

‘NONE OF THEIR BUSINESS’? DIPLOMATIC INVOLVEMENT IN HUMAN RIGHTS

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Diplomatic relations today are marked by an increasing (though hardly universal) willingness of diplomatic agents to leave their role as passive observers when faced with human rights violations in the receiving state. International law offers tools which allow their involvement in matters of this kind, including the right to make representations where erga omnes interests are concerned and the right to fulfil the functions of their office. At the same time, diplomats are also subject to legal duties which impose limitations on their conduct, and there is ample evidence that their hosts are keen to insist on their observance. That, however, causes a dilemma for diplomats who encounter human rights abuses, and international law has failed to provide a readily accessible solution to the problem. This article argues that the application of general principles of harmonisation offers a way out of the conflict: a method which recognises the inherent values of the relevant interests, and places them in a relationship in which each has room to survive. In so doing, it is possible to provide guidance for diplomats and foreign ministries in situations where human rights meet interests of the receiving state and to further an understanding of the interrelationship of the norms which permit and restrict diplomatic conduct in this field.

CONTENTS

I	Introduction.....	1
II	Human Rights Involvement and the Spectre of Diplomatic Interference	4
III	Human Rights Involvement and the ‘Finest Traditions of Diplomacy’	10
	A Human Rights and Recognised Tasks of the Diplomatic Mission	10
	B Permissive Norms outside the <i>Vienna Convention on Diplomatic Relations</i>	16
IV	Between Interference and the Protection of Rights: Tackling a Dilemma.....	27
	A In Search of a Solution: The Problem of Prioritisation	27
	B Weighing the Measures, Assessing the Interests: The Advantages of a Comparative Approach.....	29
V	Concluding Thoughts.....	37

I INTRODUCTION

Diplomatic language does not usually carry the blemish of bluntness. The definition of diplomacy offered in a 1963 Otto Preminger movie has lost none of its currency: ‘If any one of us says exactly what he is thinking’, remarks one of the Vatican’s seasoned diplomats, ‘it’s a slip of the tongue’.¹

There are exceptions of course, and some of the most notable ones arise when diplomats are faced with human rights abuses in the receiving state. In October 2002, one such incident occurred when the British Ambassador to Uzbekistan, Craig Murray, gave a speech at the opening of the offices of Freedom House, a

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¹ *The Cardinal* (Directed by Otto Preminger, Otto Preminger Films, 1963) 1:43:28.

United States non-governmental organisation, in Tashkent. Murray did not mince his words. Uzbekistan, in his view, was ‘not a functioning democracy, nor does it appear to be moving in the direction of democracy’.² The Ambassador referred to ‘between seven and ten thousand people in detention whom we would consider as political and/or religious prisoners’.³ He mentioned the practice of committing people to psychiatric institutions to suppress dissent and referred to the banning of political parties, torture in prisons and the reported boiling to death of two prisoners.⁴

Murray did not have to wait long for a reaction. He was summoned to the Uzbek Foreign Ministry and told that the government ‘took issue’ with his speech.⁵ What is more remarkable is that the sending state too criticised its diplomat. The speech had been cleared with the British Foreign and Commonwealth Office,⁶ but the Ambassador still met with a rebuke by his superiors. According to Murray’s memoirs, he was told that ‘[n]o ambassador should ever make such a speech. That is the job of politicians. Your job is not to undermine UK–Uzbek relations’.⁷

But states have not always been dismissive of human rights involvement by their diplomatic agents. In 2007, the Canadian Chargé d’affaires to Sudan, Nuala Lawlor, was expelled by the Sudanese government after she had reportedly called for the release of leaders of the opposition of that state.⁸ The Canadian Minister for Foreign Affairs, however, put up a staunch defence of her conduct: Lawlor had acted ‘in the finest traditions of Canadian diplomacy and was standing up for the values of freedom, democracy, human rights and the rule of law in Sudan’.⁹

These two instances highlight the difficulties which diplomats face if they make human rights in the receiving state the object of their message. To observers of diplomatic relations as well as practitioners in the field, making distinctions between conduct which is ‘not an ambassador’s job’ and conduct which is ‘in the finest traditions of diplomacy’ can be exceedingly difficult.

This is far more than a question of *courtoisie* and protocol. Diplomatic law accepts that certain duties are incumbent on diplomatic agents in the receiving state — duties which can have a distinct impact on human rights involvement. Chief among them is the obligation not to interfere in the internal affairs of that state, which is today enshrined in art 41 of the *Vienna Convention on Diplomatic*

² Craig Murray, *Murder in Samarkand* (Mainstream, 2006) 109.

³ Ibid.

⁴ Martin Williams, ‘Human Rights Group in Plea for Scots Envoy; Blair is Asked to Return Ambassador to Tashkent’, *Herald Scotland* (online), 25 October 2003 <<http://www.heraldscotland.com/sport/spl/aberdeen/human-rights-group-in-plea-for-scots-envoy-blair-is-asked-to-return-ambassador-to-tashkent-1.104425>>; Murray, above n 2, 108–12.

⁵ Murray, above n 2, 122.

⁶ Nick Paton Walsh, ‘The Envoy Who Said Too Much’, *The Guardian* (online), 15 July 2004 <<http://www.theguardian.com/politics/2004/jul/15/foreignpolicy.uk>>.

⁷ Murray, above n 2, 152.

⁸ ‘EU Apologizes for Mistakes Made by Envoy in Khartoum’, *Xinhua News Agency* (Beijing), 25 August 2007; ‘Canada Right to Back Envoy in Sudan Case’, *The Star Phoenix* (Saskatoon), 29 August 2007.

⁹ ‘Canada Right to Back Envoy in Sudan Case’, above n 8.

Relations ('*Vienna Convention*').¹⁰ It is frequently invoked in international relations: receiving states are acutely aware of the option of countering diplomatic criticism of their human rights record with the charge that the envoy's conduct violated diplomatic law.¹¹

But if the rule of noninterference were to prevent diplomats from any involvement in this field, states would be deprived of one of the most important tools to bring human rights abuses to the attention of the world. This spells dire results for the people affected who may have no other way of obtaining a hearing in the international community. But it may also affect certain rights — and even duties — which apply to sending states where the protection of human rights is concerned.

It may also affect rules which apply to the diplomats themselves and which give approval to the conduct in question. Chief among them is art 3 of the *Vienna Convention*, which deals with the functions of the diplomatic mission. As will be shown, some of these tasks have considerable significance in situations in which diplomatic agents display an interest in the human rights situation of the receiving state. And it appears that, at least in recent years, diplomats have become more aware of the possibility of meeting accusations of interference with a reference to other norms enshrined in the *Vienna Convention*.¹²

The evaluation of diplomatic conduct in this field is therefore complicated by the fact that both restrictive and permissive norms have an impact on the same form of behaviour. The *Vienna Convention* itself does not provide clear guidance as to how the meeting of such divergent rules is to be resolved. But it is likely that neither the unqualified approval offered by the Canadian Minister nor the unqualified disapproval by her British counterparts can lead to a satisfactory legal assessment. What is needed is a more discerning assessment which begins with an understanding of the relevant norms and examines the position which international law adopts with regards to their coexistence.

This article seeks to provide an evaluation of diplomatic involvement in human rights by identifying the norms which have an impact on conduct of this kind and by analysing the legal consequences of their meeting. It therefore examines the rule of noninterference as the main prohibition on diplomatic behaviour in this field (Part II), but also investigates the norms which support the position of the diplomatic agent (Part III). In its final Part, the article explores ways to resolve the meeting of the norms and focuses in this regard in particular on the principle of proportionality as a 'mediating method' (Part IV).

¹⁰ *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 41(1) ('*Vienna Convention*').

¹¹ See, for instance, the 2008 case of the US Ambassador to Zimbabwe (who had made remarks about ongoing violence in that State): Tracy McVeigh, 'Tsvangirai Ready to Take on Mugabe in Election Run-Off', *The Observer* (London), 11 May 2008, 43; the 2002 case of the German Ambassador to Kenya (who had called for free and peaceful elections in that State): 'Kenya's Moi Accuses Germany of Interference in Domestic Affairs', *Agence France-Presse* (Paris), 26 October 2002; the 2011 case of the US and French Ambassadors who had visited the Syrian town of Hama following anti-government protests: 'Syria Summons US, France Ambassadors to Protest Unauthorized Activities', *Xinhua General News Service* (Beijing), 10 July 2011. In all these cases, charges of interference were made by the receiving state; in the 2008 and the 2011 cases, art 41 of the *Vienna Convention* was directly invoked.

¹² Cf SW Radio Africa, below n 52.

The article focuses mainly on the human rights of residents in the receiving state who are not nationals of the sending state. Where nationals of the sending state are concerned, more specific norms will often be applicable which have their own impact on the assessment of diplomatic conduct in this area.¹³ Diplomatic ‘involvement’ in human rights can encompass a wide range of activities — principally, the monitoring of the situation in the receiving state, analysing it and reporting on it to the sending state, engagement in verbal representations (including criticism of the receiving state and its government), but also activities such as the provision of moral and material support to parties in the receiving state and the issuing of threats in an effort to avert human rights violations. The diplomatic agents who feature most frequently when allegations of interference are made are diplomats assigned to permanent missions in interstate relations — agents, in other words, to whom the regime of the *Vienna Convention* applies. There is therefore good reason to limit the subsequent examination to this particular group of representatives, especially because their cousins in other posts — ad hoc diplomats, diplomats assigned to international organisations and consular officers — are subject to different normative systems.¹⁴ But the decisive rule of noninterference has been reiterated in each of these systems¹⁵ and cases from these fields are therefore included as illustrations where they share common ground with permanent diplomats in interstate relations.

II HUMAN RIGHTS INVOLVEMENT AND THE SPECTRE OF DIPLOMATIC INTERFERENCE

That diplomats would show concern about the plight of residents in the receiving state was not unheard of even in the days before the *Vienna Convention*. Abraham de Wicquefort recalls an incident that occurred in France in 1570 — at a time of ongoing conflict with the Huguenots in that country and two years before the St Bartholomew’s Massacre — when the envoys of certain German princes asked Charles IX of France to ‘spare his Protestant Subjects’ and faced criticism as a result.¹⁶

Another example occurred in the 1820s, when Stratford Canning, the British Ambassador to the Ottoman Empire, reportedly made representations to the Sultan to save a Muslim man who faced the death penalty for converting to

¹³ See especially *Vienna Convention* art 3(1)(b).

¹⁴ For consuls: *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) (‘VCCR’). For ad hoc diplomats: *Convention on Special Missions*, opened for signature 16 December 1969, 1400 UNTS 231 (entered into force 21 June 1985) (‘CSM’). For diplomats representing their states in international organisations or at conferences: *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, opened for signature 14 March 1975, UN Doc A/CONF.67/16 (not yet in force) (‘CRSIO’).

¹⁵ VCCR art 55(1); CSM art 47(1); CRSIO art 77(1). The rule of noninterference reflects customary international law, and it therefore applies likewise to diplomats falling under the regime of the CRSIO, which is not yet in force.

¹⁶ Abraham de Wicquefort, *The Ambassador and His Functions* (John Digby trans [1716], Maurice Keens-Soper (ed), University of Leicester, 1997) 316 [trans of: *Ambassadeur et ses fonctions* (first published 1682)].

Christianity¹⁷ — conduct which would today be considered behaviour in support of religious freedom.

But these cases are few and far between, and it would be fair to say that human rights have not been one of the main focal points of diplomatic activity until fairly recently. This situation is also reflected in the early attempts to initiate a codification of diplomatic law, beginning with the ‘Draft Codes of Diplomatic Law’ in the 19th and 20th centuries.¹⁸ These were initiatives by legal scholars to provide a set of systematic rules in the area of diplomatic law. As private projects, their authority in international law was limited, but many of the rules can be considered to reflect customary law as it existed at that time.

While several draft codes refer to the general rule against interference,¹⁹ they are less helpful on the question of whether engagement in the human rights situation of the receiving state qualifies as interference. Johann Bluntschli mentions the ‘liberty of the people’, but only with regard to diplomatic actions which could encroach on them and which diplomatic agents were therefore not allowed to adopt.²⁰ Pasquale Fiore tends to focus rather on the rights of those persons who are fellow nationals of the diplomatic agent than those who are nationals of the receiving state.²¹

The *Havana Convention regarding Diplomatic Officers* — one of the first multilateral instruments on diplomatic law — fails to provide further illumination.²² The treaty does refer to the rule on noninterference — art 12 states that diplomats ‘may not participate in the domestic or foreign politics’ of the receiving state.²³ But it is silent on the question of human rights involvement.

In light of the fact that the codification of human rights on the international level only received particular drive after World War II, this situation may not appear overly surprising. What is surprising is that it continued well into the second half of the 20th century.

When the International Law Commission (‘ILC’) in 1957 began its consideration of a draft code on ‘Diplomatic Intercourse and Immunities’²⁴ (which was to become the blueprint for the *Vienna Convention*), considerable progress had been made in international human rights law. The *Universal*

¹⁷ Sir Edwin Pears, *Turkey and Its People* (Methuen, 1911) 319.

¹⁸ The relevant parts of the various Draft Codes to which reference is made in this article are reprinted in: (1932) 26 *American Journal of International Law Supplement* 19, 19–187.

¹⁹ Cf Pasquale Fiore, ‘International Law Codified and Its Legal Sanction or the Legal Organization of the Society of States’ (Edwin M Borchard trans, Baker, Voorhis, 1918) [trans of: *Il Diritto Internazionale Codificato e la sua Sanzione Giuridica* (5th ed, 1915)] reproduced in (1932) 26 *Supplement to the American Journal of International Law* 19, 161 [484]; ‘Project of the American Institute of International Law, 1925: Project No 22 — Diplomatic Agents’ (1932) 26 *Supplement to the American Journal of International Law* 168, 169 (art 16); ‘Project of the International Commission of American Jurists, 1927: Project No VII — Diplomatic Agents’ (1932) 26 *Supplement to the American Journal of International Law* 171, 173 (art 26).

