

## DIPLOMATS BEARING PRESENTS: DIPLOMATIC FUNDING UNDER INTERNATIONAL LAW

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### SUMMARY

Diplomats with a budget can be dangerous persons. Envoys who fund political parties in the receiving State possess a powerful method to gain influence in the host country. And yet, international law has been slow to react to such activities, and even today, there is no express norm banning the diplomatic provision of material means.

This article explores existing rules of diplomatic law, but also bans on corruption and bribery which exist under general international law and which have an impact on situations of this kind. But it also takes into account the fact that not all rules in the field restrict diplomatic funding. At times, diplomats are able

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to refer to the ordinary exercise of their functions as grounds for funding activities and thus to a norm which is enshrined in the Vienna Convention on Diplomatic Relations. On other occasions, they are able to invoke permissive norms under general international law—such as the existence of *erga omnes* interests which may open the way to the provision of financial support to beneficiaries in the receiving State. This article also reflects on the need for a mechanism to mediate between opposing interests in this area of diplomatic relations and suggests a method which allows each legitimate interest to survive by determining its appropriate place in the framework of specific situational parameters.

## I. INTRODUCTION

In 2008, just seven years prior to the reopening of the U.S. embassy in Cuba,<sup>1</sup> relations between the two States were still fraught with difficulty. They did exist—though in a somewhat unusual form: both countries had representatives assigned to “interests sections” in each other’s territory, and the work of U.S. diplomats in Cuba was viewed with a measure of suspicion by the local authorities.<sup>2</sup>

In May of that year, a case arose which gained prominence in U.S.-Cuban relations: the Cuban government made accusations against the head of the U.S. Interests Section, Michael Parmly, who had allegedly provided financial support to Cuban activist Martha Beatriz Roque.<sup>3</sup> According to the authorities of the receiving State, Parmly had made three monthly cash payments of at least \$1,500 (USD), which were intended to go to Cuban dissidents.<sup>4</sup> The U.S. State Department, while not commenting on

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1. On the reopening, see *US Flag Raised Over Reopened Cuba Embassy in Havana*, BBC NEWS (Aug. 15, 2015), <http://www.bbc.co.uk/news/world-latin-america-33919484> [<http://perma.cc/PLY8-XVUZ>].

2. For an example of the problems encountered by a U.S. diplomat stationed in Cuba in 1994, see Thomas W. Lippman, *Surviving a Nightmare Inside Castro’s Cuba; Expelled Foreign Service Officer Details Harassment During Human Rights Mission in Havana*, WASH. POST, Nov. 1, 1996, at A23.

3. Will Weissert, *Cuba Demands U.S. Answer Charges that Top Diplomat Carried Funds to Havana Dissidents*, ASSOCIATED PRESS, May 22, 2008.

4. Rory Carroll, *Cuban Sting Shows US Diplomat Handing over Cash to Dissidents*, GUARDIAN (May 23, 2008, 8:01 PM), <https://www.theguardian.com/world/2008/may/24/>

the particular allegations, noted that it had for a long time given humanitarian assistance to opposition leaders.<sup>5</sup>

Funding activities by diplomatic agents can look back on a long history in international relations. Recipients and purposes varied widely: Thayer, for instance, notes that, in the 18th century, the funding of intelligence agents was essential for a “well-run” embassy: “the employment of a modest stable of spies was considered so essential that the diplomat was expected to pay them out of his own pocket—and very liberally at that.”<sup>6</sup>

In one of the earliest cases of diplomatic funding in the history of the United States—an incident involving the French Minister to the young republic, Edmond-Charles Genêt—the objective of the relevant activities would have had even more direct repercussions. Genêt arrived in 1793, but even before he had presented his credentials, he had begun to fit out armed privateers to attack British merchant ships and to enlist U.S. citizens in the French fight against Britain.<sup>7</sup> Genêt had been authorized by the French Executive Council to maintain a network of agents in Louisiana (then mainly under Spanish control) and to incur the necessary expenses to lay the seeds of revolution in this part of the continent.<sup>8</sup> The United States eventually requested the diplomat’s recall.<sup>9</sup>

In contemporary diplomatic relations, another recipient of diplomatic funding has gained prominence: what has moved to the center of concern these days is the funding of parties and factions within the jurisdiction of the receiving State. A 1980 case exemplifies the situation: in January of that year, Vsevolod Sofinsky, the Soviet Ambassador to New Zealand, was declared *persona non grata*.<sup>10</sup> Robert Muldoon, then Prime Minister of New Zealand, declared that Sofinsky had been personally involved in

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cuba.usa [<http://perma.cc/58K6-AKJ5>].

5. *Id.*

6. CHARLES W. THAYER, *DIPLOMAT* 163-64 (1959).

7. 4 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 486 (1906).

8. Wesley J. Campbell, *The Origin of Citizen Genet’s Projected Attack on Spanish Louisiana: A Case Study in Girondin Politics*, 33 *FRENCH HIST. STUD.* 515, 531 (2010).

9. SATOW’S *GUIDE TO DIPLOMATIC PRACTICE* § 21.17 (Lord Gore-Booth ed., 5th ed. 1979).

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

the financing of the Socialist Union Party—a “substantial” sum had apparently made it to that party’s coffers, and the funding activities had been going on for some time.<sup>11</sup> And in February 2003, India expelled Jalil Abbas Jeelani, the Pakistani Deputy High Commissioner to the country, amid charges of diplomatic funding activities.<sup>12</sup> According to India, Jeelani had been personally involved in the financing of separatists based in the Indian zone of the Kashmir region.<sup>13</sup> Jeelani and three other diplomats were given forty-eight hours to leave the country.<sup>14</sup>

That receiving States have frequently taken a negative position towards the provision of material means by diplomatic agents is clear from these and other instances in which allegations to this effect have been raised.<sup>15</sup> It is also clear that this is a position shared by States with varying political structures and cultural backgrounds. And yet, the legal assessment of diplomatic funding under international law is not without its difficulties.

