

Diplomatic asylum and extraterritorial *non-refoulement*

The foundational and enduring contribution of Latin America to extraterritorial human rights obligations

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Introduction

Diplomatic asylum—a state offering refuge in its diplomatic premises in a foreign state to an individual requiring protection from that foreign state, as happened with Julian Assange in the Ecuadorean Embassy in London—is a practice long associated with Latin American States (Vieira 1961; Planas-Suárez 1953). Although not usually thought of in this way, it can and should be viewed as an extraterritorial form of human rights protection. Whether and to what extent obligations to provide such protection exist are contested, including, notably, in Europe. At the same time, it is often the European region that is commonly understood to have led jurisprudential developments here, via the case law under the European Convention on Human Rights (ECHR). The present chapter challenges this narrative. The Latin American region, through its much earlier normative commitment to providing diplomatic asylum, should be regarded as having paved the way for the concept of extraterritorial human rights protection. This set a precedent that would, much later, become understood in terms of an obligation to provide such protection in international human rights law, including European human rights law. Moreover, the most recent, contrasting developments in Inter-American and European human rights jurisprudence regimes suggests that the former is now advocating a more protective approach on this subject whereas the latter is potentially pulling back from certain protections.

Linking ‘diplomatic asylum’ to human rights law

Diplomatic asylum involves, in effect, the operation of the concept of *non-refoulement*—the idea that a state does not transfer an individual from its control, to the space (usually) of another state, when there is a risk of human rights abuse in that space. An obligation to this effect (with important variations) exists expressly in the Refugee and Torture Conventions, and has been read into other human rights treaties.

As this concept is being invoked by a state in its embassy in a foreign country, it is necessarily extraterritorial as far as that state is concerned. Contrary to what is sometimes suggested, diplomatic premises are not somehow discrete territorial enclaves of the foreign states involved. Thus situations like that of Julian Assange in the Ecuadorean Embassy operate in the arena of *extraterritorial* human rights protections.

European and Latin American contributions to international human rights jurisprudence

As far as extraterritorial protections operating in international human rights law is concerned, the story told by the predominantly European, Europe-based commentators is that this is a relatively recent area of normative development (e.g. Milanovic 2011, pp. 1, 4–5; Wallace 2019, p. 1). The relevant jurisprudential authority crystallized long after the adoption of the early, foundational international instruments, notably through decisions under the ECHR mostly from the 1990s onwards with the main decisions about northern Cyprus.

This story disregards important decisions of the Organization of American States (OAS), such as the 1999 *Coard* decision about the US invasion of Grenada. It also overlooks decisions by the UN Human Rights Committee about situations in Latin America, such as the 1981 *Lopez Burgos* and *Celiberti de Casariego* decisions ('Views'), concerning the kidnapping of individuals by Uruguay in Argentina and Brazil (UN Human Rights Committee 1981a; 1981b).

But more fundamentally, such an account is only possible by adopting a siloed view of the subject-matter coverage of international law, whereby human rights protections only exist in international human rights law.

This exclusive focus paves the way for the following view, again amongst Europe-based international lawyers. It is the 'European' region (defined broadly—the Council of Europe (CoE)) that made the most significant, and well-developed, contribution to the protection of human rights in international law (e.g. Harris et al. 2018, pp. 35–36; Milanovic 2011, p. 4). This is because of the relative significance accorded to the jurisprudence of the CoE Human Rights mechanisms compared to the jurisprudence of other equivalent mechanisms, including the OAS bodies. This significance is not simply a matter of comparing the position within each regime. It is also because of a common assumption that the general approach taken in decisions made under one regime is potentially transferrable to other regimes with similar norms. Through such transference, the European regime contributed to international human rights law jurisprudence generally (e.g. Harris et al. 2018, p. 36; Heyns and Killander 2013, p. 688; Bantekas and Oette 2020, pp. 243–244, 249). In consequence, there has been a process of universalization from the particular—globalizing from the European region.

Such a narrative has purchase in Europe partly because it feeds into and reflects broader European tropes about European civilizational exceptionalism, and the bringing of these exceptional European standards to other parts of the world via their transfer to other regional normative systems and/or the globally-applicable normative system. This fits into one narrative associated with the broader theory and practice of colonialism and post-colonialism, both generally and in how these practices relate to international law. According to this narrative, in the colonial era, European notions of statehood, sovereignty and territorial title were universalized via colonial subjugation in a particular fashion. Certain non-Europeans were regarded to lack what Europeans possessed, paving the way for European domination. Specifically, their societies were conceptualized by Europeans as lacking statehood, and so, in consequence, lacking sovereignty and title to their land. Such land was therefore *terra*

nullius and could be acquired by Europeans. At the same time, the international legal concept of a racist standard of civilization—which Europeans met, and certain non-Europeans fell below—used as the alibi for the non-application of the foregoing entitlements to such non-Europeans, was deployed as the basis for what Europeans would and should (legally, in certain international law arrangements of trusteeship) bring to such non-Europeans—the ‘civilizing mission’.