²⁰ ‘Bluntschli’s Draft Code, 1868’ (1932) 26 *Supplement to the American Journal of International Law* 144, 151 [225] [author’s trans].

²¹ See Fiore, above n 19, 244–5 [481]–[482].

²² *Convention regarding Diplomatic Officers*, signed 20 February 1928, 155 LNTS 259 (entered into force 21 May 1929).

²³ *Ibid* art 12.

²⁴ ‘Summary Records of the Ninth Session’ [1957] I *Yearbook of the International Law Commission* 1, 2 [6] (‘YILC 1957/I’).

Declaration of Human Rights had been adopted,²⁵ the *European Convention on Human Rights* ('ECHR') had been concluded and had already entered into force,²⁶ and the United Nations Commission on Human Rights had been created.

There was increasing evidence, at that stage, that human rights had begun to occupy a more prominent place in the activities of diplomatic agents. The US Ambassador to Cuba, for instance, had become the subject of criticism when he had protested against excessive force by the Batista police in restraining crowds which had turned out to greet him,²⁷ and the US Ambassador to Colombia, Philip Bonsal, was reassigned after he had criticised 'the suspension of democratic procedures' in that country.²⁸ Both events took place in 1957.

All the same, when the ILC in that year turned to the discussion of the rule of noninterference, none of its members mentioned the possibility that diplomats might wish to — or need to — become involved in human rights in the receiving state. Several members made reference to the possibility that interests of the sending state or its nationals might require diplomatic representations,²⁹ but rights of nationals of the receiving state did not feature in the examples which members introduced to illustrate the concept of interference. The locus classicus of diplomatic interference back then was still the case of the British Minister to the US in 1888, Lord Sackville, which was mentioned in several contributions³⁰ — an incident which relates to political partisanship rather than the protection of human rights.

In the draft articles on 'Diplomatic Intercourse and Immunities', the ILC contented itself on the topic of interference with the somewhat laconic statement that beneficiaries of diplomatic privileges and immunities 'also have a duty not to interfere in the internal affairs' of the receiving state.³¹ The phrase survived the subsequent debates at the Vienna Conference in 1961 and was incorporated in identical form into the *Vienna Convention*, where it now forms the second sentence of art 41(1).

Subsequent case law has not provided much assistance for the interpretation of that norm. In the jurisprudence of the International Court of Justice ('ICJ'),

²⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('UDHR').

²⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

²⁷ 'US Ambassador to Cuba Resigns', *The Times* (London), 12 January 1959, 7.

²⁸ Bart Barnes, 'Philip Bonsal Dies at 92; Last Ambassador to Cuba', *The Washington Post* (Washington), 30 June 1995 (paraphrasing by Barnes).

²⁹ *YILC* 1957/I, 145 [71], 149 [34].

³⁰ *Ibid* 147 [15], 147 [17], 147 [22].

³¹ *Report of the International Law Commission — Covering the Work of its Ninth Session*, UN GAOR, 12th sess, Supp No 9, UN Doc A/3623 (28 June 1957) ch II(II) art 33; *Report of the International Law Commission — Covering the Work of its Tenth Session*, UN GAOR, 13th sess, Supp No 9, UN Doc A/3859 (4 July 1958) ch III(II) art 40 ('*Report of the ILC to the GA*').

this provision of the *Vienna Convention* has received only marginal attention³² and the question of whether human rights involvement by diplomats falls within its remit has not been discussed.

In academic literature, on the other hand, the attitude towards this form of diplomatic conduct has traditionally been rather strict. The 1979 edition of *Satow's Guide to Diplomatic Practice*, for instance, stated that a head of a mission must 'on no account occupy himself with the interests of any but the subjects or *ressortissants* ... of his own sovereign or state, and especially not with those of the subjects of the local sovereign'.³³

Jean Salmon, in his more recent work on diplomatic law, was likewise unable to divorce himself from the traditional view, although he clothed it in somewhat more cautious terms. International law, in his opinion, seemed 'well settled' (*bien fixé*) to the degree that diplomatic agents who demanded respect for human rights risked interference in the internal affairs of the receiving state — at least in the eyes of the latter.³⁴

Observations of this kind appear to support the view taken by those states which, when faced with diplomatic involvement in human rights, were keen to invoke art 41 of the *Vienna Convention* as a restrictive norm which should govern conduct of this kind.³⁵

There may be room for a different understanding of the provision if the rule against interference is subject to certain implied limitations. It is true that limitations of this kind have been accepted in the past. The ILC commentary on the final draft articles, for instance, refers to the making of representations to protect the interests of the sending state or its nationals and states that such conduct '[did] not constitute interference'.³⁶ But where human rights observation is concerned, no such limitation has found express mention in the draft or its commentary. If such an exception were suggested, it would have to be based on sound evidence of customary international law to that effect, and such an assumption cannot be made lightly.

States have traditionally been critical of human rights involvement by diplomatic agents. An instance arising in 1848 provides an illustration. Following an incident of alleged interference by the British Minister to Spain,

³² The International Court of Justice ('ICJ') has rarely had an opportunity to touch upon art 41 of the *Vienna Convention*. In the *Tehran Hostages Case*, interference was mentioned among the 'abuses of [diplomatic] functions': *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 38–9 [84] ('*Tehran Hostages Case*'). In 2009, Honduras filed an application with the ICJ against Brazil and made express reference to art 41(1). However, following elections in Honduras, the new government informed the ICJ that it no longer wished to proceed with the application: 'Application Instituting Proceedings by the Republic of Honduras against the Federative Republic of Brazil', *Certain Questions concerning Diplomatic Relations (Honduras v Brazil)* [2009] ICJ Pleadings [11]; *Certain Questions concerning Diplomatic Relations (Honduras v Brazil) (Order)* [2010] ICJ Rep 303, 304.

³³ Lord Gore-Booth (ed), *Satow's Guide to Diplomatic Practice* (Longman, 5th ed, 1979) 450. For a change in direction, see Eileen Denza, 'Privileges and Immunities of Diplomatic Agents' in Sir Ivor Roberts (ed), *Satow's Diplomatic Practice* (Oxford University Press, 6th ed, 2009) 121, 152–3 [9.58]. See below n 154 and accompanying text.

³⁴ Jean Salmon, *Manuel de Droit Diplomatique [Manual of Diplomatic Law]* (Bruylant, 1994) 129 [197] [author's trans]. Salmon would however have allowed this right to sending states themselves.

³⁵ See above n 11 and accompanying text.

³⁶ *Report of the ILC to the GA*, UN Doc A/3859, ch III(II) art 40.

William Bulwer, the Spanish Foreign Secretary issued a letter of protest in which he provided a list of hypothetical examples which, in his view, would constitute interference.³⁷ One of the items on that list was a scenario in which the Spanish government would ‘in the name of humanity’ demand better treatment ‘of the unfortunate people of Asia’ by Britain³⁸ — conduct which today would be considered under the headings of human rights and assistance towards the realisation of self-determination.

The sensitivity of the topic has not changed since the entry into force of the *Vienna Convention*. This is apparent in cases in which diplomats have commented on the human rights record of the receiving state in general. In 2002, for instance, the French Ambassador to Haiti, Yves Gaudeul, triggered negative reactions when, during a discussion hosted by the Franco-Haitian Chamber of Commerce, he commented on certain shortcomings of the receiving state, including its perceived human rights violations.³⁹ Gaudeul subsequently had to meet with the Haitian Prime Minister to ‘exchange’, as diplomatic parlance would have it, ‘points of view regarding respect for the *Vienna Convention*’.⁴⁰

Even where particularly grave human rights violations were alleged, there is no evidence that receiving states were willing to see diplomatic conduct which concerned itself with such violations as exceptions to the rule against interference. In June 2000, for instance, the US Ambassador to Indonesia, Robert Gelbard, gave a speech at Trisakti University (Jakarta), in which he called on the receiving state to ‘bring to accountability and to justice those who were responsible for the violence in East Timor last year’⁴¹ — violence which was the subject of judicial examination by the Special Panels of the Dili District Court and was investigated under various categories of international crimes, including genocide.⁴² Gelbard, too, faced negative reactions: in Indonesia, military leaders reportedly accused him and the US of interfering in Indonesia’s internal affairs.⁴³

And when, in 1999, the US embassy in Windhoek, Namibia, released a statement to express concerns about the reported serious physical abuse of civilians in the Caprivi region and called on the Namibian government to respect

³⁷ ‘Mr Bulwer and the Spanish Government’, *The Times* (London), 26 April 1848.

³⁸ *Ibid.*

³⁹ BBC, ‘Haiti: Highlights of Radio Metropole News’, *BBC Monitoring Americas — Political*, 24 April 2002 (Source: Radio Metropole).

⁴⁰ BBC, ‘Haiti: Foreign Minister on Prime Minister’s Meeting with French Ambassador’, *BBC Monitoring Americas — Political*, 30 April 2002.

⁴¹ Robert S Gelbard, ‘Respecting the Rule of Law and Human Rights in Indonesia’ (Speech delivered at Trisakti University, Jakarta, 29 June 2000) <<http://www.library.ohiou.edu/indopubs/2000/07/02/0025.html>>.

⁴² The Special Panels of the Dili District Court were granted jurisdiction over such matters: see United Nations Transitional Administration in East Timor, *Regulation No 2000/11 on the Organization of Courts in East Timor*, UN Doc UNTAET/REG/2000/11 (6 March 2000) s 10.

⁴³ ‘US–Indonesian Relations Strained Due to Anti-Americanism’, *Associated Press* (online), 31 October 2000 <http://www.bangla2000.com/news/archive/international/10-31-2000/news_detail4.shtm>.

the civil rights of its citizens,⁴⁴ Namibia took exception to this and declared her objection to foreign diplomats who criticised security forces but did not condemn terrorist attacks.⁴⁵

In other cases, there were negative reactions when diplomats acted to protect specific rights which are today enshrined in the leading human rights conventions including the right to life;⁴⁶ freedom from racial discrimination;⁴⁷ the right to vote;⁴⁸ freedom of the press;⁴⁹ and the fairness of trial proceedings.⁵⁰

This negative attitude does not mean that the legal assessment has to adopt a similarly restrictive position. It is, in particular, possible that there are coexisting rights which favour the position of the sending state and its agents — a matter which will be discussed in more detail in Part III. But what these reactions show is that there is little agreement within the international community to the effect that human rights involvement, as such, is to be seen as an inherent limitation to the concept of interference. In that regard, it would be exceedingly difficult to

⁴⁴ See 'Namibian Government Admits Atrocities in Caprivi', *Agence France-Presse* (Paris), 12 August 1999; 'US Expresses Concern Over Human Rights Abuse in Caprivi', *Africa News* (Dakar), 18 August 1999. Freedom from torture or inhuman and degrading treatment is guaranteed under the following: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('*ICCPR*'); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978) art 5(2) ('*ACHR*'); *ECHR* art 3. On the classification of the abuse in the Namibian case as torture: see 'Namibian Government Admits Atrocities in Caprivi'.

⁴⁵ Christof Maletsky, 'US Remarks Over Abuse Rile Namibia', *Business Day* (South Africa), 20 August 1999.

⁴⁶ *ICCPR* art 6(1); *ECHR* art 2(1); *ACHR* art 4(1). An example is the 1987 case of the US military attaché to the Philippines who reportedly tried to convince government soldiers not to shoot at rebels and was accused of interference: 'US Diplomat Accused of Interfering in August Philippine Coup', *Japan Economic Newswire* (Tokyo), 22 October 1987.

⁴⁷ *ICCPR* art 26; *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 2000, ETS No 177 (entered into force 1 April 2005) art 1; *ACHR* arts 1(1), 24. In 1987, for instance, the South African Prime Minister, P W Botha, criticised Western diplomats who had 'gone out of their way to express solidarity with the black population' and whom he accused of 'meddling in' South African politics: Jim Jones, 'Botha Threat to Curb Diplomats', *Financial Times* (London), 14 August 1987.

⁴⁸ *ICCPR* art 25(b); *ACHR* art 23(1)(b); *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954) art 3 ('*Protocol 1 to ECHR*'). For cases in which diplomats called for 'fair elections': see below n 74 and accompanying text.

⁴⁹ *ICCPR* art 19(2); *ECHR* art 10(1); *ACHR* art 13(1). See, eg, the 2007 case involving the United Kingdom High Commissioner to Sri Lanka, who had visited the editor of the *Daily Mirror* (a newspaper in that country). That move was seen by commentators in connection with British concerns about the state of the freedom of expression in the receiving state (the editor had recently complained about a death threat by the Sri Lankan Defence Secretary). The High Commissioner was summoned to the office of the Defence Secretary the following day: 'British Envoy Embroiled in Sri Lanka Media Crisis', *Agence France-Presse* (Paris), 19 April 2007.

⁵⁰ *ICCPR* art 14(1); *ECHR* art 6; *ACHR* art 8. See the 1998 case of British, Australian and US diplomats in Malaysia, who were prevented from attending parts of the trial of the former Malaysian Deputy Prime Minister, Anwar Ibrahim. The Judge at the trial was quoted as saying that allowing official observers would 'amount to interference': 'Anwar Upbeat as Trial Opens', *BBC News* (online), 2 November 1998 <<http://news.bbc.co.uk/1/hi/world/asia-pacific/205764.stm>>; Julian Beltrame, 'Malaysian Politician's Trial Starts Under Cloud', *The Vancouver Sun* (Vancouver), 3 November 1998.

identify the consistency of state practice which customary international law requires.⁵¹

The fact remains that human rights involvement has never been given the status which, for instance, has been conferred on the protection of interests of the sending state. Neither were they explicitly excluded from the remit of interference at the drafting stage nor is such an exception apparent from later customary law. The truth would seem to be much simpler: the fact that there are some rules which allow this form of diplomatic conduct is merely reflective of one of many instances in which the largely unsystematic development of international law has led to divergent norms which now have an impact on the same situation.