For one, there is no express norm that addresses this kind of conduct when performed by diplomatic agents. The Vienna Convention on Diplomatic Relations (VCDR), the leading multilateral treaty in the field of diplomatic law relating to permanent missions between States, makes no reference to the employment of money or other material means by diplomatic agents.<sup>16</sup>

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11. *Id.*

12. Palash Kumar, *AFP: India, Pakistan Ties Sink Further as Top Diplomats Expelled*, WORLD NEWS CONNECTION, Feb. 8, 2003.

13. *Id.*

14. *Pakistan Daily Outlines “Bitter” Diplomatic Relations Between Pakistan, India*, WORLD NEWS CONNECTION, Feb. 10, 2003.

15. See, for example, the case of Kathleen Barmon and Joel Cassman, two U.S. diplomats who were expelled from Nicaragua in May 1989 amid charges of “distributing money and exhorting the teachers to strike.” Doralisa Pilarte, *Nicaragua Expels Two U.S. Diplomats, Accuses Them of Instigating Strikes*, ASSOCIATED PRESS, May 25, 1989. See also the warning issued by Malaysia against Western diplomats after allegations had been made that they had offered funds to opposition parties. See *infra* text accompanying notes 173-74. See also the 2007 case of the U.S. embassy to Bolivia, which faced accusations by the Bolivian government of financing opposition parties. Martin Arostegui, *Morales Puts U.S. Diplomat in Sights – Says Envoy Funds Rivals*, WASH. TIMES, Nov. 28, 2007, at A13.

16. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR].

Receiving States, however, have often invoked different grounds in their evaluation of diplomatic funding activities. Following the Sofinsky incident, for instance, the Prime Minister of New Zealand pointed out that it was an “established international convention that a diplomatic representative [did] not interfere in the domestic politics” of the receiving State;<sup>17</sup> and similar statements have been made in other situations in which diplomatic agents provided financial assistance to factions in the State in which they were based.<sup>18</sup>

The invocation of the ban on diplomatic interference, however, is more than an expression of political disagreement or the reflection of opposing opinions on a point of protocol. Meddling by diplomatic agents is directly addressed in the VCDR, whose Article 41 establishes the general duty of beneficiaries of diplomatic privileges and immunities under this convention “not to interfere in the internal affairs” of the receiving State.<sup>19</sup>

Outside the framework of diplomatic law, there are further rules which may have an impact on situations of this kind. They are norms against certain funding activities which were mainly established by multilateral conventions on bribery and corruption and which were drafted without reference to the particular scenario in which diplomatic agents are the authors of financial support. However, if such activity fulfils the parameters established by the norms in question, it is subject to these regulations if the sending State is party to the existing treaties, or if the relevant rules reflect a corresponding obligation under customary international law.

And yet, the identification of restrictive rules on this matter and their application to cases of diplomatic funding does not, by itself, suffice for a legal assessment of the underlying conduct. A particular difficulty arises from the fact that diplomatic activity in situations of this kind can often rely on norms whose basis in

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17. *New Zealand Boots Soviet Ambassador*, *supra* note 10.

18. In a 1999 case concerning Western diplomats to Malaysia, the Malaysian Deputy Prime Minister referred to the rule against diplomatic interference, *see infra* text accompanying notes 173-74; and in the 2008 case of Michael Parmly, the Cuban Foreign Minister invoked the same rule and made a direct reference to the VCDR. Carroll, *supra* note 4.

19. VCDR, *supra* note 16, art. 41(1).

international law is as strong as that of the ban on interference and the codified prohibition of funding activities.<sup>20</sup> That includes the exercise of traditional diplomatic functions, but also interests of the sending State which derive from obligations which the host country owes *erga omnes*—i.e., to the international community as a whole. It is this coexistence of seemingly divergent interests which accounts for of the most serious challenges to any attempt to reach a legal evaluation of diplomatic funding today.

This article examines the position which international law adopts with regard to diplomatic funding activities. Section II deals with rules whose existence generates a restrictive impact on conduct of this kind—including the ban on interference and more general rules on bribery and corruption. Section III examines norms which can form a basis for diplomatic agents in such situations and can be invoked by the sending State in defense of the relevant conduct. Section IV analyzes ways of resolving the meeting of the divergent norms, and Section V offers concluding thoughts on the evaluation of diplomatic funding in the context of contemporary international law.

At the center of these considerations are diplomatic agents assigned to permanent missions, to which the VCDR applies.<sup>21</sup> An examination of that kind excludes consular officers, *ad hoc* diplomats and diplomats representing their States in international organizations or at conferences—persons who fulfil such functions are subject to different regimes.<sup>22</sup> However, incidents involving these persons are included as illustrations, where they share common ground with diplomats assigned to permanent missions in inter-State relations.

## II. TOWARDS A BAN ON DIPLOMATIC FUNDING

International law, at least in its codified form, has been slow

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20. On this, *see infra* Section III.

21. *See* VCDR, *supra* note 16.

22. For consular officers, *see* Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; for *ad hoc* diplomats, *see* Convention on Special Missions, Dec. 16, 1969, 1400 U.N.T.S. 231; for diplomats representing their States in international organizations or at conferences, *see* Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Mar. 14, 1975, UN.Doc. A/CONF.67/16.

to react to funding by foreign agents. Abbott goes so far as to state that, prior to the 1990s, corruption had been considered “a fact of life and a taboo subject in international fora” and that “many development advocates viewed it as an essential lubricant for economic activity.”<sup>23</sup> As late as 1964 did the editor of Satow’s *Diplomatic Practice* maintain that “[i]t may be that the Law of Nations is not concerned with bribery. It seems rather a question of morality.”<sup>24</sup>

This statement is, in its unqualified form, not tenable in the contemporary situation relating to such funding activities. Where diplomats are the authors of activities of this kind, there are two principal regimes which are capable of exercising an impact on the relevant conduct: the framework of the VCDR—in particular, its rule against diplomatic interference—and the more general norms on bribery and corruption which have today found codification in multilateral conventions.