There is much to challenge in the narrative of the exceptional contribution of European human rights law, notably through a greater appreciation of the other regimes of international human rights law. But there is a more fundamental challenge. If the focus moves out from ‘human rights law’ to international law generally, and the Latin American practice of diplomatic asylum is viewed as a species of extraterritorial human rights protection, things look different. Such a standpoint reveals the Latin American region grappling with the subject of extraterritorial human rights protections much earlier than the relatively recent sagas under the European human rights system.

It is perhaps fitting, then, that the most complete treatment of the subject of extraterritorial *non-refoulement* by an international human rights body to date is that provided by the Inter-American Court of Human Rights (IACtHR), in its 2018 Advisory Opinion on Asylum (I-A Asylum AO). The Opinion was requested by Ecuador, prompted by the Assange situation. In it, the Court addressed the subject holistically and, in terms of the legal regimes potentially in play, broadly. It reflected on the Latin American practice and associated treaties on diplomatic asylum (covered further below), the question of whether the right to ‘asylum’ in the Inter-American Declaration and Convention on Human Rights applied to extraterritorial diplomatic premises (it did not) and whether the separate but related obligation of *non-refoulement* in the Inter-American human rights instruments applied in such places (it did—covered further below). The Court drew widely on the jurisprudence from other international human rights regimes, including the ECHR regime, in its analysis.

The broad-ranging and comparative nature of this analysis is in contrast to the narrower and more parochial approach taken in, and some of the external characterizations of, the three main decisions on extraterritorial *non-refoulement* applying the ECHR.

European story of groundbreaking European decisions on extraterritorial *non-refoulement* obligations

In 2012, the *Hirsi* decision of the European Court of Human Rights (ECtHR) held that the *non-refoulement*-type obligation in the ECHR, and the separate provision prohibiting the collective expulsion of aliens in ECHR Protocol 4 Article 4, apply extraterritorially—in this instance to Italian maritime push-backs of migrants outside Italian territorial waters—and that these obligations were violated. A common reaction amongst human rights lawyers was to view this as a landmark affirmation of the extraterritorial application of *non-refoulement* protection (e.g. Giuffrè 2016, p. 272; Kim 2017, p. 49); and/or the prohibition of the collective expulsion of aliens (e.g. Costello 2012, p. 323). The response by them, and by ECHR-contracting states, NGOs concerned with human rights in general and refugees in particular, European institutions with an interest in the subject etc., was then to try to explore, *de novo*, some of the dilemmas and challenges the operation of such protection throws up.

Such dilemmas and challenges were also raised in another case, *Al-Saadoon*. This concerned UK troops in Iraq handing individuals over to the Iraqi criminal justice system when there was a risk of the use of the death penalty. It related to the situation after the 2003 war in and subsequent occupation of Iraq. Certain authority had been transferred from the occupiers to

Iraqi representatives. The continued UK military presence was subject to the agreement of those representatives. The case went through the English courts, applying the ECHR standards indirectly via the domestic law Human Rights Act (HRA). It ended up in Strasbourg, and two years before *Hirsi*, in 2010, the Court found that a *non-refoulement*-type obligation was in operation and had been violated.

Eight years before that, in 2004, the Court of Appeal of England and Wales, applying the HRA, considered individuals claiming refuge in the UK consulate in Melbourne in the *B & Others* case. It held that a *non-refoulement*-type obligation under the ECHR could potentially apply (the Court is somewhat ambiguous on whether it did, with a confused reasoning that shifts between permissive and obligatory normative concepts) but on the facts the relevant test was not met and so there was no violation (the ultimate finding of no violation seems to imply that an obligation was regarded to be applicable) (see paras. 88–89, 93–94, 96–97).

The dilemmas and challenges raised in the context of these cases, especially, because of the findings of a violation, and the decisions being made at Strasbourg, in *Al-Saadoon* and *Hirsi*, included the following: How can states discharge a *non-refoulement*-type obligation when they are acting extraterritorially, not within their own sovereign territories? What about the profoundly different circumstances that prevail, basis for their presence and other obligations they bear? Are they supposed to hold onto people until the human rights situation in the place where the individual would be transferred to improves? What if the nature of their presence extraterritorially is temporary? Should they somehow prolong this, in order to ensure protection? Alternatively, should they transfer the individuals to some third location, including, possibly, their own territories, to ensure protection there? In either case—prolonging the extraterritorial presence, or transferring the individual to a third location—what if these options are not practicable and/or are, indeed, objectionable, for example if they are opposed by the foreign state in whose territory the states are acting (where applicable)?