How this meeting of the norms is to be resolved will be the subject of discussion in Part IV. But the assumption of such a meeting presupposes that there are rules which favour the position of the diplomatic agent in situations of this kind. Their identification and analysis will be the topic of Part III.

III HUMAN RIGHTS INVOLVEMENT AND THE 'FINEST TRADITIONS OF DIPLOMACY'

A *Human Rights and Recognised Tasks of the Diplomatic Mission*

When, in 2007, a number of Western diplomats faced accusations of meddling in the domestic affairs of Zimbabwe, the US Ambassador to that country, Christopher Dell, responded to the charges in a radio interview. The government of Zimbabwe, according to Dell, relied heavily on

certain Articles of the *Vienna Convention on Diplomatic Relations* about non-interference in the internal affairs of the receiving State, conveniently ignoring other Articles of the *Convention* which obligate the receiving State ... to allow diplomatic missions to ascertain ... the conditions and developments in the receiving State.⁵²

This position indicates that rules which permit or even call for certain forms of diplomatic conduct may be derived from the *Vienna Convention* itself — a consideration which furnishes a particularly strong argument for diplomatic agents in cases in which the receiving state has just affirmed its approval of that treaty by relying on its rule against interference. The norm to which Dell made reference is art 3 of the *Vienna Convention* which relates to the functions of the diplomatic mission, and it is indeed helpful to begin an examination of permissive norms in this context with the question of whether human rights involvement can be considered a diplomatic task. But there may also be rules outside the regime of diplomatic law which, in certain circumstances, may allow or mandate the involvement of sending states and their agents in the human rights of the receiving state — a topic which will be discussed in more detail in Part IV.

⁵¹ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 98 [186] ('*Nicaragua*').

⁵² Violet Gonda, Interview with Christopher Dell, US Ambassador to Zimbabwe (Radio Interview, 20 March 2007) <<http://swradioafrica.com/pages/hotseat210307.htm>>. See generally 'Foreign Diplomats in Zimbabwe Said "Unfazed" by Expulsion Threats', *BBC Monitoring Africa*, 22 March 2007 (Source: Financial Gazette).

It is true that art 3 of the *Vienna Convention* does not expressly mention human rights activities of diplomatic agents. Its first paragraph makes reference only to five functions of the diplomatic office: representation of the sending state in the receiving state,⁵³ the protection of interests of the sending state and its nationals,⁵⁴ negotiation,⁵⁵ observing conditions and developments in the receiving state and reporting back to the sending state⁵⁶ and the promotion of friendly relations.⁵⁷ That does not mean that human rights involvement cannot qualify as a diplomatic function under international law — the phrasing of the paragraph clarifies that the five named functions do not constitute an exhaustive list.⁵⁸ On the other hand, the acceptance of an additional function would presuppose its existence in customary international law. The various cases in which sending and receiving states have given widely differing assessments to human rights involvement by diplomatic agents, do, however, militate against the assumption that human rights involvement is already considered an established function of diplomatic missions.⁵⁹

Nothing, of course, prevents individual states from entering into an understanding that, in their bilateral relations, diplomatic involvement in human rights should be recognised as a function. There are in fact numerous instances in which sending states have been able to appoint members of diplomatic missions whose stated purpose was to deal with human rights affairs, or who were expressly labelled ‘human rights attachés’.⁶⁰ If the receiving state has been informed about the appointment of such members and their functions⁶¹ and has not declared the members unacceptable,⁶² it conveys the impression that it acquiesces in the sending state’s assessment of human rights work as a legitimate

⁵³ *Vienna Convention* art 3(1)(a).

⁵⁴ *Ibid* art 3(1)(b).

⁵⁵ *Ibid* art 3(1)(c).

⁵⁶ *Ibid* art 3(1)(d).

⁵⁷ *Ibid* art 3(1)(e).

⁵⁸ Article 3 of the *Vienna Convention* begins with the words ‘[t]he functions of a diplomatic mission consist *inter alia* in ...’ (emphasis added).

⁵⁹ See ‘Haiti: Highlights of Radio Metropole News’, above n 39 et seq.

⁶⁰ See, for instance, the Netherlands: Second Secretary, responsible for political affairs and human rights (‘Freedom of Association and Human Rights Organisations in Egypt’ (Report, Euro-Mediterranean Human Rights Network, May 1999)); Switzerland: human rights attaché in Colombia (‘SOS for Francisco Ramirez’, *Centro de Medios Independientes de Colombia* (Columbia), 20 October 2004); UK: First Secretary (human rights) in Nepal (‘Money for Rights’, *Nepali Times* (online), 5 July 2002 <<http://nepalitimes.com/news.php?id=5310>>); US: diplomatic agents responsible for human rights work in Argentina (Megan Rosenfeld, ‘Missing Persons, Anguished Mothers’, *The Washington Post* (Washington), 18 July 1979); and human rights attaché to Cuba (Igor Varlamov, ‘Cuban Minisrty [sic] Scolds US Diplomat Who Attended Procession’, *ITAR-TASS News Agency* (Moscow), 19 September 1998).

⁶¹ As the *Vienna Convention* requires in art 10(1)(a).

⁶² As is its right under the *Vienna Convention* art 9(1).

function. In those circumstances, it is estopped from claiming at a later stage that such a function did not exist in its relations with the sending state.⁶³

Beyond that, it is possible that diplomatic involvement in human rights constitutes, at least in specific situations, an emanation of one of the ‘traditional’ diplomatic functions to which the *Vienna Convention* refers. That possibility arises in the context of various functions, but most prominently where the task of observation under art 3(1)(d) of the *Vienna Convention* is concerned. The reference in art 3(1)(d) to ‘conditions and developments’ in the receiving state is certainly broad enough to cover the assessment of the degree to which the government of that state fulfils its obligations under international human rights law, as long as this can be done by reference to publicly accessible sources. That may include the direct involvement of the diplomatic agents, who can on occasion become eyewitnesses to relevant events.

The wording of art 3 of the *Vienna Convention* also takes into account the sometimes dynamic nature of the target of observation (‘developments’). This aspect is of some importance where the changing nature of human rights awareness is concerned — particularly in situations in which nationals of the receiving state engage in demonstrations or spontaneous gatherings to protest against human rights abuses by their government.

Reference may be made in this context to the 1997 case of Serge Alexandrov, a First Secretary at the US embassy in Minsk, who had attended a protest rally against the authoritarian president of that country.⁶⁴ Belarus reacted by expelling the American diplomat and accusing him of ‘provocative’ conduct.⁶⁵ The US, on the other hand, stressed that Alexandrov had merely been observing the demonstration and referred to it as a ‘normal diplomatic duty’.⁶⁶ Insofar as this relates to ‘mere’ observation of protest marches, it is certainly a correct assessment.

The question of whether the function of art 3(1)(d) of the *Vienna Convention* may extend even to active participation in such events is more difficult to assess. The task of observation may occasionally call for conduct which is indispensable to the collection of information, but which causes the diplomatic agent to move beyond a merely passive presence on the sidelines.

The 1996 case of Robin Meyer furnishes an illustration. Meyer was a Second Secretary at the US Interests Section in Havana, engaged in the monitoring of the

⁶³ An interesting case in this context is that of the diplomat Timothy Brown, assigned to the US Interests Section in Cuba. Brown was described as a ‘human rights attaché’: Varlamov, above n 60. The Cuban government issued harsh criticism of Brown’s work, but it can be noted that this was focused on particular aspects of his conduct (eg the alleged staging of an anti-government demonstration) and that the receiving state expressly referred to ‘interference in the internal affairs of our country’ instead of claiming that the diplomatic function of human rights observation did not exist in the first place: ‘Cuba Accuses US Diplomat of Meddling, Sowing Dissent’, *The Miami Herald* (Miami), 19 September 1998; Pascal Fletcher, ‘Expulsions Cast Cold War Shadow over US–Cuban Ties’, *Reuters News*, 23 December 1998.

⁶⁴ ‘US Envoy Expelled; Other Developments’, *Facts on File World News Digest*, 27 March 1997.

⁶⁵ Robert Kilborn, Cynthia Hanson and Debbie Hodges, ‘The News in Brief’, *Christian Science Monitor* (Boston), 28 March 1997.

⁶⁶ *Ibid* (paraphrasing by Kilborn, Hanson and Hodges).

human rights situation in the receiving state.⁶⁷ The Cuban Foreign Ministry accused her of engaging in ‘counterrevolution’ instead of ‘diplomacy’ and expelled her from the country.⁶⁸ Meyer’s activities had involved interviews with protesters in Cuba⁶⁹ — conduct, therefore, which clearly goes beyond merely passive behaviour.

And yet, conduct of this kind must be embraced by the task of observation. Limiting observation activities to the mere reception of information would reduce the function to a meaningless exercise: even the purchase of a newspaper could then no longer be embraced by the concept of observation. Neither can it be assumed that the drafters of the *Vienna Convention* envisaged such a narrow remit of observation, nor has the function been limited to that degree in customary international law. The rule of art 26 of the *Vienna Convention* (freedom of movement) corroborates the view that preliminary and ancillary acts are included in the task: the rationale for 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.⁷⁰

Another function whose exercise can have an impact on human rights involvement by diplomatic agents is that of the protection of interests of the sending state and its nationals.⁷¹ That may, at first blush, appear a strange suggestion, since diplomatic activities of this kind will primarily concern nationals of the receiving state. But it is certainly true that human rights violations in one state may have an impact on the interests of another. In this context, Biswanath Sen points out that such violations ‘may sow the seeds of a revolution whose repercussions may not be confined within the boundary of the particular state’⁷² (a finding which was dramatically confirmed by the wave of revolutions that shook the Arab world in 2011). On other occasions, human rights violations in one state set in motion a flow of refugees, which becomes a direct concern to its neighbours and, frequently enough, to other states as well. The receiving state might still consider the matter an internal affair and dismiss diplomatic representations on this point as interference. But it would find it difficult to claim exclusivity of concern.⁷³ And there are, of course, situations in which the interests of the sending state are directly concerned because its

⁶⁷ David L Marcus, ‘Saying No to Fidel: Cuban Dissidents Push for Revolution, but They Know Chances Are Dim’, *The Gazette* (Montreal), 12 October 1996.

⁶⁸ *Ibid.*

⁶⁹ Thomas W Lippman, ‘Surviving a Nightmare Inside Castro’s Cuba’, *The Washington Post* (Washington), 1 November 1996.

⁷⁰ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press, 3rd ed, 2008) 205.

⁷¹ *Vienna Convention* art 3(1)(b).

⁷² B Sen, *A Diplomat’s Handbook of International Law and Practice* (Martinus Nijhoff, 3rd revised ed, 1988) 66.

⁷³ The situation mirrors a development in the United Nations. A rule of nonintervention is recognised in the *Charter of the United Nations* (‘UN Charter’) as well — the UN must refrain from intervening ‘in matters which are essentially within the domestic jurisdiction of any state’: at art 2(7). That does not mean that the UN does not express its concern about grave human rights abuses in member states. It is the danger that a ‘refugee-creating environment’ will result in a flow of fugitives to other countries that has in the past given the UN Security Council a basis for involvement in situations of this kind: Carlyn M Carey, ‘Internal Displacement: Is Prevention through Accountability Possible? A Kosovo Case Study’ (1999) 49 *American University Law Review* 243, 246. See also SC Res 812, UN SCOR, 48th sess, 3183rd mtg, UN Doc S/RES/812(1993) (12 March 1993).

nationals who are working in the receiving state are detained there or residents of the receiving state working for companies of the sending state are mistreated, and so forth.

Reliance on art 3(1)(b) of the *Vienna Convention*, however, requires a careful assessment of the situation. A diplomat wishing to invoke this ground for human rights work may be challenged to demonstrate in what way the interests of the sending state are affected. By comparison, it may be easier to rely on the function of observation. At the same time, the range of conduct that can be based on the protection of interests is wider than that which the mere observation of events allows. A diplomat engaging in the protective task is more than an observer; it is consequently easier to base addresses to the general public, contact with the opposition and even open criticism of the government of the receiving state on this function.

There are, finally, cases in which a diplomatic agent merely represents views held by the sending state and therefore acts in fulfilment of the function of representation as enshrined in art 3(1)(a) of the *Vienna Convention*. When, for instance, the Canadian Ambassador to Ukraine, Andrew Robinson, in 2004 expressed his government's concerns over the possibility that presidential elections in the receiving state would fall below democratic standards,⁷⁴ he triggered sharp criticism from officials⁷⁵ and was subsequently summoned to the Ukrainian Foreign Ministry.⁷⁶ But there can be no doubt that diplomats in situations of this kind can rely on a well-established function which the *Vienna Convention* recognises.

And it is this function in particular which calls for a repositioning of the traditional view on diplomatic involvement in human rights, as expressed by Salmon and others. Salmon would have allowed states themselves to demand respect for human rights, but employed much more restrictive terms where human rights involvement by diplomats was concerned.⁷⁷ But it is of course possible that a sending state uses its diplomat merely as a 'mouthpiece' to voice its concerns in this area, and in those instances, a meaningful distinction between the diplomat and the sending state is no longer possible.

The significance of the tasks of the diplomatic mission is further underlined by art 25 of the *Vienna Convention*, which places a duty upon the receiving state to 'accord full facilities' for the performance of diplomatic functions. This provision primarily addresses the state, but in connection with art 3 of the *Vienna*

⁷⁴ 'Canadian Ambassador to Ukraine Reprimanded for Criticism', *Interfax News Service* (Moscow), 22 September 2004; Anna Melnichuk, 'Ukrainian Authorities Criticize Western Governments for Pressure Ahead of Presidential Vote', *The Associated Press* (New York), 23 September 2004.