Taken by itself, the rule against diplomatic interference is a norm which does not reveal much about the underlying conduct. When the International Law Commission (ILC) was asked by the General Assembly in 1952 to undertake the codification of “[d]iplomatic intercourse and immunities” as a matter of priority,<sup>25</sup> its members could have turned to the writings of scholars on international law to elaborate on the concept of diplomatic interference—some of the existing texts even then were quite explicit on the forms of conduct which their writers considered to fall within this category.<sup>26</sup> Yet the rule which the

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23. Kenneth W. Abbott, *Corruption, Fight Against*, in 2 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 813, 814 ¶ 5 (Rüdiger Wolfrum ed., 2009).

24. SATOW’S GUIDE TO DIPLOMATIC PRACTICE 103 (Nevile Bland ed., Longmans, 4th ed. 1964). He did, however, concede that “the employment of bribes to obtain secret information” was generally condemned. *Id.*

25. G.A. Res. 685 (VII), at 62 (Dec. 5, 1952).

26. Particular prominence in this regard was enjoyed by the “draft codes on diplomatic law.” These were early attempts by legal scholars to provide a systematic examination of the framework of diplomatic law. As private projects, their authority was limited; but several of their provisions reflected customary law as it existed at that time (including the rule against interference). Some of the earliest draft codes were already more explicit on interference than the later provision in the VCDR. Bluntschli, for instance, linked the rule of non-interference to the obligation to respect the “independence and honour” of the receiving State and referred to some common fields of interference (provocations, threats, and the making of certain promises). JOHANN KASPAR BLUNTSCHLI,

ILC submitted in 1958 merely referred in general terms to the duty of beneficiaries of diplomatic privileges and immunity “not to interfere in the internal affairs” of the receiving State.<sup>27</sup> The prohibition was not changed by the Vienna Conference which in 1961 discussed the final ILC draft and which adopted the relevant paragraph without discussion.<sup>28</sup>

The rule which was thus established and which eventually entered into force for the vast majority of States<sup>29</sup> could, at least *prima facie*, be seen to embrace a multitude of diplomatic activities. And there are scholars who have indeed adopted a wide understanding of diplomatic interference. At different times, the concept has been held to embrace the “[r]endering of aid or active assistance . . . in favour of a party in the national elections,”<sup>30</sup> the organization of a secret police and the kidnapping of dissidents who live in the receiving State,<sup>31</sup> and even the assassination of opponents and involvement in the preparation of terrorist acts.<sup>32</sup>

Nor can a narrower understanding be derived from international case law. Diplomatic interference has rarely been a topic of discussion for the International Court of Justice (ICJ). In

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LE DROIT INTERNATIONAL CODIFIÉ ¶ 225 (M.C. Lardy trans., 1870) (1868), *reprinted in* 26 AM. J. INT’L L. SUPP. 144, 151 (1932). Pasquale Fiore’s draft condemned provocations and threats, but Fiore also outlined some other emanations of interference and mentioned in particular interference with administrative or judicial authorities. PASQUALE FIORE, INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION OR THE LEGAL ORGANIZATION OF THE SOCIETY OF STATES ¶ 482 (E.M. Borchard trans., 5th ed. 1918), *reprinted in* 26 AM. J. INT’L L. SUPP. 153, 160 (1932). The draft also condemned the stirring up of conflicts between political parties and the involvement in “intrigue to approve or disapprove” governmental acts. *Id.* at 161.

27. See *Draft Articles on Diplomatic Intercourse and Immunities*, [1958] 2 Y.B. Int’l L. Comm’n 89, art. 40, U.N. Doc. A/CN.4/117.

28. U.N. Conference on Diplomatic Intercourse and Immunities, *Proposals and Amendments Submitted in the Committee of the Whole*, ¶¶ 200-02, U.N. Doc. A/CONF.20/14/Add.1, 38 (Vol. II) (Mar. 2-Apr. 14, 1961).

29. As of February 2017, the VCDR has 191 parties. *Vienna Convention on Diplomatic Relations*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-3&chapter=3](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3) [http://perma.cc/AFF3-Q76Q] (last updated June 12, 2017).

30. BISWANATH SEN, *A DIPLOMAT’S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 90 (3d ed. 1988).

31. 4 CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 167 (1980).

32. 1 OPPENHEIM’S INTERNATIONAL LAW 1068-69 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

1950, the ICJ made a brief reference to the concept in the *Asylum Case*, but this case dealt with a different form of activity—the granting of diplomatic asylum which the Court found to be “an intervention in matters which are exclusively within the competence” of the territorial State.<sup>33</sup> The ICJ’s next opportunity to clarify the concept of interference came only thirty years later, in the *Tehran Hostages Case*. There, the Court merely listed interference among the “abuses of [diplomatic] functions”<sup>34</sup> and acknowledged that it was difficult to determine exactly when the diplomatic function of observation would involve acts such as espionage or interference.<sup>35</sup>

The codification history, too, is only of limited use where the clarification of diplomatic interference in this regard is concerned. The commentary which the ILC supplied for the relevant Draft Article does not mention diplomatic funding activities, though such conduct could in some situations be embraced by the one example of interference to which reference is made, i.e., the participation in political campaigns.<sup>36</sup> Cases have certainly arisen in which receiving States raised allegations of funding which would have benefitted certain political parties ahead of elections in that State.<sup>37</sup>

A more specific mention of diplomatic funding was, however, made during the ILC debates on the rule of interference in the first year in which that topic was discussed by the Commission. Various members voiced their objections against this kind of conduct, and, given the existence of State practice pointing in a

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33. *Asylum Case (Colom. v. Peru)*, Judgment, 1950 I.C.J. Rep. 266, 275 (Nov. 20).

34. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 3, ¶ 84 (May 24).

35. *Id.* ¶ 85. In 2009, a case reached the court which involved questions both of interference and diplomatic asylum. See *Application Instituting Proceedings by the Republic of Honduras against the Federative Republic of Brazil*, ¶ 5 (Oct. 28, 2009), <http://www.icj-cij.org/docket/files/147/15935.pdf> [<http://perma.cc/Q8ZW-JE9Z>]. However, the case was withdrawn by the State of Honduras before it reached decision stage. *Certain Questions Concerning Diplomatic Relations (Hond. v. Braz.)*, Order, 2010 I.C.J. Rep. 303, 304 (May 10).

36. *Draft Articles on Diplomatic Intercourse and Immunities*, *supra* note 27, art. 40 cmt. ¶ 2.

37. See, e.g., the 1999 case involving diplomats from several sending States who were stationed in Malaysia. See *infra* text accompanying notes 173-74.

similar direction, it is of particular interest that they, too, focused on funding of political factions. Yokota expressed the opinion that it was “unwarranted interference” for an “ambassador to encourage or subsidize a political party in the receiving State”;<sup>38</sup> Ago thought it “improper action” for the head of a mission to give “moral or financial support to a political party in the receiving State.”<sup>39</sup> But these were observations by individual members; and while they were not contradicted by their colleagues, they did not seem to command sufficient attention to generate an express prohibition of this activity in the ILC draft either.

The views which have been advanced in academic literature on diplomatic funding show a distinct degree of diversity. The generally permissive view advocated by the editor of *Satow* in 1964<sup>40</sup> can be understood to reflect the traditional position on this topic, which considered funding as merely one of several arrows in the quiver of the diplomatic agent.<sup>41</sup> Yakembe, on the other hand, asserts that diplomatic missions must at all costs avoid having recourse to “corruption,”<sup>42</sup> and several other scholars considered this form of behavior one of the principal examples of interference.<sup>43</sup>

A third opinion calls for a closer examination of the relevant behavior. Sen, too, notes that bribery in general “overstep[s] the bounds of propriety.”<sup>44</sup> But he also draws attention to the difference between bribery and the customary exchange of presents: in some countries, there was, after all, a tradition to give “small presents and flowers on certain occasions such as

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38. *Summary Records of the Ninth Session*, [1957] 1 Y.B. Int'l L. Comm'n 146-47, U.N. Doc. A/CN.4/SER.A/1957.

39. *Id.* at 149.

40. *See supra* text accompanying note 24.

41. For additional information, *see* THEODOR SCHMALZ, *EUROPÄISCHES VÖLKERRECHT* 98 (1817). In the more recent literature, *cf.* David D. Newsom, *Clandestine Collection*, in *INSIDE AN EMBASSY: THE POLITICAL ROLE OF DIPLOMATS ABROAD* 38, 39 (Robert Hopkins Miller ed., 1992).

42. YOKO YAKEMBE, *TRAITÉ DE DROIT DIPLOMATIQUE* 67 (1983).

43. JEAN SALMON, *MANUEL DE DROIT DIPLOMATIQUE* ¶ 197 (1996); *see also* 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 787 (H. Lauterpacht ed., 1967) (referencing the case of the French Ambassador to Britain, 1677-81)

44. SEN, *supra* note 30, at 59, *see also* PRASANTA BIHARI MUKHARJI, *THE MODERN TRENDS OF DIPLOMATIC LAW* 23 (1973).

Christmas or the New Year Day.”<sup>45</sup>

It is certainly true that not every case in which diplomats hand money or other material means to a recipient can qualify as conduct prohibited under international law. Diplomats, like most persons under the jurisdiction of the receiving State, dispense funds for a great variety of purposes, and not all of them are considered illegitimate. It would, for instance, be difficult to adduce evidence for the assertion that the international community considers the purchase of a (legally available) newspaper interference in internal affairs.

The paucity of sources which could settle the boundaries of diplomatic interference where diplomatic funding is concerned raises the question whether a more precise definition of the prohibited diplomatic conduct can be derived from the second type of restrictive rules which has an impact on situations of this kind—i.e., those treaties which address “bribery” and “corruption” more generally.

The international regulation of situations in which material goods were provided by foreign agents certainly did not proceed at a quick pace. But in 1975, the General Assembly did condemn “all corrupt practices, including bribery” (albeit with particular reference to “transnational and other corporations, their intermediaries and others involved”).<sup>46</sup>

And today, a panoply of instruments exists which have relevance in this regard: among them, the Inter-American Convention against Corruption of 1996 (IACAC),<sup>47</sup> the EU Protocol of the same year,<sup>48</sup> and the EU Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of 1997,<sup>49</sup> the Council

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45. SEN, *supra* note 30, at 60; SATOW'S GUIDE TO DIPLOMATIC PRACTICE, *supra* note 24, at 103.

46. G.A. Res. 3514 (XXX), ¶ 1 (Dec. 15, 1975).

47. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter IACAC].

48. Protocol Drawn up on the Basis of Article K.3 of the Treaty on European Union to the Convention on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 1, 2-10 [hereinafter EU Financial Interests Protocol].

49. Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, 2007 O.J. (C 195) 1 [hereinafter EU Corruption Convention].

of Europe Criminal Law and Civil Law Conventions on Corruption,<sup>50</sup> the OECD Convention on Combating Bribery of Foreign Officials,<sup>51</sup> the AU Convention on Preventing and Combating Corruption,<sup>52</sup> the UN Convention against Transnational Organized Crime of 2000,<sup>53</sup> and the UN Convention against Corruption of 2003 (UNCAC).<sup>54</sup>

The primary purpose of these instruments is the establishment of certain obligations of member States—particularly, the obligation to criminalize certain funding activities in their domestic legal orders, such as the bribery of foreign public officials.<sup>55</sup> Beyond that, there is reason to argue that States which accept these duties, thereby also agree not to commit such offenses in the first place through their own agents.<sup>56</sup> The relevant norms, however, are binding on those States only which are parties to the relevant instruments.

In the context under consideration, however, a further meaning can be derived from the relevant rules. If a systematic consideration of the concept of unlawful funding in the relevant norms yields the result that a consensus on the elements of such conduct can be established, such assessment will assist in

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50. Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173 [hereinafter CoE Criminal Law Convention]; Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174 [hereinafter CoE Civil Law Convention].

51. Convention on Combating Bribery of Foreign Officials in International Business Transactions, Nov. 21, 1997, O.E.C.D. Doc. DAFFE/IME/BR(97)20 [hereinafter OECD Bribery Convention].

52. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 [hereinafter AU Corruption Convention].

53. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter UN Transnational Crime Convention].

54. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 141 [hereinafter UNCAC]. The UNCAC has 181 parties. *United Nations Convention Against Corruption*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&clang=_en) [http://perma.cc/LN25-TETW] (last updated June 13, 2017).

55. UNCAC, *supra* note 54, art. 16(1); UN Transnational Crime Convention, *supra* note 53, art. 8(2); CoE Criminal Law Convention, *supra* note 50, art. 5; OECD Bribery Convention, *supra* note 51, art. 1(1); IACAC, *supra* note 47, art. VIII.

56. For the link between the recognition of a crime and the duty not to commit it in the first place, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 166 (Feb. 26).

delineating the parameters of behavior which the international community considers unlawful even where diplomatic agents were the authors of such activities.

In this way, the consensus that has thus been established serves as evidence for the interpretation which States in general are prepared to apply to this particular emanation of diplomatic interference.

And the relevant instruments do contain elements which point to commonalities among them. The understanding of “corruption” or “bribery” is remarkably similar in all of them:<sup>57</sup> there is agreement that the act involves, on the one hand, the offering (or promising, giving, etc.) of a monetary or other benefit to the recipient<sup>58</sup> and, on the other hand, the intended provision of a service (which can be an act or an omission),<sup>59</sup> or at least a change in the conduct of the recipient.<sup>60</sup> In almost all instruments, a reciprocal relationship is at the center of the

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57. The terminology differs. G.A. Res. 3514 (XXX), *supra* note 46, appeared to consider “corruption” the wider term and “bribery” only a subset. That distinction was retained in the UNCAC, which refers to “bribery” as only one of several forms of financial misbehavior. UNCAC, *supra* note 54, arts. 15-16, 21; *see id.* arts. 17-20, 22-23. “Corruption” is used as an umbrella term. But what the UNCAC describes as “bribery” is the equivalent to conduct that the UN Transnational Crime Convention, *supra* note 53, art. 8, calls “corruption.” *See also* Protocol Against Corruption art. 3, Aug. 14, 2001, S. African Dev. Cmty., [http://www.sadc.int/files/7913/5292/8361/Protocol\\_Against\\_Corruption2001.pdf](http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf) [<http://perma.cc/VP9A-S9ER>] [hereinafter SADC Protocol]; EU Corruption Convention, *supra* note 49, arts. 2-3; CoE Civil Law Convention, *supra* note 50, art. 2; EU Financial Interests Protocol, *supra* note 48, at arts. 2-3; IACAC, *supra* note 47, art. VI. For rules preferring the word “bribery,” *see* CoE Criminal Law Convention, *supra* note 50, arts. 2-11; OECD Bribery Convention, *supra* note 51, art. 1. The AU Corruption Convention, *supra* note 52, art. 4(1), uses the phrase “acts of corruption and related offences.”

58. *See* UNCAC, *supra* note 54, arts. 15-16, 21; AU Corruption Convention, *supra* note 52, art. 4(1)(b); UN Transnational Crime Convention, *supra* note 53, art. 8; CoE Civil Law Convention, *supra* note 50, art. 2; CoE Criminal Law Convention, *supra* note 50, arts. 2, 5; OECD Bribery Convention, *supra* note 51, art. 1; EU Corruption Convention, *supra* note 49, art. 3; EU Financial Interests Protocol, *supra* note 48, art. 3; IACAC, *supra* note 47, arts. VI, VIII.

59. *See* UNCAC, *supra* note 54, arts. 15, 16, 21; AU Corruption Convention, *supra* note 52, art. 4(1)(b); UN Transnational Crime Convention, *supra* note 53, art. 8; CoE Criminal Law Convention, *supra* note 50, art. 2; OECD Bribery Convention, *supra* note 51, art. 1; EU Corruption Convention, *supra* note 49, art. 3; EU Financial Interests Protocol, *supra* note 48, art. 3; IACAC, *supra* note 47, arts. VI, VIII.

60. *See* the phrasing in the CoE Civil Law Convention, *supra* note 50, art. 2.

activity; expressed through the phrase “in exchange for”<sup>61</sup> or “in order to,”<sup>62</sup> or simply “for him (or her) to act.”<sup>63</sup> The advantage offered might thus be direct or indirect in nature, but a return service is expected—the act of bribery is goal-oriented.

UNCAC, in line with most of the instruments, also refers to the character of the means provided to the recipient: they must constitute an “undue advantage.”<sup>64</sup> It is an important distinction which rules out incidents in which, for instance, legitimate fees attached to administrative work or to the use of particular facilities are owed to the recipient or his organization.