In *Al-Saadoon*, the UK government submitted that the continuance of the UK military presence in Iraq depended on agreement to this by the Iraqi authorities. And a factor in that agreement was whether or not the UK would hand over the suspects in question to those authorities (paras. 56, 66). Put differently, the UK's ability to continue to detain the suspects, rather than hand them over to the local authorities, was dependent on Iraqi agreement, and this would not be forthcoming. Thus there was no realistic prospect of the UK obtaining Iraqi consent enabling it to retain custody, whether indefinitely, or even just until after their trial had been conducted and the question of whether the death penalty would be applied was determined. The UK also submitted that Iraq would not agree to the UK transferring the individuals to the UK for trial there. The ECtHR found that there had been a moment when the Iraqi side was reluctant to try the suspects, and that this provided an:

...opportunity to seek the consent of the Iraqi government to an alternative arrangement involving, for example, the applicants being tried by a United Kingdom court, either in Iraq or in the United Kingdom. It does not appear that any such solution was ever sought. (para. 141)

A further, related, ultimately determinative issue was whether the UK could have obtained an assurance from Iraq that it would not seek the death penalty in the trial of the suspects. This could have paved the way for a transfer compatible with the *non-refoulement*-type obligation (para. 142). The ECtHR held that certain opportunities to obtain such an assurance were not taken by the UK, and in the absence of an assurance, the transfer was a breach of the *non-refoulement*-type obligation (paras. 142–143).

The extraterritorial form of *non-refoulement* protection implicates the paradoxical nature of that type of protection, and the challenges it creates, in a particular fashion. The extraterritorial state provides protection from things it may ultimately have no control over (the situation the individual will face when they are outside the control of that state—in the *Al-Saadoon* case, the use of the death penalty by Iraq). This is, of course, the case with protection from *non-refoulement* in the *territorial* context. But the two contexts are materially different. Territorially, the state might be in a better position to offer a sustainable temporary home to the individual affected, if the situation elsewhere giving rise to the need for protection does not improve. In the context of transfers from a state's territory, those states, including the UK, routinely seek assurances of the kind that was not obtained from Iraq. But if such efforts do not bear fruit, or the assurance is unreliable, the individual can remain in the state's territory. However challenging this might be, the challenges are of a different order if the issue involves a state providing protective care extraterritorially. In *Al-Saadoon* the ECtHR held that the UK had not explored fully the opportunities to obtain assurances from Iraq. Assuming this is correct: what if the UK had fully explored such opportunities, and no assurances could be obtained? Then the matter would turn to the foregoing challenges about the UK retaining protective custody of the individuals or somehow conducting a trial itself in Iraq or transferring the individuals to the UK for this. As indicated, the UK and the ECtHR disagreed on the nature of these potential impediments. But impediments of this kind would not present themselves in the first place were the individuals already in UK territory.

The idea that *Al-Saadoon* and then *Hirsi* established a requirement of *non-refoulement* protection extraterritorially in human rights law, and, in doing so, raised a novel set of dilemmas and challenges, even a matter of the European system of human rights protection, flies in the face not only of the *B* decision of 2004, but also the 1992 European Commission on Human Rights decision in *M v Denmark*. There, the Commission held that certain acts of the Danish ambassador in the Danish embassy in the DDR could have given rise to responsibility. These acts were: not allowing the applicant to seek refuge; requesting the applicant leave the embassy; and inviting the DDR police into the embassy—the police asked the applicant to leave with them, which he did. However, what happened to the applicant when he was arrested by DDR authorities outside the embassy (trial, conviction and 33 associated days in detention, for offences relating to entering and refusing to leave the embassy) did not reach the severity to cross the threshold for a transfer-related responsibility on the part of Denmark. Although not entirely clear, the Commission seemed to be using the threshold to determine whether the obligation was in operation, rather than whether the obligation, in operation, was violated. But the implication was that had the threshold been met, an obligation would exist, arising out of what happened to the applicant at the hands of DDR authorities, because of the unwillingness to offer protection from this in the embassy. Although not put in these terms, this operates as, in effect, a transfer-related obligation—an obligation of *non-refoulement* (and was characterized as such by the ECtHR in *Al-Saadoon* (para. 139)).

Perhaps because there was no finding that the threshold for the operation of responsibility was not met, and it was only a Commission decision, this did not register within the collective consciousness. It fell largely to the wayside, along with certain other, even earlier, general non-transfer-related extraterritoriality decisions such as *Hess* in 1975, in the wake of the juggernaut narrative on extraterritoriality at Strasbourg that everything started with the main cases about northern Cyprus. As far as the *B* case having similarly already established the existence of an extraterritorial *non-refoulement*-type obligation, this may have been ignored in part because it was a domestic court decision, and, as with *M*, there was no ultimate finding of a violation.

More fundamentally, *M* and *B* could be distinguished because of the particular diplomatic context in which the *non-refoulement* obligation operated—i.e. *because* they were, in effect, forms of *diplomatic asylum* in human rights law and characterized as such. Although the *M* decision does not reference diplomatic asylum, in *Al-Saadoon* the Court, when discussing the concept, invokes *M*, seemingly to affirm that the finding of the possibility of an obligation in that decision was relevant to the concept (para. 139). In *B*, the finding that a *non-refoulement*-type obligation could exist is characterized as an obligation ‘applying to diplomatic asylum’ (para. 88). As it seems to root this in an extension of what was originally held in *M*, there is an implicit characterization, as in *Al-Saadoon*, of that decision as one concerned with diplomatic asylum (see para. 80 et seq.).