⁷⁵ A spokesperson for the Ukrainian Foreign Ministry took issue with the 'prejudiced nature of [Robinson's] statements amid the election campaign, his personal opinions about the outcome of the future elections, and his doubts about the legitimacy of the executive authorities to come to power': 'Canadian Ambassador to Ukraine Reprimanded for Criticism', above n 74 (paraphrasing by Interfax).

⁷⁶ Melnichuk, above n 74.

⁷⁷ See Salmon, above n 34. Salmon does accept the potential overlap between state actions and diplomatic actions when he discusses the general concepts of 'non-immixtion' and 'non-intervention', but does not make that point when analysing the right to criticise the human rights record of a state.

Convention, it is possible to derive from it an ancillary right of diplomatic agents who can in this context demand fulfilment of art 25.⁷⁸

The connection between arts 3 and 25 of the *Vienna Convention* is of particular importance in the field of human rights — especially where nationals of the receiving state are concerned who work for a diplomatic mission of the sending state. Receiving states are not always welcoming towards the employment of their nationals and have resorted to intimidation and even arrests and trials of citizens who engaged in work of this kind⁷⁹ — as in a case in 2009 when Iran arrested several employees of the British and the French embassies in Tehran.⁸⁰

In these instances, concerns may arise that the treatment of the staff members does not conform with international human rights standards (in the Iranian case, the British Foreign Office accused Iranian authorities of failing to grant the prisoners their fundamental human rights).⁸¹ If this is the case, the receiving state not only infringes its obligations under human rights law, but also under art 25 of the *Vienna Convention*. Diplomatic agents are then entitled, on behalf of the sending state, to take a critical position on the conduct of the receiving state and to demand the fulfilment of its obligations.

If none of these provisions apply in a given case, it may be difficult for diplomats of the sending state to base their involvement in human rights on tasks enshrined in the *Vienna Convention*.⁸²

But the fact must be taken into account that the *Vienna Convention* is not the only instrument capable of sustaining interests of the sending state. Norms of general international law which protect such interests will usually address the states themselves, but where states in international relations make use of diplomatic missions as their organs,⁸³ diplomats are able to invoke these rules on their behalf. In these situations, however, they also have to observe the limitations which international law imposes on the sending state.

⁷⁸ Cf Denza, *Diplomatic Law*, above n 70, 202.

⁷⁹ See B S Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (Martinus Nijhoff, 1989) 501.

⁸⁰ James Tapsfield, 'UK Embassy Staff Arrested for "Role" in Iranian Unrest', *Belfast Telegraph* (Belfast), 29 June 2009; 'British, French Embassy Workers on Trial over Iran Protests', *CNN* (online), 9 August 2009 <<http://edition.cnn.com/2009/WORLD/meast/08/08/iran.detainee.trials/>>.

⁸¹ 'British, French Embassy Workers on Trial Over Iran Protests', above n 80; Andrew Johnson, 'Miliband's Fury as Iranian Embassy Worker is Charged with Spying', *The Independent on Sunday* (London), 9 August 2009.

⁸² Even the function of representation may not always offer an undisputed basis for diplomatic conduct. The 1993 case of the German Ambassador to Sierra Leone, Karl Prinz, may be recalled in that context. Prinz was accused of interference after he had allegedly called for the release of five arrested journalists: 'Western Diplomats Accused of Interference', *BBC Summary of World Broadcasts*, 25 October 1993 (Source: Agence France Press). The Sierra Leonean government, however, stressed that the measure had been 'directed solely at Mr Karl Prinz', and spoke at the same time of 'excellent bilateral relations' between Sierra Leone and Germany — thus indicating that it considered Prinz's behaviour a form of private conduct: Lansana Fofana, 'Sierra Leone: Politics — German Diplomat Ordered to Leave', *Inter Press Service Global Information Network* (Rome), 9 April 1994.

⁸³ On this point, see *Report of the International Law Commission — Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) 96 [4] (art 6) ('Draft Articles on State Responsibility with Commentary').

B Permissive Norms outside the Vienna Convention on Diplomatic Relations

The fact that permissive rules must exist even beyond the express regulation of diplomatic functions becomes apparent in cases in which a receiving state alleges interference in matters over which it cannot claim exclusive ownership. The most prominent of these situations arises when the matter in question is an obligation which the receiving state owes *erga omnes* — ie to ‘the international community as a whole’⁸⁴ — and in whose protection all states can therefore be held to have an interest.⁸⁵

And reference to *erga omnes* norms is typically made where human rights are involved — particularly where they have been subjected to severe threat. Protection from slavery, racial discrimination,⁸⁶ the prohibition of torture⁸⁷ and the outlawing of genocide⁸⁸ 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 and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32 [33] (*‘Barcelona Traction’*).

⁸⁵ See *ibid.* See also *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.702 (18 July 2006) [37] (*‘ILC Study Group on Fragmentation’*); Otto Spijkers, ‘What’s Running the World: Global Values, International Law, and the United Nations’ (2009) 4 *Interdisciplinary Journal of Human Rights Law* 67, 77; Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 *European Journal of International Law* 125, 165.

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* [1970] ICJ Rep 3, 32 [34]. On freedom from slavery: ICCPR art 8(1); ECHR art 4(1); ACHR art 6(1). On freedom from racial discrimination: see above n 47 and accompanying text.

⁸⁷ *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-17/1-T, 10 December 1998) [151]. On freedom from torture as a human right: ICCPR art 7; ACHR art 5(2); ECHR art 3.

⁸⁸ *Barcelona Traction* [1970] ICJ Rep 3, 32 [34].

⁸⁹ Cf *Prosecutor v Brđanin and Talić (Decision on Motion by Brđanin for Provisional Release)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 25 July 2000) [25] n 61. See *Prosecutor v Blagojević and Jokić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia Trial Chamber I, Case No IT-02-60-T, 17 January 2005) [815]; *Prosecutor v Nikolić (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60/1-S, 2 December 2003) [59]; *Prosecutor v Musema (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) [986]; *Prosecutor v Rutaganda (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [456].

⁹⁰ See Larissa van den Herik, ‘A Quest for Jurisdiction and an Appropriate Definition of Crime — Mpambara before the Dutch Courts’ (2009) 7 *Journal of International Criminal Justice* 1117, 1129. See also Lisa J Laplante, ‘The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court’s Sphere of Influence’ (2010) 43 *John Marshall Law Review* 635, 648.

This has a direct impact on the assessment of diplomatic involvement in this field: diplomats who draw attention to the commission of international crimes can invoke a powerful basis for their conduct.⁹¹

The basis is even stronger if *erga omnes* obligations confer not only a right on the sending state to claim their fulfilment, but a positive duty to do so. The identification of such duties in international law has, however, proven difficult. Where a suggestion of such an obligation has been made in the literature, both its existence and extent tend to be subject to controversy.

This is even the case where obligations arising from the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*')⁹² are concerned. Not all states are party to the treaty,⁹³ and the question can therefore be raised if, besides the 'outlawing' of genocide,⁹⁴ the duty of prevention and prosecution⁹⁵ has also attained the status of an *erga omnes* rule. Carlo Focarelli points out that in the past, even contracting states have not felt an obligation to prevent the crime.⁹⁶

The strongest case for an *erga omnes* obligation to act in the defence of human rights in the receiving state can arguably be derived from Common Article 1 of the *Geneva Conventions* of 1949.⁹⁷ Under this rule, states parties 'undertake to respect and ensure respect' for the *Geneva Conventions* 'in all

⁹¹ See, for instance, the case of the US representations in Namibia in 1999: 'US Expresses Concern over Human Rights Abuse in Caprivi', above n 44. The mistreatment of civilians in armed conflict constitutes an international crime, even if the conflict was internal in nature. For a modern codification of this concept: SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827(1993) (25 May 1993) art 2; SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955(1994) (8 November 1994) annex ('*Statute of the International Tribunal for Rwanda*') art 4. With regard to the International Criminal Tribunal for the Former Yugoslavia's jurisdiction over acts which would violate Common Article 3 of the *Geneva Conventions*: cf *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995) [89], [137]. For the regulation in the statute of the International Criminal Court: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 8(2)(c), (e) ('*Rome Statute*').

⁹² *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 1 ('*Genocide Convention*').

⁹³ At the time of writing, the *Genocide Convention* had 145 parties: *Convention on the Prevention and Punishment of the Crime of Genocide: Status* (9 May 2014) United Nations <https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTS&tabid=2&mt_dsg_no=IV-1&chapter=4&lang=en#Participants>.

⁹⁴ *Barcelona Traction* [1970] ICJ Rep 3, 32 [34].

⁹⁵ *Genocide Convention* art 1.

⁹⁶ Focarelli, above n 85, 140.

⁹⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

circumstances'. Given the universal acceptance of the Geneva regime,⁹⁸ there would be good reason to speak in this regard of norms which the international community as a whole accepted as applying to all its members.

Outside the *Geneva Conventions*, it is more difficult to identify norms stipulating a duty to act. Such a duty would have to arise from general customary international law, and it is usually not possible to find the consistency of state practice which is required for that. The reason may well be that states shy away from the consequences of such an assessment,⁹⁹ or that their different legal traditions make it less likely that they would display broadly uniform conduct with regard to such rules.¹⁰⁰

Where the ICJ itself spelled out duties arising from *erga omnes* obligations, they tended to be negative in character — in the *Wall Opinion*, for instance, the duty 'not to recognize the illegal situation' arising from the construction of the wall in Palestine, and the duty 'not to render aid or assistance in maintaining the situation created by such construction'.¹⁰¹

A particular *erga omnes* interest which may form the basis of diplomatic involvement in human rights requires special consideration — the case of peoples who are striving for the realisation of self-determination, a right which has today found entry into some of the leading human rights treaties, including the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.¹⁰²

The wording it received there makes clear that the rule comprises other, more specific interests: peoples, '[b]y virtue of that right ... freely determine their political status and freely pursue their economic, social and cultural development'.¹⁰³ It is particularly in view of its political aspects that self-determination has informed the context of diplomatic involvement in human rights. It has thus become relevant in cases where diplomats sought contact with

⁹⁸ As of 7 May 2014, the *Geneva Conventions* had 196 parties; for the current status of states parties, see International Committee of the Red Cross, 'States Party to the Following International Humanitarian Law and Other Related Treaties' (Reference Document) 6 <<http://www.icrc.org/applic/ihl/ihl.nsf/>>.

⁹⁹ In the context of Common Article 1 of the *Geneva Conventions*, Focarelli points out that a breach of the *Geneva Conventions* which does not trigger reactions by other states would result in 193 further violations of the *Geneva Conventions* (in 2010, there were 194 parties to the *Geneva Conventions*) — 'a very extreme construction which is far from being supported by state practice': Focarelli, above n 85, 171.

¹⁰⁰ See Brown, who refers to the different treatments which 'bystander responsibility' receives in different states: Bartram S Brown, 'Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq' (2004) 11 *UC Davis Journal of International Law & Policy* 23, 53–4.

¹⁰¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 200 [159] ('*Wall Opinion*').

¹⁰² 'All peoples have the right of self-determination': ICCPR art 1(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'), art 1(1). On the *erga omnes* character of the right: *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [29]; *Wall Opinion* [2004] ICJ Rep 136, 199 [155]–[156]; *ILC Study Group on Fragmentation*, UN Doc A/CN.4/L.702, 23 n 32; Iain Scobbie, 'Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* for the Responsibility of the UN for Palestine' (2005) 16 *European Journal of International Law* 941, 946.

¹⁰³ ICCPR art 1(1); ICESCR art 1(1).

the opposition in the receiving state¹⁰⁴ or where they engaged in active criticism of developments in the receiving state which they considered to endanger the realisation of that right.

In 2008, for instance, James McGee, the US Ambassador to Zimbabwe, was summoned to the Foreign Ministry of the receiving state¹⁰⁵ after he had visited the Avenues clinic (which treated victims of the political unrest in that state) and had afterwards stated that the ‘violence in Zimbabwe has to stop’.¹⁰⁶ The Zimbabwean Minister of Foreign Affairs, Simbarashe Mumbengegwi, branded the remarks as ‘interference in Zimbabwe’s internal affairs’ and referred in this context to art 41 of the *Vienna Convention*.¹⁰⁷ But there can be little doubt that the diplomatic involvement in this case was directly relevant to the political rights of the people in the receiving state, and, in particular, to impediments to their ability to freely choose their political status.

A particular difficulty arising in this field is the fact that diplomatic involvement relating to this right will almost unavoidably give the impression of support for a particular faction. It has thus proven to be one of the most fertile fields for charges of meddling. In the debates of the ILC on the rule of noninterference, several members referred to this conduct by way of example: Kisabúro Yokota (Japan) voiced the opinion that it was ‘unwarranted interference’ for an ‘ambassador to encourage or subsidize a political party in the receiving State’¹⁰⁸ and Roberto Ago (Italy) thought it an ‘improper action’ for the head of a mission to give ‘moral or financial support to a political party in the receiving State’.¹⁰⁹

But the view of the international community may have undergone a change in this regard. It is certainly difficult to ignore the many resolutions passed by the General Assembly — some of which arguably reflecting customary international law¹¹⁰ — which call for the rendering of assistance by all states to peoples

¹⁰⁴ On this point, see the 2008 incident involving the US Ambassador to Bangladesh, James Moriarty, who courted criticism when he invited the leaders of several political parties to a ‘tea party’ at his residence: ‘US Envoy Discusses Emergency with Bangladesh Leaders’, *BBC Monitoring South Asia*, 16 July 2008 (Source: The Daily Star website); Harun ur Rashid, ‘Diplomatic Norms and Some Local Diplomats’, *United News of Bangladesh* (Dhaka), 1 August 2008. It appears that the discussions concerned the state of emergency then in existence in Bangladesh and the viability of ‘credible’ democratic elections if the situation were to prevail — interests therefore which have a direct impact on the right of the people of the receiving state to freely choose their political status.