But the application of this concept to incidents of diplomatic funding is not always without difficulties. The provision of material goods to political parties in the receiving State poses particular challenges in that regard. If a diplomat offers funds to a party, the result which he expects in return will regularly not be a specific service, but the strengthening of a faction deemed to be favorable to the policies of the sending State—or the weakening of a faction deemed to be dangerous to its interests.<sup>65</sup>

Difficulties may also arise where the distinction between “due” and “undue” advantages is concerned. If a diplomatic agent subscribes to a party newsletter or attends events for which the

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61. APEC Conduct Principles for Public Officials, July 3, 2007, princ. 3, [http://mddb.apec.org/documents/2007/SOM/SOM3/07\\_som3\\_012attB3rev1.doc](http://mddb.apec.org/documents/2007/SOM/SOM3/07_som3_012attB3rev1.doc) [<http://perma.cc/7WWN-A72H>] [hereinafter APEC Conduct Principles for Public Officials]; AU Corruption Convention, *supra* note 52, art. 4(1)(a),(b); SADC Protocol, *supra* note 57, art. 3(1)(b); IACAC, *supra* note 47, arts. VI(1)(a), VIII.

62. OECD Bribery Convention, *supra* note 51, art. 1(1). The UN Transnational Crime Convention, *supra* note 53, art. 8, and the UNCAC, *supra* note 54, arts. 15-16, 21, both say “in order that.”

63. CoE Criminal Law Convention, *supra* note 50, art. 2; EU Corruption Convention, *supra* note 49, art. 3; EU Financial Interests Protocol, *supra* note 48, art. 3; *see* G.A. Res. 51/191, Annex ¶ 3 (Dec. 16, 1996).

64. UNCAC, *supra* note 54, arts. 15(a), 16; AU Corruption Convention, *supra* note 52, art. 4; UN Transnational Crime Convention, *supra* note 53, art. 8(a); CoE Civil Law Convention, *supra* note 50, art. 2; CoE Criminal Law Convention, *supra* note 50, art. 2; *see* APEC Conduct Principles for Public Officials, *supra* note 61, princ. 2; OECD Bribery Convention, *supra* note 51, art. 1(1); G.A. Res. 51/191, *supra* note 63, Annex ¶ 3.

65. It may be recalled that, when Salvador Allende came to power in Chile, the recipients of U.S. financial contributions included not only the conservative Christian Democratic Party, but also the Radical Party of the Left, in an effort to weaken the Socialist government of the elected President. *Report: CIA Funded Chilean Parties*, ASSOCIATED PRESS, Nov. 13, 2000.

party charges admission, it will be understood that due payment must be provided in return. There is no reported case where a receiving State would have taken exception to the provision of material advantages in these situations;<sup>66</sup> but it is true that the dividing line between due and undue advantages may be thin.

Most of all, however, the usefulness of the instruments mentioned above is impaired by the fact that they tend to envisage, as the recipient of the advantage, a national<sup>67</sup> or foreign official,<sup>68</sup> or, on occasion, an elected representative or member of a public assembly.<sup>69</sup> The African Union (AU) Corruption Convention is the only one which imposes an obligation upon State parties to “proscribe the use of funds acquired through illegal and corrupt practices” to finance political parties.<sup>70</sup> UNCAC merely obliges States to “enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.”<sup>71</sup>

One of the most prominent situations in which diplomatic funding arises in contemporary international relations is therefore not subject to a codified ban on a global level; as such, it is also difficult to derive, based on these instruments alone, evidence for the existence of customary international law banning the provision of material funds to parties. That may appear a

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66. As opposed to attendance of party meetings as such. On this, see, for example, the 2009 case of the U.S. Ambassador to Afghanistan, Karl Eikenberry, who was criticized by the Afghan President Karzai after he had attended a press meeting hosted by one of Karzai's competitors. *Karzai Protests US Diplomat's Presence at Rival's Meeting*, INDO-ASIAN NEWS SERV., June 29, 2009.

67. UNCAC, *supra* note 54, art. 15(a); UN Transnational Crime Convention, *supra* note 53, art. 8(1)(a); CoE Criminal Law Convention, *supra* note 50, art. 2; EU Corruption Convention, *supra* note 49, art. 3; EU Financial Interests Protocol, *supra* note 48, art. 3; IACAC, *supra* note 47, art. V(1)(b); G.A. Res. 51/191, *supra* note 63, ¶ 3(a). The AU Corruption Convention has one of the widest ranging provisions in this regard by referring to any person who performs “public functions.” See AU Corruption Convention, *supra* note 52, art. 4(1)(b).

68. UNCAC, *supra* note 54, art. 16(1); UN Transnational Crime Convention, *supra* note 53, art. 8(2); CoE Criminal Law Convention, *supra* note 50, art. 5; OECD Bribery Convention, *supra* note 51, art. 1(1); IACAC, *supra* note 47, art. VIII.