The English courts in the *Al-Saadoon* litigation considered the situation through the prism of a *non-refoulement*-type obligation classified in some sense as connected to the concept of diplomatic asylum as it had been understood in *M*. However, at Strasbourg, the Court departed from this, preferring to understand the obligation as conceptualized autonomously from diplomatic asylum and the *M* approach thereto (paras. 139–140). The later *Hirsi* decision of that Court does not even bother with any of this. There is no mention of any connection to principles developed in the context of diplomatic asylum. Nor does the Court discuss the potential relevance of the *M* and *B* decisions (or *Al-Saadoon*, other than on an unrelated issue (in para. 129)) (diplomatic asylum is discussed in the concurring opinion of Judge Pinto de Albuquerque).

The choice not to see all these cases as essentially concerned with the same thing—extraterritorial *non-refoulement*—and to avoid conceptualizing the obligation in a holistic, connected fashion, enables *Al-Saadoon* and then *Hirsi* to be understood not only as novel when it comes to ECHR-based jurisprudence (not following on from *M* and *B*). But also, more broadly, because they are most definitely *not* to be linked to diplomatic asylum, they can be understood as entirely disconnected from the earlier Latin American jurisprudence on that particular form of extraterritorial *non-refoulement*-type protection.

Even the findings that are characterized as forming an ECHR-basis for providing diplomatic asylum—*M* (not in the *M* decision itself) and *B*—this characterization does not pave the way for an acknowledgment of the link between the findings and the earlier Latin American practice. The only mention of that practice is a reference to it in a longer quotation from an article by Susanne Riveles (Riveles) in *B* (para. 87).

Disregarding the relevance of the Latin American precedent

It is no surprise, then, that the decisions and associated commentary on extraterritorial *non-refoulement* under the ECHR typically address the dilemmas and challenges this concept throws up as if they have not for most of the last century been played out in the Latin American region in its practice and associated treaties on diplomatic asylum. This practice and associated treaties are commonly understood in terms of a potential right on the part of the state to grant diplomatic asylum, not an obligation to do so (see e.g. Caracas Convention, Art. II; IA Asylum A–O, para. 87). Nonetheless, the practice and treaties involved approaches to address some of the dilemmas raised by the provision of protection extraterritorially which are relevant to circumstances where such provision is obligatory as a matter of human rights law.

This is illustrated by the 1954 OAS Caracas Convention on Diplomatic Asylum. That treaty addresses one of the aforementioned dilemmas, that extraterritorial facilities like embassies or military bases cannot serve anything other than very short-term havens, yet the extraterritorial state cannot control whether and when the host-state circumstances necessitating refuge will improve. It enables safe passage to ports of exit to be accorded by the territorial state (articles V, XI, XII). This creates a potential bridge between *extraterritorial* protection in a foreign embassy,

and *territorial* protection by that same state (or a foreign state) which has greater potential to be sustained for longer if needed.

Had the situation at issue in *Al-Saadoon* not been treated as novel, but, rather, involving dilemmas concerning extraterritorial protection from *non-refoulement* that have come up from time to time and therefore require forward planning, things might have been different. Some sort of equivalent work-around mechanism, along the lines of the approaches reviewed by the ECtHR, might have been given greater priority, at the right time, than the court held had been the case. And/or such a mechanism might have had greater likelihood of being acceptable to Iraq than the UK claimed was the case.

The doctrine of misplaced European exceptionalism enables European lawyers and judges to heroically act as norm pioneers and problem-solvers. It also enables those European states who resist the development of extraterritorial *non-refoulement* protection in human rights law as unrealistic and problematic to avoid having to reckon with how Latin American states faced up to the dilemmas and challenges involved and attempted to craft solutions such as in the Caracas Convention. And how they somehow managed to do this so long ago, when international human rights law even as a territorial proposition was only just being established.

To understand further how these links end up being ignored, it can be helpful to look more into the concept of diplomatic asylum in international law. And, within this, to consider how the leading scholar globally of diplomatic law, Eileen Denza, treats the significance of the Latin American treaties and associated practice (Denza 2011; 2016).

Diplomatic law

The provision of diplomatic asylum implicates international diplomatic law, in particular the law of diplomatic immunities and privileges (Denza 2016). A key relevant norm is that the diplomatic premises of a foreign state are inviolable *vis-à-vis* the authorities of the host state (e.g. VCDR Art. 22, VCCR Art. 31). This and other immunities enable states to interact and operate in each other's territory without interference. The offer of diplomatic asylum exploits this to provide individuals protection from the authorities of the host state. International lawyers tend to suggest that this is unlawful in diplomatic law terms (Denza 2011). It is an abuse of the entitlement to inviolability of diplomatic/consular premises, and/or, more specifically, a violation of the stipulations in that area of law (e.g. the obligation to respect the laws of the host state, and not interfere in the internal affairs of that state—VCDR, Art. 41.1; VCCR, Art. 55.1). The Latin American treaties providing for a right to grant diplomatic protection in certain circumstances are regarded to be a compatible treaty-based derogation from this default position in diplomatic law, insofar as the right is exercised in the territory of another party to the treaty. Thus, the right to grant diplomatic asylum on this basis is kept within the Latin American region.