¹⁰⁵ See McVeigh, above n 11; ‘Government Summons, Warns US Ambassador McGee’, *The Herald* (Zimbabwe), 17 May 2008.

¹⁰⁶ McVeigh, above n 11.

¹⁰⁷ ‘Government Summons, Warns US Ambassador McGee’, above n 105.

¹⁰⁸ *YILC* 1957/I, 146–7 [10].

¹⁰⁹ *YILC* 1957/I, 149 [36].

¹¹⁰ For instance, see *Nicaragua* [1986] ICJ Rep 14, 99–100 [188] (on the nature of: *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/RES/2625(XXV) (24 October 1970) annex 123–4 (‘*Friendly Relations Declaration*’)).

striving for self-determination,¹¹¹ and it is understandable that commentators like Faundez feel that the situation concerning ‘intervention’ has now been reversed: where, traditionally, the involvement of third states was allowed only to assist the established government, involvement today appears to be only permitted if it assists peoples striving for self-determination.¹¹²

The need for diplomatic representation in this context becomes particularly clear if the *erga omnes* character of self-determination generates not only a common interest for the international community, but also certain duties incumbent upon the sending state. Negative duties have certainly been accepted in this regard.¹¹³ But in the *Wall Opinion*, the ICJ went further and stated that all states had the obligation to ‘see to it’ (while respecting international law and the *Charter of the United Nations*) that ‘any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination [was] brought to an end’.¹¹⁴ That wording indicates that self-determination is capable of creating positive duties for third states — a view which had earlier been expressed in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among*

¹¹¹ See, eg, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2105(XX), UN GAOR, 20th sess, 1405th plen mtg, Agenda Item 23, UN Doc A/RES/2105(XX) (20 December 1965); *Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination*, GA Res 2160(XXI), UN GAOR, 21st sess, 1482nd plen mtg, Agenda Item 92, UN Doc A/RES/2160(XXI) (30 November 1966); *The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 2649(XXV), UN GAOR, 3rd Comm, 25th sess, 1915th plen mtg, Agenda Item 60, UN Doc A/RES/2649(XXV) (30 November 1970); *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 3070(XXVIII), UN GAOR, 3rd Comm, 28th sess, 2185th plen mtg, Agenda Item 59, UN Doc A/RES/3070(XXVIII) (30 November 1973); *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 3163(XXVIII), UN GAOR, 28th sess, 2202nd plen mtg, Agenda Item 23, UN Doc A/RES/3163(XXVIII) (14 December 1973); *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 3328(XXIX), UN GAOR, 29th sess, 2321st plen mtg, Agenda Item 23, UN Doc A/RES/3328(XXIX) (16 December 1974); *Adverse Consequences for the Enjoyment of Human Rights of Political, Military, Economic and Other Forms of Assistance Given to Colonial and Racist Régimes in Southern Africa*, GA Res 31/33, UN GAOR, 3rd Comm, 31st sess, 83rd plen mtg, Agenda Item 70, UN Doc A/RES/31/33 (30 November 1976).

¹¹² Julio Faundez, ‘International Law and Wars of National Liberation: Use of Force and Intervention’ (1989) 1 *African Journal of International and Comparative Law* 85, 96. Faundez refers to the particular case of self-determination from colonial domination, but on the convergence of that situation with cases outside colonial domination, see below n 122 and accompanying text.

¹¹³ See text accompanying above n 101; *Wall Opinion* [2004] ICJ Rep 136, 200 [159]. The ICJ itself drew a connection to the right of self-determination by finding that the construction of the wall constituted a serious impediment to the realisation by the Palestinian people of that right: at 202 [163].

¹¹⁴ *Ibid* 200 [159].

States in Accordance with the Charter of the United Nations,¹¹⁵ in the 1980 Espiell Study¹¹⁶ and in several UN General Assembly resolutions.¹¹⁷

The view is not unopposed: Judge Kooijmans, in his separate opinion, stated his doubts on the opinion that the violation of *erga omnes* duties by one state must necessarily result in obligations for third states.¹¹⁸ On the other hand, if self-determination did not trigger duties of this kind, any statement about the support to be provided to peoples striving for its realisation would be no more than a political promise — hardly the kind of legal right to ‘receive support’ which the *Friendly Relations Declaration* envisages.¹¹⁹ And the support of third countries matter: peoples faced with severe curtailments of their political rights often do not have any other way to realise their right to self-determination but through outside assistance.

Such assistance does carry its own difficulties. Quite apart from the negative political repercussions that interaction of this kind can generate,¹²⁰ the fact remains that the territorial integrity of the state from which the right to self-determination is sought is likewise recognised in international law — and

¹¹⁵ ‘Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the *Charter*’: *Friendly Relations Declaration*, UN Doc A/RES/2625(XXV), annex 123–4 (The Principle of Equal Rights and Self-Determination of Peoples).

¹¹⁶ The study speaks of a ‘positive legal obligation to assist a people struggling against colonial domination’: Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN.4/Sub.2/405/Rev.1 (April 1980) [97].

¹¹⁷ See, eg, *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 2787(XXVI), UN GAOR, 26th sess, 2001st plen mtg, UN Doc A/RES/2787(XXVI) (6 December 1971) [7]. On the ‘right and duty of States’ to support self-determination: see *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN GAOR, 36th sess, 91st plen mtg, UN Doc A/RES/36/103 (9 December 1981) annex art 2(III) (which speaks of a ‘right and duty of States’: at para 2(III)(b)).

¹¹⁸ *Wall Opinion* [2004] ICJ Rep 136, 231 [40] (Judge Kooijmans).

¹¹⁹ *Friendly Relations Declaration*, UN Doc A/RES/2625(XXV), annex 123–4 (The Principle of Equal Rights and Self-Determination of Peoples); *Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, Agenda Item 86, UN Doc A/RES/3314(XXIX) (14 December 1974) annex art 7(1).

¹²⁰ One may recall that Michael Reisman, in a 1987 editorial comment, expressed the view that third states were ‘under an obligation’ to render help to the Mujahedin who were resisting the Soviet Union and the government in Kabul that was supported by the Soviet Union: W Michael Reisman, ‘Editorial Comment — The Resistance in Afghanistan is Engaged in a War of National Liberation’ (1987) 81 *American Journal of International Law* 906, 909. In 2010, US Secretary of State Hillary Clinton stated in an interview with the American Broadcasting Corporation: ‘We created the Mujahedin force against the Soviet Union. We trained them, we equipped them, we funded them, including somebody named Osama bin Laden’: Cynthia McFadden, Interview with Robert Gates, United States Secretary of Defense and Hillary Rodham Clinton, Secretary of State (Television Interview, 9 November 2010) <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4718>>.

frequently affirmed by the same instruments which emphasise the principle of self-determination.¹²¹

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 people primarily strive to fulfil their right to self-determination internally. A right to secession exists therefore only if internal self-determination has been denied to them.¹²²

These considerations shape the contours of the *erga omnes* interests which lift self-determination out of the exclusive domain of the receiving state. For the position of diplomatic agents, this means that at least the right to internal self-determination can be employed as a basis for involvement in this right, when diplomatic assistance towards its realisation is indicated.

This is of particular importance in those cases where diplomats express criticism about the political system of the receiving state,¹²³ but it also means that not all cases of contact with the opposition or assistance to a political faction can be automatically classed as interference. In the above named incident of Nuala Lawlor, for example, the values invoked by the Canadian Minister for Foreign Affairs in defence of her diplomat's conduct (freedom, democracy, human rights and the rule of law) are easily associated with the right of internal self-determination and assistance towards that goal.¹²⁴

On the other hand, situations in which the receiving state already grants the right to internal self-determination do not, in principle, allow for further diplomatic involvement in this context. Diplomats who assist a call for secession

¹²¹ See, eg, *Friendly Relations Declaration*, UN Doc A/RES/2625 (XXV), Preamble. See also *UN Charter* art 2 (dealing with principles, stating that members shall refrain from the threat or use of force inter alia 'against the territorial integrity' of any state: at art 2(4)). *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960) [6]. See also 'Conference on Security and Co-Operation in Europe' (Final Act, Organization for Security and Co-Operation in Europe, 1 August 1975) art IV.

¹²² See Rob Dickinson, 'Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet' (2009) 26 *Arizona Journal of International and Comparative Law* 547, 553. 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: *Reference re Secession of Quebec* [1998] 2 SCR 217, 287 [138].

¹²³ See, for instance, the 2004 case of *Gaudeul*: text accompanying above n 39. For the right of peoples to decide their own political development: *ICCPR* art 1(1); *ICESCR* art 1(1); text accompanying above n 103.

¹²⁴ On the particular human rights which self-determination presupposes: see below n 136 and accompanying text.

in these circumstances could therefore not be considered to have helped in the realisation of a right which international law recognises.¹²⁵

The traditional, restrictive, view on diplomatic involvement in human rights of nationals of the receiving state¹²⁶ therefore requires repositioning. The existence of *erga omnes* interests, and in particular the impact of the right to self-determination, highlight the weaknesses of the claim that diplomatic agents are invariably prevented from taking an interest in the rights of the nationals of the receiving state.

There is, however, still room for the question of whether diplomats have a basis for their involvement in the protection of *any* human right which international law recognises and any dispute that arises from its interpretation. There seems to be a considerable difference between human rights debates ignited by the ongoing commission of war crimes and those kindled by questions of whether headscarves may be worn in institutions of higher education,¹²⁷ the charging of tuition fees at universities¹²⁸ or whether a state has done enough to provide protection against unemployment.¹²⁹

A view which would envisage the making of representations by diplomats with respect to all of these matters would certainly amount to an extensive understanding of the office of the diplomatic agent and would in many cases also necessitate involvement in budgetary decisions by the government of the receiving state¹³⁰ — matters which not only affect an area which many states

¹²⁵ In a case arising in the 1980s, 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 allegedly engaged. The Australian Prime Minister severed diplomatic relations with Libya and gave diplomatic staff ten days to leave the country: Volker Epping, ‘Internationale Organisationen [International Organisations]’ in Knut Ipsen et al (eds), *Völkerrecht [International Law]* (C H Beck, 5th ed, 2004) 489; ‘Libyan Diplomats Expelled’, *Facts on File World News Digest*, 22 May 1987; ‘Libya: Australia Involved in Campaign against the Arab Nation’, *United Press International*, 21 May 1987. It would be difficult to consider the Australia of the 1980s as a state, which, through ‘subjugation, domination or exploitation’ denied the right to internal self-determination to its indigenous peoples.

¹²⁶ See Gore-Booth, above n 33 and accompanying text.

¹²⁷ See *Şahin v Turkey* [2005] XI Eur Court HR 173, 181 [17].

¹²⁸ See Katarina Tomaševski, ‘Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998–2004’ (2005) 5 *Human Rights Law Review* 205, 229; Katarina Tomaševski, Special Rapporteur on the Right to Education, *Addendum — Mission to the United Kingdom of Great Britain and Northern Ireland (England) 18–22 October 1999*, UN ESCOR, 56th sess, Agenda Item 10, UN Doc E/CN.4/2000/6/Add.2 (9 December 1999) [65]–[69].

¹²⁹ *UDHR* art 23. See also Louis B Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather Than States’ (1982) 32 *American University Law Review* 1, 45; Philip Harvey, ‘Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously’ (2002) 33 *Columbia Human Rights Law Review* 363, 367.

¹³⁰ See *ICESCR* art 2(1). Article 2(1) obliges parties to take steps ‘to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present *Covenant* by all appropriate means, including particularly the adoption of legislative measures’.

consider a classic example of their exclusive domain,¹³¹ but which also allow the argument that the receiving state is in a much better position to reach an informed decision than diplomats of the sending state.¹³²

Human rights which are at the core of *erga omnes* obligations are more restricted in number. Freedom from slavery, from racial discrimination and from torture are arguably rights whose protection has *erga omnes* character,¹³³ but it would be more difficult to consider other rights, including the right to life (by itself), in the same light.¹³⁴

Similar limitations apply where diplomatic agents act to assist in the realisation of self-determination. Self-determination certainly presupposes the existence of other rights.¹³⁵ That includes the ‘classical’ political rights — chief among them, the right to vote and to stand in elections.¹³⁶ It has been suggested that there are additional rights which are affected where self-determination is concerned — in particular, freedom of assembly and association and freedom of

¹³¹ For an example of the sensitivity of states in matters of budgetary decisions, see the 2001 case of Dan Coats, who, at his confirmation hearing for the post of US Ambassador to Germany, indicated that Germany needed to allocate more resources to the North Atlantic Treaty Organization. His remarks met with distinctive criticism by his prospective receiving state, which considered the matter to be an ‘internal German issue’: Daryl Lindsey, ‘US Ambassador Starts Off on Stern Foot with Germany’, *The Christian Science Monitor* (Boston), 6 August 2001.

¹³² It should be noted that human rights bodies themselves are willing to grant a margin of appreciation to states as far as the interpretation of certain aspects of human rights is concerned. With regard to the particular context of *ECHR* art 10(2): see *Handyside v United Kingdom* (1976) 24 Eur Court HR (ser A) [57]. But see also at [49]. See also Salmon, above n 34, 134 [205].

¹³³ See above n 86 and accompanying text.

¹³⁴ If the view is followed that the prohibition on international crimes has *erga omnes* character, then certain, but not all, violations of the right to life would be embraced by that concept. The taking of life can, for instance, constitute a crime against humanity or a war crime. But to qualify under these crime categories, certain contextual elements need to be in place as well: cf *Rome Statute* arts 7(1)(a), 8(2)(a)(i).

