it would therefore be difficult to base diplomatic assistance towards the realization of external self-determination on a ground which international law recognizes.

Even in situations in which diplomats can invoke legitimate reasons for the taking of sides in the receiving State, not every action adopted by a diplomatic agent will qualify as conduct which is permitted under international law. The fact remains that the interests of the receiving State have not disappeared; the need in particular to preserve its internal peace and order and its territorial integrity is arguably even more apparent in instances in which diplomatic support is given to particular factions than in cases in which diplomats "merely" discussed certain matters with members of the opposition. For an assessment of

---

[169] Secession of Quebec, *supra* note 167, ¶ 138; Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT'L & COMP. L. 547, 553 (2009). However, once the right to internal self-determination has been denied, the right to external self-determination does exist even if the people concerned did not live under colonial domination. Secession of Quebec, *supra* note 167, ¶ 138.

[170] *Cf.* KNUT IPSEN, VÖLKERRECHT 489 (2004); *Libyan Diplomats Expelled*, FACTS ON FILE WORLD NEWS DIG., May 22, 1987; *Libya: Australia Involved in Campaign Against Arab Nation*, UNITED PRESS INT'L, May 21, 1987.

[171] The phrase used by the Canadian Supreme Court when referring to those peoples who, outside the context of colonization, would enjoy the right to external self-determination. *Secession of Quebec*, *supra* note 167, ¶ 133.

diplomatic activities in this field, the tests of proportionality, to which reference has been made above,[172] are again of relevance and have as such found reflection in the practice of members of the international community.

It is in particular the first test of proportionality which features commonly in the considerations of receiving States in situations of this kind: host governments are often keen to point out that less intrusive alternatives to the granting of support to particular factions did exist.

This consideration was apparent in the 2007 case of the Canadian chargé d'affaires in Sudan, Lawlor, and the EU diplomat, Degerfeld, who were expelled after they had reportedly called for the release of opposition leaders who had been detained without charge.[173] The Sudanese people's right to self-determination certainly provided a strong basis for the envoys' conduct, and the defense which the Canadian Foreign Affairs Minister advanced in support of her diplomat made reference to rights which are intimately linked to internal self-determination.[174] But in the eyes of the receiving State, alternatives to the diplomatic measure would have been available. Sudan took exception to the fact that the diplomats had contacted the security services directly (Lawlor had written to the National Intelligence and Security Service on that matter) instead of resorting to "diplomatic channels."[175] In the literature, too, the opinion has been advanced that diplomats have to take less intrusive alternatives into account and give them priority. Richtsteig for one, talking about the diplomatic monitoring of political demonstrations, differentiates between "tacit observation" and conduct that could be misunderstood as "ostentatious partisanship" and provocation.[176] The alternative which causes less of an intrusion appears to find greater acceptability.

However, stated in such a rigid form, this position encounters difficulties. Most of all, even undisguised partisanship can be adopted to

---

[172] *See supra* text accompanying notes 102–21.

[173] *Canada Right to Back Envoy in Sudan Case*, STAR PHOENIX, Aug. 29, 2007.

[174] The Foreign Minister stated that "Ms Lawlor . . . [had been] standing up for the values of freedom, democracy, human rights and the rule of law in Sudan." *Id.*

[175] Estanislao Oziewicz, *Canada Ejects Sudanese Diplomat*, GLOBE & MAIL, Aug. 29, 2007.

[176] RICHTSTEIG, *supra* note 82, at 22 (in the context of VCDR art. 3(1)(d)). For a similar position advanced by the former British Ambassador Sir John Graham with regard to the participation of two British diplomats in a demonstration in Romania in 1989, see *supra* note 150. *See also* John Graham, *Undiplomatic Activity*, TIMES, Dec. 30, 1989.

pursue strong and legitimate aims which could otherwise not be achieved. That certainly includes situations in which diplomatic agents acted to give assistance towards the realization of the right to self-determination. In these cases, silent observation may well be a method that is less likely to invoke negative reactions from the receiving State, but at the same time, a method which, by itself, is often not efficient for the pursuit of the intended goal.[177]

The determination of the efficiency of the relevant diplomatic measure and its alternatives strongly depends on the parameters of the individual situation. The nature of the particular interest which the diplomatic agent seeks to protect plays a role in this assessment,[178] as does the gravity of the threat which that interest has encountered. But of equal importance are the mechanisms which the receiving State itself provides for addressing the underlying right. If that right consists of self-determination, and the people concerned have recourse to an independent judiciary which is authorized to rule on their claim or have other venues which provide effective representation, it may be difficult for a diplomatic agent to assert that "ostentatious partisanship" had been objectively required.

Similar considerations apply when it is the diplomatic agent himself who could have resorted to means which, while causing less of an intrusion, carried the promise of equal or even greater efficiency. Alternative measures of this kind can include talks with the government of the receiving State, or the soliciting of the help of third States whose relations with the government of the receiving State may be stronger than those which the sending State enjoys.[179]

But the fact remains that there are situations in which the available alternatives are removed by several degrees from the efficiency which the adopted measure promises. In situations in which neither the people concerned, nor the diplomatic agents themselves could have been referred to feasible alternatives, support of factions in the receiving State is an option which must be seen in compliance at least with this test of the principle of proportionality.