More significantly for wider purposes, Eileen Denza suggests that states generally have a 'limited and temporary' right in customary international law, left intact by diplomatic law, to provide protection 'as a matter of humanitarian protection' in diplomatic premises 'at least where there is immediate danger to the life or safety' of the individual concerned or 'where ... there is no prospect of his or her being given a fair trial on any charges by the authorities of the territorial State' (Denza 2011, pp. 1426–1431, 1433–1434; Denza 2016, p. 115; Roberts and Denza 2016, Section 13.24).

Has the Latin American practice of providing diplomatic asylum, and the various treaties on the topic adopted by states in the region providing for a right to do this, played some role in the formation of this broader customary international law right? Judge Alvarez, in his Dissenting

Opinion in the 1950 *Asylum* decision of the ICJ, characterized these treaties as ‘American International Law’. Did this American International Law universalize to the global in the context of a right to provide diplomatic asylum? Just as European human rights jurisprudence has, it is claimed, universalized to the global in the context of human rights law generally?

A preliminary question is whether the practice and treaties in Latin America have constituted customary international law for the region. The predominant view of experts does not seem to have shifted from that articulated by Judge Alvarez in his dissent, viz:

...there is no customary American international law of asylum properly speaking; the existence of such a law would suppose that the action taken by the Latin States of the New World was uniform, which is not at all the case: governments change their attitude according to circumstances and political convenience.

(Asylum, dissent of Judge Alvarez, 295)

Denza writes:

It has often been claimed that under certain conditions a state has a ‘right’ to grant asylum within its embassies abroad to fugitives and even that the individual fugitive has a ‘right’ to asylum if he has taken shelter in a foreign embassy. But the existence of such ‘rights’ is not generally accepted as a matter of customary international law. Within Latin America there exists an extensive network of treaties which for the states parties do create a right of granting diplomatic asylum. But it has not been shown that these treaties have created even a regional rule of customary international law and in other parts of the world there has been no disposition to accept the existence of any customary rule of international law.

(Denza 2011, 1426)

This position on the lack of regional custom was affirmed by the IACtHR in the 2018 Advisory Opinion (IACtHR 2018, paras. 157–162).

Neither Judge Alvarez nor the IACtHR were concerned with the existence of a global norm of customary international law as well as a regional one. Denza, however, was, and in her writings follows her above-quoted rejection of a Latin American regional norm with an assertion that her ‘limited and temporary’ right exists as a matter of global custom (*id.*, 1429). On the one hand, then, the Latin American practice and treaty-making on the subject has had no customary international law significance even to Latin American states, let alone on a global level. On the other hand, somehow at the same time as this extensive regional practice and treaty-making, but entirely disconnected from it, a global norm of customary international law has been in operation/has emerged on the subject.

What, then, is the evidence for the existence of this global norm? In her articulation of the norm, Denza offers citations to two dicta—one for each of her two elements of the test (the imminent threat to life/of injury, and the risk that there will be no fair trial)—of the International Court of Justice in the *Asylum* case (Denza 2011, p. 1426, 1429, citing *Asylum*, 282–284). This case was *about two Latin American states* (Columbia and Peru) *and the application of a regional treaty on diplomatic asylum to those states*. Assuming that Denza is correct about the meaning of these dicta on their own terms (a matter that is beyond the scope of this chapter), more fundamentally what is striking is that she is using the dicta as the sole authority for a proposition for a rule of custom that is somehow disconnected from the Latin American practice and treaty-making on the subject, *even though the case the dicta is derived from is about such practice and treaty-making*.

Why did Denza root her assertion of the existence of a customary rule on diplomatic asylum solely on dicta from a case about Latin American practice and treaty-making, but then articulate this rule as entirely disconnected and separate from the potential norm-generating significance of Latin American practice and treaty-making? This seems to at once acknowledge the latter significance—Denza needs something to underpin her assertion of the existence of a general norm—but then simultaneously disregard it.

Ultimately, regional exceptionalism is deployed to block the potential contribution to the development of the global normative regime. This is despite the idea that for a customary international law rule to exist, there needs to have been the relevant practice (linked to *opinio juris*), and the fact that the region has been the most prominent generator of this practice. Such an approach neatly complements and reinforces, while being based on a reversal of the underlying logic of, the exceptional narrative about the European contribution to the protection of human rights in international law. The Latin American practice of providing extraterritorial protection from *non-refoulement* stayed in the region when it came to any normative significance beyond the region. And this was the case even when an equivalent norm entitling states to provide such protection was regarded to be in existence at a global level, the generation and/or sustaining of which one might have expected the regional practice to have had had some bearing on.

The European affirmation that there is an *obligation* to provide such protection from *refoulement* extraterritorially as a matter of human rights treaty law can potentially effect a global shift. This shift can be viewed as a novel regional contribution to the general subject of extraterritorial protection from *refoulement* because of the dismissal that Latin American practice has global implications when it came to the supposedly already-existing norm of customary international law.