¹³⁵ See Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford University Press, 1997) 98; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 292.

¹³⁶ *ICCPR* art 25; *ACHR* art 23. Cf *Protocol 1 to ECHR* art 3. *ICCPR* and *ICESCR* allude to these rights when they refer to the right of peoples to ‘freely determine’ their political status: see above n 103 and accompanying text. See also ‘Charter of Paris for a New Europe’ (Charter, Conference on Security and Co-Operation in Europe, 21 November 1990) 3 <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=125321&lng=en>>: ‘Democratic government is based on the will of the people, expressed regularly through free and fair elections’. See also ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’ (Conference Document, Conference on Security and Co-operation in Europe, 29 June 1990) [6] <<http://www.internationaldemocracywatch.org/index.php/osce-declarations/349-copenhagen-document-on-the-human-dimension-of-the-csce-1990>>; Steven Wheatley, ‘Democracy in International Law: A European Perspective’ (2002) 51 *International and Comparative Law Quarterly* 225, 237. However, for a critical view, see Daniel Thürer, ‘Self-Determination’, *Encyclopedia of Public International Law* (North-Holland, 2000) vol 4, 364. Kofi Darko Asante, ‘Election Monitoring’s Impact on the Law: Can it be Reconciled with Sovereignty and Nonintervention?’ (1994) 26 *New York University Journal of International Law & Politics* 235, 276–7. On the connection between political and other rights: Randy B Reiter, M V Zunzunegui and Jose Quiroga, ‘Guidelines for Field Reporting of Basic Human Rights Violations’ (1986) 8 *Human Rights Quarterly* 628, 640; Sigrun I Skogly, ‘Human Rights Reporting: The “Nordic” Experience’ (1990) 12 *Human Rights Quarterly* 513, 519.

expression¹³⁷ — and there are good reasons to follow this view. The beneficiaries even of internal self-determination may find it difficult to determine their political status if they are prevented from the exercise of these rights.

On the other hand, self-determination is a group right and its beneficiaries are entities which fulfil the criteria of a ‘people’.¹³⁸ That constitutes a difficulty in those cases in which a diplomat has made representations because the rights of only selected individuals have been violated. The general rule here will have to be that this is not an act which assists in the realisation of a right owed *erga omnes*. But that rule must allow for exceptions: it is not uncommon that the receiving state targets individuals precisely because of their relevance to the group — the leaders of the group, say, or prominent journalists — and that restrictions of their rights then affect the exercise of self-determination by the collective. In these instances, diplomatic representations on individual human rights violations can still relate to the breach of *erga omnes* obligations.

Outside situations in which diplomatic human rights work corresponds to an *erga omnes* interest (or fulfils a recognised function), it may be difficult to identify a basis in international law for involvement in this field. Such a basis can be specifically constructed between the sending and the receiving state,¹³⁹ but it can also be derived from the provisions of a multilateral treaty.

The latter scenario is of some importance, as treaties have come into existence which allow state parties to take an interest in the protection of human rights without having to demonstrate that they have been affected by alleged violations. The underlying obligation has been elevated to a level where it is presumed to be of interest to all parties — it has become a duty *erga omnes partes*.¹⁴⁰

This is certainly the case where the *Genocide Convention* is concerned. Mention has already been made of the difficulty of considering the duty to prevent genocide (as opposed to the duty not to commit the crime) as an obligation *erga omnes*.¹⁴¹ Its status as a duty *erga omnes partes*, however, is beyond question. The ICJ spoke in this regard of an ‘obligation of States parties ... to employ all means reasonably available to them’.¹⁴² As a consequence, states need not make the case that they would be affected

¹³⁷ Shaw, above n 135, 292; Wheatley, above n 136, 240–1; Patrick Thornberry, ‘The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 101, 136. The ICJ noted that ‘the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned’: *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 32 [55]. The European Court of Human Rights noted the importance of freedom of expression for a people’s right to determine its own political fate when it stated that ‘[d]emocracy thrives on freedom of expression’: *Freedom and Democracy Party (ÖZDEP) v Turkey* [1999] VIII Eur Court HR 293, 316 [44].

¹³⁸ *UN Charter* art 1(2); *ICCPR* art 1(1); *Friendly Relations Declaration*, UN Doc A/RES/2625(XXV), annex (The Principle of Equal Rights and Self-Determination of Peoples). On the definition of ‘people’: *Reference re Secession of Quebec* [1998] 2 SCR 217, 281 [123]–[124] et seq; Elizabeth Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff, 1996) 4–5.

¹³⁹ See above n 60 and accompanying text.

¹⁴⁰ On the relationship between obligations owed *erga omnes* and obligations owed *erga omnes partes*: *ILC Study Group on Fragmentation*, UN Doc A/CN.4/L.702, 23.

¹⁴¹ See above n 98 and accompanying text.

¹⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 221 [430].

by the commission of genocide in the receiving state before they can engage in representations on this matter. Resorting to diplomatic involvement — highlighting the situation and warning of the consequences — is arguably one of the traditional methods of engaging in genocide prevention; it is certainly among the ‘means reasonably available’ to those state parties that have diplomatic representatives in the state at risk.

Of greater practical importance are those situations in which a treaty has elevated the protection of individual human rights to the level of obligations *erga omnes partes*. A prominent example for that is the *ECHR*, whose art 33 permits ‘[a]ny High Contracting Party’ to refer an alleged breach of the *ECHR* and its protocols by another state to the European Court of Human Rights.¹⁴³ The character of the duties contained in the *ECHR* was clarified by the Court in *Ireland v United Kingdom*, when it stated that the treaty created ‘objective obligations’ and allowed state parties to require the fulfilment of these obligations without having to ‘justify an interest’.¹⁴⁴

The Inter-American Court of Human Rights went even further when it applied a similar reasoning to ‘modern human rights treaties in general’, stating that they — including the *American Convention on Human Rights* — constituted treaties by which states submitted themselves ‘to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction’.¹⁴⁵

It is true that the availability of interstate complaints is often dependent on the recognition by the affected state of the supervisory body’s competence to receive such complaints.¹⁴⁶ But once such recognition exists, the affected state has then renounced its right to assert that the human rights situation in its territory is a matter that falls entirely within its internal affairs. That has direct consequences for diplomatic representations: diplomatic involvement in human rights which are owed *erga omnes partes* must be possible because the sending state can claim to have an interest in the matter.

On the other hand, diplomatic agents wishing to avail themselves of this option also have to observe the limits which the relevant conventions themselves impose or which human rights bodies authorised to interpret the relevant texts have identified. They also have to take into account the discretionary space which individual states may enjoy in their interpretation of specific aspects of individual rights.¹⁴⁷

Human rights treaties then can considerably enlarge the basis for diplomatic involvement in this area: they incorporate bases for diplomatic

¹⁴³ For other examples: see *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 47.

¹⁴⁴ *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A) 3 [239]. See Vassilis P 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? Between Evolution and Systemic Integration’ (2010) 31 *Michigan Journal of International Law* 621, 644.

¹⁴⁵ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)* [1982] Inter-Am Court HR (ser A) No 2 [29].

¹⁴⁶ See *ICCPR* art 41(1); *ACHR* arts 45(1), 45(2). See also *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 21(1).

¹⁴⁷ See above n 132 and accompanying text.

representations — even in the absence of a direct impact of a perceived violation on the sending state. But reliance on this basis requires a keen understanding of the precise interplay between rights and restrictions which emanate from the interpretation of the relevant treaties.

IV BETWEEN INTERFERENCE AND THE PROTECTION OF RIGHTS: TACKLING A DILEMMA

A *In Search of a Solution: The Problem of Prioritisation*

In 2002, the German Ambassador to Kenya, Jürgen Weerth, called on the government of the receiving state to ensure that the forthcoming elections in that state be ‘free, fair and peaceful’.¹⁴⁸ In light of the considerations discussed in Part III, the Ambassador should not have found it difficult to invoke the right to self-determination as a basis for his conduct — especially given the particular circumstances which prevailed in Kenya, including 40 years of often autocratic rule by the dominant party¹⁴⁹ and a recent history of bloodshed at the first multi-party elections.¹⁵⁰

But the fact that the diplomatic agent pursued a legitimate aim is not by itself decisive for the assessment of his conduct under international law. It merely indicates that divergent interests exist. In Weerth’s case, the interest on the side of the receiving state had certainly not been waived: the Kenyan President Daniel arap Moi reportedly requested his ‘friends from the West ... not to interfere in the internal affairs of Kenya’.¹⁵¹

What this demonstrates is that different rights, both recognised under international law, may well exist at the same time and claim an influence on the current situation. To diplomats, this presents a dilemma, for they find themselves subject to mandates which ostensibly point in very different directions.

The *Vienna Convention* itself does not offer a solution to this situation — it does not, for instance, establish a hierarchy for situations in which its rules meet with other norms of international law (as certain other multilateral treaties do).¹⁵²

Nor is it quite clear whether a hierarchical solution — one which subordinates one set of rules under another — would be an adequate method in the first place for the resolution of cases of this kind. And yet, some commentators have suggested a hierarchical method, where one of the affected rules derives from the international system of human rights. The UN Sub-Commission on the Promotion and Protection of Human Rights, for one, referred in the year 2000 to the ‘primacy of human rights law over all other regimes of international law’ and called it a ‘basic and fundamental principle that should not be departed from’.¹⁵³

¹⁴⁸ ‘Kenya’s Moi Accuses German of Interference in Domestic Affairs’, above n 11.

¹⁴⁹ Adrian Blomfield, ‘Kenyans Rejoice as Moi’s Party Loses Power’, *The Sunday Telegraph* (London), 29 December 2002.

¹⁵⁰ Matthew Green, ‘Kenya’s President Fires Deputy in Power Struggle: Election Tensions — Revolt Grows over Choice of Successor’, *National Post* (Toronto), 31 August 2002.

¹⁵¹ ‘Kenya’s Moi Accuses German of Interference in Domestic Affairs’, above n 11.

¹⁵² Cf *UN Charter* art 103.

¹⁵³ J Oloka-Onyango and Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, UN ESCOR, 52nd sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2000/13 (15 June 2000) [63].

Similar views have recently found their way into the literature where the very meeting of human rights and diplomatic obligations was involved,¹⁵⁴ so that the protection of the former regime would arguably have to take precedence over the duty of noninterference. But substantiation for these claims is rarely provided, and the establishment of a hierarchy between these norms would therefore have to be based on general rules on norm conflict in international law.

That, however, is an approach which encounters insurmountable difficulties. A hierarchy of norms would certainly exist if human rights constituted rules of *jus cogens*,¹⁵⁵ and at least for some norms of the human rights system — such as the prohibition of torture and of slavery — a convincing claim to that effect can be advanced.¹⁵⁶ But it does not follow that ancillary rules — such as the prosecution of those who violate the relevant norms, or the making of diplomatic representations in this field — enjoy the same status.¹⁵⁷ The view can indeed be supported that the very protection of human rights calls for a lesser status of ancillary rules — that, for instance, the prosecution of human rights offenders who enjoy immunity should still be barred, so that the perpetrators can be induced to engage in negotiations to resolve the situation.

However, the principal reason why a hierarchical approach is difficult to sustain lies in the fact that the meeting of the rule of noninterference with assistance to the realisation of human rights marks the intersection between two areas which are both of fundamental importance to the entire system of modern international law: the rights of the receiving state in the preservation of its territorial sovereignty encounter the interest of the international community in

¹⁵⁴ In the 2009 edition of *Satow*, Eileen Denza emphasises in the chapter on diplomatic duties that ‘international law now requires States to defend and actively protect human rights abroad’: Denza, ‘Privileges and Immunities’, above n 33, 153 [9.58]. For the position on this matter in an earlier edition: see Gore-Booth, above n 33. See also ‘The Protection of Human Rights and the Principle of Non-Intervention in the Internal Affairs of States’ (Resolution, International Law Institute, 13 September 1989) art 3 (‘Protection of Human Rights’).

¹⁵⁵ The fact that the protection of some human rights may constitute obligations *erga omnes* does not automatically convey *jus cogens* character on the respective norms. On the relationship between *jus cogens* and *erga omnes* norms: *ILC Study Group on Fragmentation*, UN Doc A/CN.4/L.702, [38]. On the effects of *jus cogens* rules on conflicting norms: at [41]; Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 *American Journal of International Law* 291, 301; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 (‘VCLT’).

¹⁵⁶ *ILC Study Group on Fragmentation*, UN Doc A/CN.4/L.702, 21 [33]. *Draft Articles on State Responsibility with Commentary*, UN Doc A/56/10, art 26 [5]. Cf Inter-American Commission on Human Rights, *Michael Domingues v United States*, Report No 62/02, Case No 12.285 (22 October 2002) [49].

¹⁵⁷ There is evidence that states and international courts and tribunals are reluctant to expand the *jus cogens* concept beyond the core obligations. In the field of torture for instance, the question may arise whether the *jus cogens* character of the core prohibition of torture would also cover the ancillary right to prosecute offenders and thus elevate that rule to a higher status than conflicting rules of immunity pertaining to state officials. For opposing views: *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [No 3] [1999] 2 All ER 97, 178 (Lord Millet), 146 (Lord Hope). See also *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 101–2 [61], 103 [66] (‘*Al-Adsani*’).

the protection of the rights of the individual.¹⁵⁸ The application of a hierarchical mechanism is therefore likely to produce unsatisfactory results: it cannot be expected that the necessary degree of consensus can be found within the international community for the prioritisation of one rule at the expense of the other.¹⁵⁹

B *Weighing the Measures, Assessing the Interests: The Advantages of a Comparative Approach*

The hierarchical approach is not the only option for the assessment of the encounter of divergent interests. Nor does it even appear to be the approach which is invariably favoured by receiving states in situations of this kind. Reference can, in this regard, be made to instances in which the hosts of the diplomatic agent highlighted a middle way which would have avoided an uncompromising decision for one of the two interests — if only to demonstrate that the relevant diplomat failed to take this path. In Weerth's case, the Kenyan President reportedly pointed out that Germany was 'going [too] deep' into the affairs of the receiving state and that her involvement had reached a 'level ... which can no longer be tolerated'¹⁶⁰ — indicating that, presumably, other more acceptable levels would have been available.