69. CoE Criminal Law Convention, *supra* note 50, arts. 4, 6; G.A. Res. 51/191, *supra* note 63, ¶ 3(a).

70. AU Corruption Convention, *supra* note 52, art. 10.

71. UNCAC, *supra* note 54, art. 7(3); accord AU Corruption Convention, *supra* note 52, art. 10(b).

surprising conclusion—one that is difficult to align with the general thrust of the instruments in the field: a good number of the relevant treaties and resolutions do realize that the fight against corruption is, at least in part, based on the need to combat a danger to the values of democracy<sup>72</sup> and to political stability.<sup>73</sup>

But this finding does not mean that States consider the diplomatic funding of parties to fall outside the scope of interference. A more persuasive argument for the existence of the opposite position may be derived from evidence that members of the international community, in general, consider the funding of parties a damaging intrusion in their own affairs. A great number of States, covering a wide spectrum of different political systems and beliefs, have indeed adopted legislation which deals with the issue of party financing through foreign funding. In 2006, the Agency for Legislative Initiatives concluded that, out of a sample of 111 countries, 64 percent had adopted legal regulations on the foreign funding of political parties.<sup>74</sup> The International Institute for Democracy and Electoral Assistance found in 2012, on a data basis of 180 countries,<sup>75</sup> that 68 percent of them banned foreign donations to political parties and 51 percent banned foreign donations to candidates.<sup>76</sup> The ban on foreign donations to parties was therefore the second most popular ban on political donations

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72. See UNCAC, *supra* note 54, pmb., operative paras. 1, 7; CoE Criminal Law Convention, *supra* note 50, pmb., operative para. 4; CoE Civil Law Convention, *supra* note 50, pmb., operative para. 3; IACAC, *supra* note 47, pmb., operative paras. 1, 2; G.A. Res. 55/188, pmb., operative para. 2 (Dec. 20, 2000).

73. AU Corruption Convention, *supra* note 52, pmb., operative para. 6; SADC Protocol, *supra* note 57, at pmb., operative para. 2.

74. Agency for Legislative Initiatives, Efficiency of Political Parties in Ukraine: Problems and Prospects, § 2.5 (Dec. 8-10, 2006), <http://www.authorstream.com/Presentation/Ulisse-54553-Analytics-eng-Efficiency-Political-Parties-Ukraine-Problems-Prospects-1-Election-System-Responsibility-a-Education-ppt-powerpoint/> [<http://perma.cc/LUY2-72HL>]; see also Ashley C. Wall, Comment, *The Money of Politics: Financing American and British Elections*, 5 TUL. J. INT'L & COMP. L. 489, 515-17 (1997) (discussing the practice of the United Kingdom and the United States).

75. Not all countries responded, but the response rate on the inquiry into bans on donations was very high at an average of 84 percent. See MAGNUS OHMAN, POLITICAL FINANCE REGULATIONS AROUND THE WORLD: AN OVERVIEW OF THE INTERNATIONAL IDEA DATABASE 6 (2012), <http://www.idea.int/sites/default/files/publications/political-finance-regulations-around-the-world.pdf> [<http://perma.cc/JW5U-SZEY>].

76. *Id.* at 10.

(out of a total of twelve options).<sup>77</sup>

One of the reasons for the concern which underlies such legislation is the fact that the exercise of influence on the electoral process by foreign powers impacts on the political rights of the nationals of the receiving State. The right to free elections has been recognized by the leading human rights instruments;<sup>78</sup> and this freedom is endangered if, during the electoral campaign, funding by a foreign power allows one party to gain significant advantages over its competitors.<sup>79</sup> A comfortable budget certainly grants the benefitting party better means to make itself known to the electorate, to purchase publicity, and to present its candidates.<sup>80</sup>

Where funding activities involve a diplomatic agent as the provider of the material means and a party or political candidates as their recipient, it would indeed be difficult to deny the existence of far-reaching consensus in the international community on the view that conduct of this kind constitutes a *prima facie* intrusion in internal affairs.<sup>81</sup>

Reference has in this regard already been made to the 1980

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77. *Id.* at 16; Oagile Key Dingake, *Botswana: Political Party Funding Helps Level Playing Field*, MMEGI/THE REPORTER (Dec. 15, 2006), <http://www.mmegi.bw/2006/December/Friday15/3570155101468.html> [<http://perma.cc/B9YZ-X4UC>].

78. American Convention on Human Rights art. 23(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; First Protocol to the Convention of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter ECHR Protocol 1].

79. James Petras, for one, doubts whether an election in which the foreign State finances “networks of cadres, mass media outlets, . . . innumerable advisers, high-tech communications and transport” can still be considered to comply with the principle of “free elections.” James Petras, *Free Elections for Empire or Democracy?*, COUNTERPUNCH (Apr. 23, 2005), <http://www.counterpunch.org/2005/04/23/free-elections-for-empire-or-democracy/> [<http://perma.cc/HUX6-KEAP>].

80. See also the concerns voiced in the debate in the United States in the 1970s, when legislative efforts were made to ban such funding activities. Senator Lloyd Bentsen, a supporter of the legislation, stated that foreign nationals had no right to “vote in our elections, so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments.” 120 CONG. REC. 8783 (1974) (statement of Sen. Bentsen); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT’L L. 1, 23 (1989).

81. See *supra* note 15, text accompanying notes 10-15.

case of the Soviet Ambassador to New Zealand, who was accused of financing the Socialist Union Party in that country and subsequently expelled.<sup>82</sup> In 1999, diplomats from various Western countries stationed in Malaysia received a warning after accusations had emerged to the effect that they had given money to the opposition in that State,<sup>83</sup> and in 2006, Stanislav Kazecki, First Secretary at the Czech diplomatic mission in Cuba, was expelled amid similar allegations.<sup>84</sup> In the following year, the Bolivian government claimed that the U.S. embassy in that State had financed the opposition<sup>85</sup>—in that context, the Bolivian President Morales threatened the expulsion of U.S. Ambassador Goldberg.<sup>86</sup> These instances, which involve States from different geographical regions and varying political and cultural systems, are by far not the only cases in the field.<sup>87</sup> Taken together, they provide ample evidence for the fact that diplomatic funding of political parties occupies a clear position among those manifestations of diplomatic interference which find, in principle, general recognition within the international community.<sup>88</sup>

It is, however, not the only restriction which diplomatic agents encounter if they provide material means to a recipient.

When France in 1975 expelled Raul Sainz Rodriguez, First Secretary at the Cuban Embassy in Paris, along with two other Cuban diplomats,<sup>89</sup> a more sinister aspect of international relations was affected:<sup>90</sup> the diplomats had allegedly supplied

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82. See *supra* text accompanying notes 10-11.