---

[177] On the requirement of equal efficiency for the alternative measures, see *supra* at note 109.

[178] *Cf. supra* paragraph following note 109.

[179] Reference should also be made to the methods for the peaceful resolution of conflicts which G.A. Res. 2734 (XXV), ¶ 6 lists. Some of the means suggested in this context (including negotiation and inquiry) are applicable here as well. Other methods, such as arbitration and judicial settlement, may be considered even more intrusive by the receiving State, depending on the level of publicity which the relevant measures carry.

It is at the stage of the second test—that of cost-benefit analysis[180]—that a more detailed examination of the interests of the receiving State in the particular shape they received through the diplomatic measure becomes possible. At the same time, this part of the examination also allows a more precise assessment of the particular benefits which the relevant measure can be said to achieve.

These benefits can be significant. For instance, the rendering of moral support to a faction which is opposed to the imminent commission of international crimes by the government may carry tangible and important consequences. In situations of this kind, the harm threatened to the protected interest will often be irreversible, and the existing danger will appear so grave that it may outweigh the negative impact which the diplomatic measure carries.[181]

Yet there is perhaps a tendency to underestimate the consequences of diplomatic involvement. To a degree, this is understandable—diplomatic action is, after all, often limited in scope and contained to particular situations. That may serve as a rationale for the conclusions which the Institute of International Law reached when, in its 1989 study on human rights and non-intervention, it found that "diplomatic" and other measures were "particularly justified when taken in response to especially grave violations of [human] rights, notably large-scale or systematic violations."[182] It is certainly true that violations of this kind would constitute a serious danger to recognized interests and

---

[180] *See supra* notes 110–18.

[181] Cases have come into existence in which diplomats did call for the suppression or punishment of international crimes. See the speech given by the U.S. Ambassador to Indonesia in the year 2000, encouraging that State to "bring to accountability and justice those who were responsible for the violence in East Timor last year." Robert S. Gelbard, *Respecting the Rule of Law and Human Rights in Indonesia*, Speech at Trisakti University, Jakarta, June 29, 2000, http://www.library.ohiou.edu/indopubs/2000/07/02/0025.html (accessed May 21, 2013). The crimes committed during East Timor's struggle for independence did become the subject of judicial examination by the Special Panels of the District Dili Court, which was authorized to investigate them as war crimes, crimes against humanity, and genocide. UNTAET Reg. 2000/11 (March 6, 2000), s. 10. However, instances in which diplomats sided with political factions which called for the suppression of international crimes by the government are less common.

[182] INST. OF INT'L LAW, THE PROTECTION OF HUMAN RIGHTS AND THE PRINCIPLE OF NON-INTERVENTION IN THE INTERNAL AFFAIRS OF STATES, art. 2, ¶ 3 (1989), http://www.idi-iil.org/idiE/resolutionsE/1989_comp_03_en.PDF. The Institute's treatment of diplomatic measures was however not entirely consistent. Its Article 3 for instance considered "diplomatic representations" to be "lawful in all circumstances," but it subjected diplomatic measures in Articles 2(2) and (3) to certain criteria. *Id*.

that it may not be difficult to identify the benefits of diplomatic measures in such scenarios.

The weakness of the 1989 study lies in the fact that there are situations in which the rendering of diplomatic support to factions within the receiving State can be at the root of significant consequences. In the discussion of the 2013 Pyatt case, mention had been made of the fact that supportive visits by envoys of an influential State can strengthen the resolve of revolutionary factions,[183] and while the further development in the case of Ukraine saw the holding of free elections in May 2014, the toppling of a government in other parts of the world has not infrequently resulted in the establishment of authoritarian regimes and the commission of human rights violations on a large scale. Diplomatic support of factions can be a gamble with unpredictable forces and consequences which may not be confined to the internal order of the receiving State.

It is exactly in situations of this kind, when both the dangers of a diplomatic measure and the dangers of diplomatic inaction are so pronounced, that an exacting mechanism is required if an appropriate assessment of the relevant conduct is to be achieved. Therein lies the advantage of this test of proportionality: if applied with precision and in a dispassionate manner, it assists not only in the evaluation of behaviour which has triggered objections by the receiving State in a given case, but it identifies the clear limits of diplomatic partisanship and thus establishes invaluable guidance for future conduct in this field.

IV. CONCLUSIONS

In the summer of 1987, P. W. Botha, President of South Africa at a time when apartheid was still the prevailing system, launched a sharp attack on Western diplomats accredited to the republic. Botha noted that several envoys had gone to some effort to express their sympathy with the black population[184] and talked about the possibility of travel restrictions on diplomats engaging in "extra-parliamentary politics"—a

---

[183] *Supra* text accompanying note 8.