It is a distinction which plays a significant role for the assessment of diplomatic conduct under international law. An approach which avoids the assumption of a conflict of interests has a better hope of commanding support among states and among international courts and institutions which largely prefer conciliatory methods to confrontational ones,¹⁶¹ and it would 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'.¹⁶²

Dogmatically, harmonisation is best considered a technique of interpretation which takes into account the contents of the rules that have an impact on a particular situation¹⁶³ and thus avoids the assumption of a normative conflict.¹⁶⁴

¹⁵⁸ It is interesting to recall in this context that there have even been suggestions in the literature that the rule of noninterference itself ought to be considered a *jus cogens* norm: Shurshalov argued in the 1950s that noninterference in internal affairs was a basic principle and concept which rendered invalid those treaties that were in conflict with it. See Jan F Triska and Robert M Slusser, 'Treaties and Other Sources of Order in International Relations: The Soviet View' (1958) 52 *American Journal of International Law* 699, 717, citing Vladimir Mikhailovich Shurshalov, *Osnovaniia deistvitel'nosti mezhdunarodnykh dogovorov* [*The Basis of Validity of International Treaties*] (Akademiya Nauk SSSR, 1957) 142–3.

¹⁵⁹ International cooperation 'in promoting and encouraging respect for human rights' is mentioned among the purposes of the UN: *UN Charter* art 1(3). However, the sovereign equality of member states is mentioned as its first principle: at art 2(1).

¹⁶⁰ 'Kenya's Moi Accuses German of Interference in Domestic Affairs', above n 11.

¹⁶¹ See Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law* 69, 71.

¹⁶² *ILC Study Group on Fragmentation*, UN Doc A/CN.4/L.702, 25 [42].

¹⁶³ *Ibid* 8 [4]; Milanović, above n 161, 73.

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 has been well established as one of the general principles to which art 38(1)(c) of the *Statute of the International Court of Justice* makes reference¹⁶⁵ — it fills the gaps of the law¹⁶⁶ and provides a default position which applies unless states have specifically opted for a deviating regulation. Its presence has thus been recognised 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 noninterference meets with norms which permit the diplomatic conduct in question.¹⁶⁷

The identification of the particular elements which constitute the mechanism of proportionality is a more difficult task. Various tests have been suggested in the literature¹⁶⁸ and in the courts as aspects of the assessment which proportionality requires,¹⁶⁹ 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 has already been made when the divergent norms were discussed — the rule of noninterference as reflected in art 41(1) of the *Vienna Convention* and the rights on the side of the sending state which this norm encounters. But proportionality also requires an assessment which takes into account the parameters of the particular situation in which rights and

¹⁶⁴ On the presumption against norm conflict in international law: see Milanović, above n 161, 98. Harmonisation derives its support from the practice of international courts: see, eg, *Al-Adsani* [2001] XI Eur Court HR 79, 100 [55], with reference to *Loizidou v Turkey* [1996] VI Eur Court HR 2231, 513, 526 [43]; *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 182 [41]. But the principle is also supported in the literature: cf C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, 427–8. 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* (Martinus Nijhoff, 2003) 25 et seq, 34 et seq. But the method of finding a way which reconciles apparently conflicting rules appears to be the adoption of an understanding which allows coexistence — this, however, is a task of interpretation. See also *VCLT* art 31(3)(c); and on this: Tzevelekos, above n 144, 621, 631, 644 (with further references).

¹⁶⁵ On this, see Thomas M Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 *American Journal of International Law* 715, 716; Riccardo Pisillo Mazzeschi, 'Book Review: *Il Principio della Proporzionalità nell'Ordinamento Internazionale* by Enzo Cannizzaro [The Principle of Proportionality in the International Order]' (2002) 13 *European Journal of International Law* 1031, 1035 (with reference to Cannizzaro's work).

¹⁶⁶ Cf Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law — In Comparative Perspective' (2007) 42 *Texas International Law Journal* 371, 404.

¹⁶⁷ For the general applicability of proportionality in these fields, see Paul Behrens, 'Diplomatic Interference and Competing Interests in International Law' (2012) 82 *British Yearbook of International Law* 178, 226–7.

¹⁶⁸ Han Xiuli, 'The Application of the Principle of Proportionality in *Tecmed v Mexico*' (2007) 6 *Chinese Journal of International Law* 635, 636–7. Cf Andenas and Zleptnig, above n 166, 382, 388.

¹⁶⁹ *Bartik v Russia* [2006] XV Eur Court HR 111, 127 [46] ('*Bartik*'); *Matthews v Ministry of Defence* [2002] EWHC 13 (QB) (22 January 2002) [35] ('*Matthews*'). Cf *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 (18 March 2003) [32].

obligations are claimed. That includes a reflection on future developments as long as they are foreseeable,¹⁷⁰ such as the threats to which the rights a diplomatic agent strives to protect may be subjected in the future. An illustration would be a situation in which a political party has already expressed a clear hostility towards an ethnic group in the receiving state, and is expected to reach a position of influence after forthcoming elections in that state.

The relevant measure must show some form of connection to the aim which it is said to pursue:¹⁷¹ at the very least, the means employed must, in general, be capable of achieving it. If, therefore, the declared aim of diplomatic human rights involvement is assistance towards the realisation of self-determination, while the measure in fact merely protects rights of an individual which are unconnected to that interest, it would be difficult to demonstrate that the necessary connection between measure and aim had been present.

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’¹⁷² and that of the ‘cost-benefit analysis’.¹⁷³

¹⁷⁰ 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 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 the context of the *Agreement on Technical Barriers to Trade*, the identification of the ‘legitimate objective’ also has to take into account future risks (‘the risks non-fulfilment would create’): *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A art 2.2 (‘*Agreement on Technical Barriers to Trade*’).

¹⁷¹ Phrased as ‘rationally connected’ to the objective: *Matthews* [2002] EWHC (QB) 13 (22 January 2002) [35]. In *Bartik*, it was found that the measure must be ‘appropriate’ to fulfil the function: *Bartik* [2006] XV Eur Court HR 111, 127 [46]. See also *Criminal Proceedings against Rémy Schmit* (C-240/95) [1996] ECR I-03179, [24] (‘*Rémy Schmit*’). Reference is also made to the ‘suitability’ of the measure for the purpose: see Han, above n 168, 636. There does not appear to be much of a difference in the practical application of these parameters: Andenas and Zleptnig, above n 166, 388 (with reference to *Rémy Schmit* (C-240/95) [1996] ECR I-03179).

¹⁷² The ‘least restrictive means’ test has been accepted in various branches of international law, including international humanitarian law (cf *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 35(2) (‘*Additional Protocol I*’), with reference to ‘superfluous injury or unnecessary suffering’; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 257 [78] (‘*Nuclear Weapons Opinion*’); Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) 396 [1395]); human rights law (see Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) 19 [8.2] (‘*C v Australia*’); *AD v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 28680, 16 March 2010) [89], [91]); trade law (see Panel Report, *United States — Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 - 36S/345 (16 January 1989, adopted 7 November 1989) [5.26], with regard to: *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) art XX). See also *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A art 5(6), n 3 (‘*Agreement on the Application of Sanitary and Phytosanitary Measures*’); and, prominently, EU/Community law (see *The Queen v Minister for Agriculture, Fisheries and Food ex parte Fedesa* (C-331/88) [1990] ECR I-4023, I-4063 [13] (‘*Fedesa*’); *Stichting Zuid-Hollandse Milieufederatie and Stichting Natuur en Milieu v College voor de toelating van bestrijdingsmiddelen* (C-174/05) [2006] ECR I-2443, I-2457 [28] (‘*Stichting*’)).

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.

Where diplomatic involvement in human rights is concerned, this test has been employed by representatives on both sides of the divide. The sending state and its agents tend to advance the assertion that the relevant conduct had included a relatively low level of involvement and could thus not be properly classed as 'interference'. Five years after the Weerth case, the British High Commissioner to Kenya, Adam Wood, emphasised at a press conference that Britain would be guided by the ban on diplomatic interference in the forthcoming Kenyan elections and that she would 'play an impartial role' in them.¹⁷⁴ He did, however, refer to a less intrusive method that would be adopted (the monitoring of the political situation in the country), and did, similar to his German counterpart, express his expectation that the Electoral Commission 'conduct the election in a free and fair atmosphere'.¹⁷⁵

And when, in 1999, the Deputy Prime Minister of Malaysia expressed his view that diplomats were committing interference by 'offering support to the opposition' in order to topple the incumbent government, the press officer of the US embassy strongly rejected the allegations and stated that the embassy did not provide 'funding for election-related activities in any way, shape or form'.¹⁷⁶ But he, too, referred to a less intrusive method which embassy officials felt free to adopt: the attending of events both by the ruling party and the opposition, a task to which he referred as the exercise of a 'normal diplomatic function and an expression of our interest in the democratic process in Malaysia'.¹⁷⁷

But receiving states, too, have shown an awareness of the availability of other measures in the field, and have on occasion used their existence in an effort to

¹⁷³ 'Comparative analysis', like the 'least restrictive means' test, makes an appearance in various branches of international law, including: international humanitarian law (see *Additional Protocol I* arts 57(2)(a)(iii), 51(5)(b); Pilloud et al, above n 172, 476–7 [1598] (art 40), 648 [2079] (art 53), 672 [2169] (art 56); Judith Gale Gardam, 'Proportionality and Force in International Law' (1993) 87 *American Journal of International Law* 391); human rights law (Cf *Maslov v Austria* (European Court of Human Rights, Grand Chamber, Application No 1638/03, 23 June 2008) [68]; *Chassagnou v France* (1999) III Eur Court HR 858 [112]; *Dudgeon v United Kingdom* (European Court of Human Rights, Plenary Court, Application No 7525/76, 22 October 1981) [53]; *Handyside v United Kingdom* (European Court of Human Rights, Plenary Court, Application No 5493/72, 7 December 1976) [49]; *C v Australia*, UN Doc CCPR/C/76/D/900/1999, 13 [4.28]); EU/Community law (*Fedesa* (C-331/88) [1990] ECR I-4023, I-4063 [13]; *Stichting* (C-174/05) [2006] ECR I-2443, I-2457 [28]). There is some indication that it also plays a role in certain areas of trade law, cf Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS/161/AB/R, WT/DS169/AB/R, AB-2000-8 (11 December 2000) [164].

¹⁷⁴ 'Britain to Remain Impartial in Kenya's General Elections — Envoy', *BBC Monitoring Africa*, 5 September 2007 (Source: Tobby Otum, 'Polls: UK Pledges to Remain Neutral', *The People*, 5 September 2007).

¹⁷⁵ *Ibid* (paraphrasing by Otum).

¹⁷⁶ 'Malaysia Accuses Diplomats', *BBC News* (online), 24 November 1999, <<http://news.bbc.co.uk/1/hi/world/asia-pacific/534847.stm>>.

¹⁷⁷ *Ibid*.

strengthen charges against the relevant diplomatic agent. In the above mentioned case of Nuala Lawlor,¹⁷⁸ the accusations of interference which the Sudanese government made included a reference to the fact that available, less intrusive methods, had not been adopted. Lawlor had sought direct contact with the security services, ‘rather than going through diplomatic channels’¹⁷⁹ — a phrase which is not uncommon in situations of alleged interference.¹⁸⁰

To a degree, distinctions of this kind have also found their way into academic opinion on appropriate diplomatic conduct. Richtsteig, when talking about diplomatic monitoring of political demonstrations (an activity which is often directly linked to a people’s attempt to achieve the realisation of their human rights), underlines the importance of differentiating between ‘tacit observation’ and conduct that could be misunderstood as ‘ostentatious partisanship’ and provocation.¹⁸¹ Here, too, the juxtaposition of two alternatives occupies a significant position and it is the less intrusive alternative that appears to find greater acceptability.

The principal difficulty of the test lies in the fact that, if applied in this basic form, it would place a powerful weapon in the hands of the receiving state which might be used for purposes other than legal assessment. Less invasive alternatives can, after all, often be found.

In this regard, a 2009 case involving the US Ambassador to Afghanistan, Karl Eikenberry, may be recalled, who was accused by the Afghan President Hamid Karzai of ‘interference’ in electoral matters after he had attended a press meeting given by a contender in the forthcoming presidential elections.¹⁸² Karzai, too, referred to alternatives which were open to diplomatic observers: he made clear that he did not, in principle, take exception to their presence at meetings of political candidates. What he found objectionable was their attendance of meetings at which the platforms of these candidates were discussed or announced.¹⁸³

That, however, is a differentiation which could hardly rely on general acceptance within the international community. It was certainly not a view which the sending state shared, which was quick to defend Eikenberry’s conduct and did not appear to see anything out of the ordinary in the diplomat’s activities.¹⁸⁴ What is more, restrictions of this kind can obstruct diplomatic conduct to a considerable degree; reference to less intrusive means might even be made in situations in which diplomatic representations concern matters of outstanding

¹⁷⁸ See above n 8 and accompanying text.

¹⁷⁹ Estanislao Oziwicz, ‘Canada Ejects Sudanese Diplomat’, *The Globe and Mail* (Toronto), 29 August 2007.

¹⁸⁰ Cf Lucas Barasa, ‘Criticism that Rubbed Officials the Wrong Way’, *AllAfrica* (Nairobi), 3 February 2005.