Moreover, the Latin American treaties cannot have a transferrable effect in the same fashion as European human rights jurisprudence because they are not part of a broader jurisprudential regime. Thus, ironically, because the Latin American region was so historically innovative in relation to this arena of protection—developing it *before* human rights-specific treaty law existed—the right to provide it (although not the obligation to do so) existed for the region in treaties that, unlike the later treaties that were the basis for the European developments, did not have the potential to be jurisprudentially linked to a global normative regime.

When human rights treaty law then came along, there was not the same pressing need to explore the possibility of developing extraterritorial human rights obligations that might operate in diplomatic premises. There were *already treaties on the topic*, albeit only covering a right to provide asylum, not an obligation to do so. European ‘innovation’ came partly, then, because, unlike in Latin America, there was a complete absence of normative standards in this area (Denza’s mysterious customary entitlement notwithstanding). In Latin America, individuals may not have had a right to, effectively, protection from extraterritorial *non-refoulement* in diplomatic premises. But states were sometimes willing to give them such protection, and, crucially, arrangements were in place enabling them to do this without breaching diplomatic law. The latter was presumably not unconnected to the former. Whenever protection was forthcoming, the need for assistance from regional or international human rights bodies was reduced. And states wishing to provide protection did not need to risk violating their obligations to host states. Indeed, it is notable that the main contribution from within Latin American human rights jurisprudence to the topic came only when a Latin American state faced a situation outside the operation of the regional diplomatic asylum treaties—Ecuador in the UK. In this context, the state required normative guidance as to its position as a matter of the obligations it had in human rights law—an area of law which is not limited, as those treaties are, to situations arising in the context of its relations with certain other Latin American states.

Europeans only got to ‘innovate’ human rights law, then, because Latin American innovation on the underlying issue—extraterritorial human right protection—had already happened decades earlier, and addressed the matter, to a certain extent (the provision of protection was discretionary) before human rights treaty law even existed. If Denza’s account is correct, European states seemingly chose to forego aligning in some way with this approach as the basis for a customary international law rule (even as supposedly such a rule did exist/emerge for them, on some other basis). And as a matter of a treaty-based equivalent, things would have to wait until much later. And when this came, it was through the very different, relatively precarious jurisprudential route of innovations in the interpretation of ambiguous treaty provisions by courts, rather than, as in Latin America, with states choosing to adopt specific treaties addressing the situation. Moreover, this happened on the basis of a big leap from a seeming absence of even being entitled to provide protection (Denza’s customary right notwithstanding) to now having an *obligation* to do so. The abrupt nature of how this came about, and the consequent treatment of the challenges it raises as novel, are in sharp contrast with how the position in Latin America shifted more gradually from arrangements that provided a right to provide protection in asylum terms (the diplomatic asylum treaties) to the IACtHR’s 2018 affirmation of an obligation to provide protection in *non-refoulement* terms.

Indeed, this abrupt shift for ECHR contracting states seems also to have led to a backlash by some such states, which, in turn, seems to have been accommodated in the 2020 *MN* decision by the ECtHR. In that decision, the Court seemed to pull back on the scope of the extraterritorial application of the *non-refoulement* obligation as it might operate in diplomatic premises from what had seemingly been affirmed at Strasbourg in the *M* case and the English courts in the *B* case. In doing this it adopted the arguments made in submissions to it by not only Belgium, the respondent state, but also 11 other European intervening states (ECtHR 2020, para. 86).

MN concerned Syrian would-be asylum seekers in the Belgian embassy in Lebanon who asked for a visa to travel to Belgium to claim asylum there. They argued that a denial of this visa would amount to *refoulement*. And that Belgium’s obligations to protect them from this were applicable *inter alia* because they were in operation within the Belgian embassy, on the basis of the control exercised by the Belgian authorities over the embassy generally and/or as far as their treatment there (in denying the visa) was concerned. The Court rejected this, seeming to hold, in effect, that an obligation of *non-refoulement* cannot be in operation in diplomatic premises simply by virtue of the control exercised by the state over such premises through its operation of them (ECtHR 2020, para. 119). Also relevant was the absence of ‘*de facto* control’ exercised by diplomatic agents over the individuals—they entered and could leave the embassy of their own free will (ibid, para 118).

The IACtHR’s Advisory Opinion two years earlier, by contrast, affirms the operation of the *non-refoulement* obligation in diplomatic premises on a seemingly more general basis (IACtHR 2018, paras. 188, 192, 194). It does not stipulate that the control exercised by the state over such premises is insufficient to trigger the obligation. Nor is the existence or otherwise of ‘*de facto*’ control by agents in such contexts invoked as a relevant factor. Just as the Latin American region had adopted a right to provide diplomatic protection earlier than other states, including in Europe, now it has potentially affirmed an obligation to provide a protection from *non-refoulement* in a broader set of circumstances in diplomatic premises than seems to be the position as a matter of the most recent European human rights law-based decision.