[184] Jim Jones, *Botha Threat to Curb Diplomats*, FIN. TIMES, Aug. 14, 1987; The MacNeil / Lehrer News Hour, *Raging Bull, Transcript*, EDUCATIONAL BROADCASTING AND GWETA, Aug. 13, 1987.

phrase which was understood as referring to meetings with the African National Congress (at that stage still a banned organization).[185]

The diplomatic conduct in this case seems a world apart from that adopted by the Spanish Ambassador in the late sixteenth century who pursued the overthrow of the Queen of England.[186] But at the core of both incidents was diplomatic partisanship—and in both cases, at least moral support was rendered to parties which sought to realize aims that were opposed to the prevailing order of the receiving State.

If these cases then warrant different evaluations, the rationale for this cannot lie in the fact that diplomats have taken sides in the political arena of the receiving State. The assessment of diplomatic engagement with the opposition can, it appears, yield very different results, depending on the parameters of the case. The intensity of the diplomatic conduct will play a role in this, but so do the interests on which the sending State and its agents are entitled to rely.

To envoys and their Foreign Ministries, this creates a problematic situation. If partisan conduct is at times a disturbance in the receiving State's affairs and at other times a form of behaviour which is positively required under international law, it may be difficult to derive clear and authoritative guidance from the incidents which have arisen in this context.

And yet, a detailed understanding of the various scenarios in which diplomatic agents became involved with factions in the receiving State and their policies helps to identify gradations in conduct and the acceptability of grounds for such behaviour and can thus highlight the crucial points on which the evaluations of actions of this kind depart. It appears that, on a basic level, at least the following considerations will have to be taken into account.

For one, contact with the opposition is part of the diplomatic office. There is no evidence that there has ever been international consensus on a ban on this form of conduct—but there is evidence that a good number of sending States passionately disagreed with the few receiving States which sought to ban access to the opposition as such. What is more: it is a certainty that several diplomatic functions, in

---

[185] Peter Goodspeed, *South Africa Stages Propaganda Attack Against Clark's Visit*, TORONTO STAR, Aug. 14, 1987. On the travel restrictions, see also The MacNeil / Lehrer News Hour, *supra* note 184.

[186] *See supra* text accompanying note 15.

particular those of observation and the maintenance of friendly relations, could not be adequately fulfilled if diplomatic agents were deprived of access to factions in the receiving State.

Discussions with the opposition, too, find their basis in the fulfillment of diplomatic functions. But it is at that stage that the impact of the diplomatic measure on interests of the receiving State becomes more apparent—especially if the matters under discussion are of particular sensitivity to the State. There is certainly a difference between a diplomat who answers questions about cultural developments that have taken place in his own State and an envoy who engages in discussions on the toppling of the government of the receiving State. The consequences of diplomatic actions and the weight of the relevant interests in the shape they have received through the diplomatic measure require consideration in this regard and lead to widely varying results.

Diplomatic agents who offer moral or material support to a faction in the receiving State are engaging in conduct whose justification may be a more complex matter. The reason for that is that diplomats in these situations have resorted to a much more involved measure, and the question whether there may have been alternatives to their activities is an inescapable facet of the assessment of this kind of conduct. Its presence is particularly apparent when the grounds for the diplomatic action are informed by the tasks of the office: the function of observation, for instance, does not always require the taking of sides.

Diplomatic functions, however, are not the only grounds on which sending States and their agents can rely. International law may well allow or even mandate the rendering of support to a people in the receiving State, and it may be comparably easy to establish the link between diplomatic support towards factions representing the relevant group and permissive norms of international law, such as the right to receive help in the realization of (internal) self-determination. Even then, however, the consequences of the act require consideration. And even in these cases, the possibility of less intrusive alternatives cannot always be discounted: is it necessary, for instance, to declare open support for a political party if support for an impartial non-governmental organization may have had similar efficiency in achieving the desired result?

It is true that diplomatic law has, for a long time, struggled with the application of harmonizing principles that would have allowed the legitimate interests in situations of this kind to survive. For centuries, it was respect for the affairs and decisions of the receiving State—and indeed, the sovereignty of that State—which informed the opinions of

observers in this field, and the assessment which resulted from that sent out a forbidding message to those agents who intended to engage with the opposition.

However, if this evaluation were employed today, it would fail to appreciate the fact that international law has developed to a point where it now does take into account the legitimate concerns of factions of the receiving State—in particular, where these factions seek to protect established rights of a particular group. It is a development which can trace its roots to the days before the beginning of the first ILC discussions on the rule of non-interference, but it was adequately reflected neither in the debates themselves nor in academic literature at the time.

And yet, it is increasingly clear that the traditional view on diplomatic partisanship, and the traditional subordination of diplomatic involvement to the interests of the receiving State constitute an undue simplification of a complex matter. The impact which diplomatic activities of this kind can generate has lost none of its importance and must remain an essential factor in the assessment of the relevant conduct. A reflection under modern diplomatic law, however, must admit of the possibility that the consequences of such action can be beneficial for the realization of competing rights whose basis in international law is equally strong.

At times, the value of diplomatic partisanship may be even greater than that. It may be the only form of conduct of which the government of the receiving State is likely to take note. To the peoples in whose favour such conduct has been adopted, it may represent the only method that can lead to an effective realization of their interests, and, if these interests have a solid foundation in the law, the only solution capable of withstanding the scrutiny of the international community.