¹⁸¹ Michael Richtsteig, Vienna Convention on Diplomatic and Consular Relations — *Legislative History, Commentary, Practice* (Nomos, 1st ed, 1994) 22 [trans of: *Wiener Übereinkommen über Diplomatische und Konsularische Beziehungen. Entstehungsgeschichte, Kommentierung, Praxis*] [author’s trans] (in the context of art 3(1)(d)).

¹⁸² ‘Karzai Protest’s US Diplomat’s Presence at Rival’s Meeting’, *Indo-Asian News Service* (New Delhi), 29 June 2009.

¹⁸³ *Ibid.*

¹⁸⁴ Khwaja Baseer Ahmad, ‘Meet Poll Contenders thru Govt, US Envoy Told’, *Pajhwok Afghan News* (Kabul), 23 June 2009.

importance and urgency, such as the development of international crimes in the receiving state.

International law, however, does recognise a corrective mechanism for this test of proportionality which introduces a limit to which calls for less intrusive means can effectively be made.¹⁸⁵ It consists of the fact that the alternative measure must reach at least an equal degree of efficiency to achieve the objective which is pursued through the adopted measure.¹⁸⁶

The precise understanding of ‘efficient measures’ can ultimately be determined only on the merits of the individual case. Situational parameters may lead to surprising results: in some situations, an impending grave violation of human rights might only be effectively countered with a threat of economic sanctions or means with similarly intrusive consequences; in other situations — especially if the diplomat maintains particularly good personal relations with the administration of the receiving state — a private talk may be the least disruptive, yet most efficient instrument in the hands of the diplomatic agent.

There is, at any rate, room for concern if the assessment which one of the parties accords to the diplomatic measure would be tantamount to the disappearance of the core character of one of the legitimate interests. That, indeed, is the main difficulty that arises in the Eikenberry case. The extensive understanding of the least restrictive means test which Karzai appeared to follow may well envisage measures which the receiving state would not find particularly troublesome. But they would not allow the diplomatic agent to engage in any meaningful way in the function of observation which the *Vienna Convention* seeks to protect. The less intrusive means would hardly approach the level of efficiency which the adopted measure promised.

In considerations of proportionality, the least restrictive means test is often joined by another examination — that of the cost-benefit analysis¹⁸⁷ (also called ‘proportionality *stricto sensu*’ or ‘true proportionality’¹⁸⁸). Cost-benefit analysis — a test which has been accepted in various branches of international law¹⁸⁹ — calls for a relationship of proportionality between the advantages 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,¹⁹⁰ for an assessment of this kind would presuppose a hierarchical relationship between the norms concerned and thus reintroduce the challenges which accompany this approach.¹⁹¹ What cost-benefit analysis must involve is a more detailed consideration: an analysis which explores the way in which the diplomatic measure has shaped the relevant interests. That means, on the one hand, the identification of the negative impact of the measure on the affected

¹⁸⁵ On the acceptability of this restriction in various branches of international law: see Behrens, above n 167, 235.

¹⁸⁶ Ibid.

¹⁸⁷ Cf Andenas and Zleptnig, above n 166, 388.

¹⁸⁸ Han, above n 168, 637.

¹⁸⁹ Behrens, above n 167, 237.

¹⁹⁰ But see Pilloud et al, above n 172, 392 [1389] (arguably supporting a different direction in international humanitarian law).

¹⁹¹ See above n 155 et seq and accompanying text.

interest, and, on the other hand, the identification of the benefit which the decision is expected to carry.¹⁹² What the analysis also includes is an understanding of the diplomatic measure within the framework of its situational parameters. Issues which have an impact on the assessment include 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. The combined weight of these considerations may well tip the scales in favour of the diplomatic measure.

This is a point which the Institute of International Law appreciated when, in its 1989 study on human rights and nonintervention, it found that ‘diplomatic’ and other measures were ‘particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations’.¹⁹³ It is certainly true that violations of this kind would constitute a serious danger to recognised interests and may often outweigh the negative effect which diplomatic measures have on the competing interests of the receiving state.

In that context, a recent case concerning the US Ambassador to Swaziland, Maurice Parker, may be recalled. When the British government in 2008 stopped a licence for the sale of helicopters, machine guns and armoured cars to Swaziland, Parker wrote a dispatch to the US State Department, noting that ‘end use concerns’ had apparently been the reason behind the British decision, including the possibility that the Swazi government intended to ‘build up domestic capability to deal with unrest’.¹⁹⁴ When the cable was published by the WikiLeaks website in 2011, the Principal Secretary in the Ministry of Defence of Swaziland accused Parker of interference in the internal affairs of the receiving state.¹⁹⁵

However, in light of the circumstances of the case, it would be difficult to claim that the ambassador’s actions had amounted to disproportionate conduct. In this context, cost-benefit analysis has, on the one hand, to consider the negative impact which the measure exercised on the internal affairs of the receiving state. Given the fact that the message was not even intended for observers other than the recipient, its immediate effect must be considered negligible, and even its eventual publication does not seem to have caused much disturbance within Swaziland. On the other side of the equation is the benefit accruing to the sending state — which in this case consisted not only of the reception of information on matters of trade and defence, but also of a warning of human rights concerns attaching to the receiving state. In view in particular of the fact that reflections on the repressive nature of the Swazi regime did hardly

¹⁹² See Andenas and Zleptnig, above n 166, 390 (arguing that the ‘effects of a measure’ must not be ‘disproportionate or excessive in relation to the interests affected’).

¹⁹³ ‘Protection of Human Rights’, above n 154, art 2(3). The Institute of International Law’s treatment of diplomatic measures was, however, not entirely consistent. Its art 3, for instance, considered ‘diplomatic representations’ to be ‘lawful in all circumstances’, but it subjected diplomatic measures in arts 2(2) and 2(3) to certain criteria.

¹⁹⁴ James Ball, ‘UK Blocked \$60m Arms Deal over Fears of Iran Link — Firm Refused Licence for Sale to Swaziland in 2008 WikiLeaks [sic] Cable Spells out Possible Destinations’, *The Guardian* (London), 24 February 2011.

¹⁹⁵ ‘Swaziland: Govt and Secret Arms Deal’, *AllAfrica* (online), 4 March 2013 <<http://allafrica.com/stories/201303041925.html?viewall=1>>.

live in the the realm of speculation — in the month preceding the attempted arms trade, the Swazi government had declared the principal opposition party a terrorist organisation and had arrested its leader¹⁹⁶ — it would be difficult to consider the benefit as anything other than significant, and the diplomatic measure thus as justified by the gravity of the threatened violations of human rights. It is an assessment which appears to be well aligned with the suggestions of the study by the Institute of International Law.¹⁹⁷

The weakness of that study must be seen in the fact that there are, of course, situations in which the costs outweigh the benefits. The rendering of material (or even 'just' moral) support to factions within the receiving state, for instance, carries risks which are easily underestimated. Its consequences may well include the creation of unrest and even armed uprisings — especially if the factions are revolutionaries who act in the belief that they now enjoy the support of the sending state.

In other situations again, both costs and benefit weigh heavily on the scales, and an accurate analysis may therefore require a meticulous application of the criteria which have been identified above.

At the same time, it must be said that this kind of detailed consideration has, that far, not enjoyed great popularity in diplomatic relations. The field is still dominated by rather vague phrases, including the ubiquitous charge of 'engagement in activities incompatible with the diplomatic status'.¹⁹⁸ The reasons for that are not difficult to understand: a detailed (and public) debate on the underlying conduct is likely to exacerbate an already tense situation between the states concerned. What is more: it may prove embarrassing to the receiving state to embark on a precise analysis of the costs and benefits of the diplomatic measure in cases in which the international community can be expected to side with the agents of the sending state.

However, given the increased focus on human rights considerations within the international community and the stronger awareness by diplomatic agents of their own position and the legal norms that allow them to take a more active role

¹⁹⁶ See Ball, above n 194.

¹⁹⁷ See above n 193 and accompanying text.

¹⁹⁸ Charges of this kind regularly arise in situations in which personal conduct by a diplomatic agent forms the basis of a negative reaction by the receiving State. For the particular field of human rights involvement see for example the 1998 case of the US human rights attaché in Cuba Timothy Brown, whose attendance at a Catholic procession triggered charges that members of the US interest section were engaging in activities 'incompatible with the diplomatic status': Varlamov, above n 60. When a US diplomat in Belarus in 1997 participated in an anti-government rally, the Belarusian authorities referred to an action "incompatible with his diplomatic status": 'Diplomat From US Expelled by Belarus After Protest Rally', *The New York Times* (New York), 24 March 1997 <<http://www.nytimes.com/1997/03/24/world/diplomat-from-us-expelled-by-belarus-after-protest-rally.html>>. In the 1996 case of Robin Meyer (see text accompanying above n 67), Cuban authorities, too, referred to 'activities "incompatible with her diplomatic status."': 'Cuban Diplomat Expelled From US', *CBS News* (online), 18 February 2000 <<http://www.cbsnews.com/news/cuban-diplomat-expelled-from-us/>>

And when Poland, in 1985, expelled the US diplomats William Harwood and David Hopper, who had reportedly participated in an anti-government demonstration, the accusation was apparently that they had engaged in activities incompatible with their political status: Christopher Bobinski, 'Poles Expel US Diplomats Over Solidarity May Day Protest', *Financial Times* (London), 4 May 1985, 2; 'Poland and USA Expel Diplomats', *BBC Summary of World Broadcasts*, 6 May 1985.

in the human rights of the receiving state, it is likely that the meeting of the underlying interests will receive greater appreciation in the future.

Under these circumstances, proportionality, and cost-benefit analysis in particular, offers a logical solution for a genuine need. For the meeting of divergent norms that so often characterises the context of diplomatic human rights work, it provides a mechanism which avoids the often destructive consequences of confrontational approaches while at the same time appreciating the respective values embodied by the affected interests. By according them a specific value under precise situational parameters, it paves a way which allows the core contents of the competing interests to survive to the greatest possible extent that international law accepts.

V CONCLUDING THOUGHTS

Diplomats who are involved in the promotion of human rights in the receiving state are not always selfless Samaritans. Human rights can be invoked as a basis for a wide range of aspects of diplomatic conduct, and the possibility cannot be excluded that diplomatic agents who, for instance, seek contact with the opposition or sponsor political parties, engage in these activities at least partly for partisan political motives.

There is therefore good reason to appreciate the particular value which international law expresses through the rule of noninterference — a value which does not disappear because the need to protect human rights has been invoked as the reason for diplomatic actions.

But this also means that a hierarchical approach — one in which one of the relevant interests has to give way to the other — is ill-suited for the assessment of situations of this kind. The rules which have been discussed in this context are all recognised under international law and carry significance in their own right. These are considerations which call for the application of an evaluative method which allows the core characters of the relevant interests to survive. A suitable mechanism is provided by the application of the principle of proportionality, whose principal advantage lies in its appreciation of the inherent values of each rule and the fact that it accords them a specific weight only after taking into account the parameters of the particular situation.

As states and their organs display greater awareness of the underlying interests and begin to counter rules of the *Vienna Convention* with other norms of the same instrument, it becomes likely that the assessment of these encounters will become more and more detailed. Both tests of proportionality — that of the least restrictive means and cost-benefit analysis — offer an appropriate way forward in this development, by weighing up the respective interests in the shape they received through the adoption of the relevant diplomatic measure.

In everyday diplomatic practice, however, the danger may be not so much the potential for abuse which reliance on human rights concerns provides to diplomatic agents, but their reluctance to involve themselves in the human rights situation of the receiving state even when this is indicated.¹⁹⁹ In spite of the various examples of ‘involved diplomats’, to which mention has been made above, the world of diplomatic relations still knows too many cases of the

¹⁹⁹ Cf Murray, above n 2, 108.

diplomatic bystander who tends to restrict his day-to-day contacts to figures in government and establishment and rather shies away from taking an active interest in the situation of the people 'on the ground'.

But the need for diplomatic involvement is very real. It derives from a number of reasons. First, the diplomatic office today cannot be adequately fulfilled if diplomats are prevented — or prevent themselves — from monitoring the human rights situation in the receiving state. But at a time when grave violations of human rights have become a universal concern, diplomatic agents must also be able to elevate these situations to topics of discussion, negotiation and criticism in their day-to-day work. They are supported in this endeavour by norms of international law which permit, and sometimes even call for, conduct of this kind.

Secondly, in the majority of cases, diplomatic human rights work still constitutes a fairly low level of involvement by the sending state. It very often represents an important stage between inaction and more dramatic measures. The fact bears observing that a wide range of options are at the disposal of states wishing to address human rights violations in other states. They may withdraw aid, resort to other sanctions, suspend cultural ties, even cut diplomatic relations or resort to litigation. In cases of crimes falling under universal jurisdiction, the sending state may decide to prosecute nationals of the receiving state, if they are suspected of perpetrating such crimes, in its own courts. In grave cases, the sending state might lobby the Security Council for the adoption of measures involving the use of force. *Per se*, none of these actions violate international law. It would be strange if a state could resort to them while its diplomats were prevented from raising the underlying human rights violations with the government of the receiving state.

Thirdly, the people in the receiving state who are subjected to such violations may often have no other way to realise their rights but through the assistance of other states. In that context, the help provided by diplomatic agents may often be not only the first, but also a particularly effective step in the involvement of the sending state. The more dramatic measures outlined above risk the creation of counterproductive results: once the alleged violations have become a matter of public discussion in the international community, the receiving state loses face if it admits any wrongdoing or implements changes in the existing system. Diplomatic representations, which often involve personal discussions with the government of the receiving state, can avoid these consequences while still conveying the message that the sending state takes the matter seriously. That does not mean that the receiving state will, in these situations, feel no disturbance at all: diplomatic involvement can after all, extend to serious actions, including sharp criticism and the threat of sanctions. But to individuals and peoples affected by human rights violations, they offer a realistic hope for a change in the current circumstances. In the international order of things, the diplomatic gadfly is a necessary beast.