Diplomatic law has its origins in an exclusively state-centric period of international law. It reflects policy considerations relating only to the rights of states, and the correlative, and reciprocal, obligations of states to those other states, not also other forms of obligations owed

to individuals. It would be odd to conceive a right to asylum for an individual/an obligation to confer asylum to an individual from within the logic of an exclusively state-centric conception of rights and obligations. Hence diplomatic asylum in the Latin American treaties being a state entitlement, not an obligation. But when that right is exercised, human rights protection is forthcoming. This can be understood, then, as a limited form of human rights protection, covering the same activity by the state that human rights law conceptualizes as an arena of obligation rather than discretion. Human rights protection has been provided pursuant to these treaties. And, as indicated, the likelihood that states will be willing to do this is enhanced by the way the treaties render such provision permissible as far as the legal relationship between the providing state and the host state is concerned.

It is important to appreciate, then, as the IACtHR did in its Advisory Opinion, that what are effectively human rights protections might exist in both diplomatic/general international law and human rights law. Moreover, rejecting the intersection between these two areas of law also enables states to miss the link between the developments in the latter, which have affirmed an extraterritorial obligation of *non-refoulement*—and the situations covered by the former—diplomatic premises. Instead, the former coverage can be treated as if it is the only operative legal regime, with such situations therefore untouched by any requirements in human rights law. In turn, the provision of protection in diplomatic premises can then be framed as an abuse of diplomatic privileges. No account is given to the idea that the state involved might be using its privileges to enable it to discharge its human rights obligations. Or, put differently, that it is the very existence of the diplomatic law privileges, for example, concerning inviolability, that created the background conditions that put the state in a position to offer protection, which needs, therefore, to be provided precisely because of this capacity to do so.

The Latin American identity of Ecuador foregrounds the significance of the tradition of states in that region for doing what that state did in London. At the same time, it may have been this very identity that enabled the situation to be viewed as entirely disconnected from the developments on extraterritorial human rights obligations in European human rights law generally, and such obligations of *non-refoulement* in particular. *B* had seemingly established the existence of the latter-type obligation in 2004, eight years before Assange entered the Ecuadorean embassy, as applicable to the UK in its diplomatic premises (although *B* was only a domestic court decision, there was no ultimate finding of violation, and things would seemingly take a different turn in Strasbourg in the *MN* decision of 2020).

Now that the shoe was on the other foot, and Ecuador was in the same position *vis-à-vis* the UK that the UK had been *vis-à-vis* Australia, the potential transferability of the normative position in human rights law that had been held to apply to the UK in *B* was not invoked. Here, then, suddenly the aforementioned grand project of universalizing European norms on human rights ground to a halt. This suggests a project operating only when such norms transfer over to non-European others (here, Ecuador) without any secondary, blow-back implications for European states (here, the UK, as the host state that cannot have Assange transferred to its custody). Again, colonial echoes are evident. In the colonial era, European colonial powers saw themselves as bringing standards of civilization to non-civilized societies. But, paradoxically, whereas these standards were somehow understood to derive from European societies, they were not understood to apply to the relations between Europeans and colonial peoples. Such relations were characterized by mass murder, other atrocities, enslavement and the plunder of land and resources.

As will be explained, this link to colonial-era double standards extends over to the wider issue at stake on this topic: resistance to the extraterritorial application of human rights as far as the UK and certain other European states are concerned.

Broader issues at stake—what is sauce for the goose is sauce for the gander

The insistence on two entirely mutually exclusive categories of diplomacy on the one hand, and human rights protection, on the other—of diplomatic law, on the one hand, and human rights law, on the other—in the case of Assange in the Ecuadorean Embassy was tied up in a broader UK policy initiative. This is the state's ongoing campaign, supported by certain other states, to challenge the scope of the two key areas of human rights law that are implicated in this issue: *non-refoulement* in general—territorial and extraterritorial—and the extraterritorial application of human rights law in general. (Cf. the role of the UK and other European states as intervenors in the *WM* case.) The stakes are, thus, high.

This links things back to the context of *Al-Saadoon*. The UK was present in Iraq alongside the US because the two states had invaded, removed the government of, militarily occupied, and sought to transform the social, economic, legal and political system in, the country. Whereas the ostensible reason put forward for this related to weapons of mass destruction, the enterprise was commonly understood, and, indeed, even partly justified as such by the leaders of the states involved, as being concerned with removing a human-rights-abusing autocratic government and replacing it with a human-rights-protecting democratic regime. Yet, when the issue arose of these two states being subject to human rights law standards themselves in the way they engaged in this enterprise, this was dismissed by them. The US has a longstanding position that human rights treaty obligations do not apply extraterritorially. When the UK position on the issue generally had to be addressed in the *Al-Skeini* litigation, the state similarly refuted applicability on a range of grounds, challenging this all the way through protracted litigation in domestic courts and on to Strasbourg. An equivalent resistant standpoint and its litigation consequences were then repeated when it came to *non-refoulement*-type obligation in particular in the *Al-Saadoon* litigation.

A further feature of colonial ideology and practice was the way that this was based on orientalist, racist notions of civilizational difference. Whereas these may have had legitimate purchase on various delusional tropes self-identity when it came to Europeans, they had had no legitimacy when it came to the position of the societies subject to European colonial domination. These notions enabled Europeans to overlook/downgrade the merit of the 'civilizations' they were subjugating. Again, the stakes were high, because this process was necessary not only to justify the subjugation, but also to undergird the very societal self-esteem of European societies and individuals themselves, via ideas of civilizational superiority.

In *Al-Saadoon*, this issue came to the fore because it implicated the human rights issue where Europeans are typically the most globally-sanctimonious—the death penalty. The extraterritorial application of the *non-refoulement*-type obligation was implicated in the case only because the UK was bound by an international human rights law obligation prohibiting this, and Iraq was not. It was the very existence of divergent applicable human rights law standards that gave rise to the UK's obligation. The UK was caught between the rock of refuting the application of human rights standards to itself when it comes to its relations with people in other parts of the world, and the hard place of its commitment to promoting the application of such standards for such people against their own governments. A European state sees two cardinal principles of European colonial doctrine, and their modern manifestation in European human rights promotion, come up against each other. The effect of the position the UK took in the *Al-Saadoon* litigation was to choose the former over the latter.

The tables were then turned when it came to the situation in the Ecuadorean embassy in London. There the UK risked being itself in the role of the host state that seemingly has a lower

commitment to human rights compared to the extraterritorial state—the reverse of the position it claimed for itself in Iraq. A non-European state was applying a higher standard of human rights protection than the European host state seemed to accept for itself when it faced the same situation in a different non-European context. Moreover, this standard was derived from norms understood partly to have been developed *outside Europe*. For this to be acceptable, Europeans would have had to accept that their position as a beacon of progressive human rights protection for the world was on shaky foundations.

In offering protection to Assange, then, Ecuador also intervened within a hugely contested debate amongst European states on extraterritoriality, and *non-refoulement*, and the intersection of the two, by example, a commitment to protections in this area which the UK itself if faced by a similar situation would wish to challenge (and did challenge, as respondent in the *B* and *Al-Saadoon* cases, and as a third party intervenor with ten other European states in the *MN* case). The problem for the UK, then, was that Ecuador was not only preventing the UK from doing what it wanted to do with Julian Assange. Also, Ecuador was acting in a way that suggests commitment to an obligation *for itself* which the UK and certain other European states would seek to refute *for themselves* in equivalent circumstances. Put differently, the UK's rejection of the legality of Ecuador's action, if grounded in a bypassing of any consideration of the potential relevance of human rights law, corresponds to the position it would want for itself as far as the extraterritorial application of human rights law is concerned. For the UK not to be bound by human rights law extraterritorially, or, at least, for the scope of extraterritorial applicability to be highly attenuated, excluding, for example, a *non-refoulement* element, necessarily requires a general position to be taken on human rights law which renders Ecuador's actions lacking in legal foundation. The position Ecuador took was transgressive, then, not only on the specific matter of what should happen to Assange. Also, it challenged the UK position on the very notion that states should have protective obligations in such contexts. And this was something which was, if anything, more of a concern to the UK as the potential *bearer* of such obligations in other contexts—i.e., playing the role performed by Ecuador—than being the host state in whose territory such obligations being applicable to other states would cause problems. Indeed, an economically privileged and militarily powerful state like the UK is much more used to being in the situation of acting outside its borders, and having to respond to human rights challenges arising out of this (as in Iraq), than dealing with the human rights implications in its own territory of the actions of other states.

That such a situation arose is due to the fact that the Assange situation occurred outside Latin America. A Latin American state sought to implement a Latin American approach to human rights protection outside its region. And it came up against a position seemingly rooted not only in a rejection of diplomatic asylum as a universal doctrine as a matter of general international law (or a Denza-esque definition of this as very limited, and inapplicable to the situation), but also skeptical of and resistant to the general project of extraterritorial human rights obligations within which an equivalent obligation of extraterritorial *non-refoulement* applied to diplomatic premises could be, and indeed had already been, situated.

Conclusions

The Assange-Ecuador embassy saga implicated a much bigger set of issues, with important historical resonances, than simply what was at stake for Assange and all the matters implicated in his situation. It is a reminder that the extraterritorial protection of human rights in international law has its historical origins in the Latin/South American region, not, as Europeans tell themselves,

in Europe. As the ECHR system seemed to catch up with the more longstanding Latin American normative developments concerning protection from *non-refoulement* extraterritorially generally, it was a Latin American state which, through its own example, affirmed a commitment to these developments (albeit a commitment that did not survive a change of government in that state) at the very time when they were under threat in Europe. With the Strasbourg Court then seeming to give into pressure and deciding to rein in the potential operation of an extraterritorial *non-refoulement* obligation in diplomatic premises in the *MN* decision of 2020, it is the 2018 Advisory Opinion of the IACtHR that provides the most robust affirmation of the operation of such an obligation to date.

Just, then, as Latin America was the historical site of norm entrepreneurship on this subject, so too much later it was, aptly, a Latin American state acting in Europe, and then the IACtHR sending out a message from San José, that served, in effect, to push back on the backlash against these norms as they had been adopted in the European system.

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