83. See *infra* text accompanying notes 173-74.

84. *Cubans expel Czech "for spying," AUSTRALIAN*, Apr. 17, 2006, at 11.

85. Arostegui, *supra* note 15.

86. *Id.*

87. See, e.g., the 1972 case of Soviet officials and diplomats who were expelled from Bolivia amid charges that the Soviet embassy had funded rebel movements. *Bolivia Is Ousting 119 Soviet Aides*, N.Y. TIMES, Mar. 30, 1972, at 1. In 2007, it was reported that the Zimbabwean President Mugabe had threatened the expulsion of Western diplomats over their alleged provision of funds to the opposition. *'Body Bag' Threat to Diplomat*, ABERDEEN PRESS & J., Apr. 4, 2007, at 16.

88. The existence of permissive grounds on the side of the sending State and its agents can change that assessment. See *infra* Sections III-IV.

89. Richard Wigg, *Expulsion of Cubans in Paris "Jackal" Case*, TIMES, July 11, 1975, at 6.

90. See *Latin America: Goodbye Ché*, ECONOMIST, July 26, 1975, at 51; Raymond Carroll & Seth S. Goldschlager, *All Roads Lead to Paris*, NEWSWEEK, July 21, 1975, at 23.

money and instructions to the Venezuelan terrorist “Carlos the Jackal.”<sup>91</sup>

Financial support to terrorists and terrorist organizations is an ongoing concern of the international community. However, as in the case of corruption, international law has been slow to react: an international treaty banning the financing of terrorism—the Terrorism Financing Convention—was not concluded until 1999.<sup>92</sup> But its speedy ratification (two years after it opened for signature), and the extremely large number of State parties which have joined it in the years of its existence<sup>93</sup> provides good reason for the assumption that its text, at least as far as its substantive provisions are concerned, reflects general customary law.<sup>94</sup>

After the 2001 attacks on the Pentagon and the World Trade Center, the Security Council adopted Resolution 1373, whose first paragraph addressed the matter of funding of terrorism,<sup>95</sup> and which incorporated the statement that “knowingly financing . . . terrorist acts” was “contrary to the purposes and principles of the United Nations.”<sup>96</sup> However, few cases have arisen in which accusations of diplomatic financing of terrorists have been made, and on those rare occasions, the sending States have not advanced arguments to the effect that the financing of terrorism would be in line with international law. In the Sainz Rodriguez incident, the Cuban embassy denied any involvement in the matter and stressed that the Cuban government rejected the methods of terrorists<sup>97</sup>—a statement which rather serves to

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91. Carroll & Goldschlager, *supra* note 90.

92. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 [hereinafter Terrorism Financing Convention].

93. 188 States have become parties to the treaty. International Convention for the Suppression of the Financing of Terrorism, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-11&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=_en) [<http://perma.cc/6AD6-945Q>] (last updated June 14, 2017).

94. Note, however, the limits of the scope of its applicability. See Terrorism Financing Convention, *supra* note 92, art. 2. On the ongoing debate about the definition of terrorism, see BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 129-42, 168-90, 247-48, 250-53, 270 (2010).

95. S.C. Res. 1373, ¶ 1(a)-(d) (Sept. 28, 2001); see also *id.* ¶¶ 2(d)-(e), 3(d).

96. *Id.* ¶ 5.

97. Wigg, *supra* note 89.

underline the generally accepted ban on funding for these purposes.

Salmon makes reference to another area of funding which raises concerns: in his view, a diplomatic agent commits interference if he engages in military or financial support to an armed opposition.<sup>98</sup> Here, too, accusations of this kind against diplomats assigned to permanent missions are not all too common.

Yet they did arise in the above-named case of Jalil Jeelani, the Pakistani Deputy High Commissioner, who was expelled by India in February 2003.<sup>99</sup> The relevant charges on this occasion extended to the funding of militants in the Himalaya province;<sup>100</sup> Jeelani himself had allegedly handed over \$6,250 to a Kashmiri recipient, money which had been meant for anti-Indian separatists.<sup>101</sup>

The low number of instances of this kind causes a particular difficulty for the evaluation of such conduct. The fact must be taken into account that Salmon's concept of giving financial assistance to an armed opposition covers a wide range of scenarios, depending both on the way in which aid is provided and the character of the recipient. Such assistance can easily include the funding of an opposition in the knowledge of the existence of a military wing, but without any intent to support a military action; the sponsoring of a party when individual members, without the party's consent, commit violent acts; and even instances of humanitarian assistance to an armed group.<sup>102</sup>

In 1986, the ICJ had an opportunity to discuss (in the wider context of State intervention) the funding of an armed opposition group by another State, when it rendered its judgment in the *Nicaragua Case*—a case in which Nicaragua claimed, *inter alia*, that the United States (which had provided financial and other

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98. SALMON, *supra* note 43, at 129.

99. *See supra* text accompanying note 12.

100. Kumar, *supra* note 12.

101. *Id.*

102. The fact may be recalled that the ICJ had observed that assistance of this kind would not qualify as “unlawful intervention, or, as in any other way contrary to international law.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 242 (June 27).

support to the contras) had intervened in her internal affairs.<sup>103</sup> It was the opinion of the ICJ that a case of intervention existed when a State, “with a view to the coercion of another State, supports and assists armed bands” in the latter State, if it was the purpose of such bands to overthrow the government.<sup>104</sup>

If funding of political parties by diplomatic agents fulfills, at least prima facie, the parameters of diplomatic interference,<sup>105</sup> it would certainly be adventurous to argue that support for armed groups would not fall within the same category. Yet it is interesting to note that the Court also raised the question whether certain justifications might have been at the disposal of the respondent State.<sup>106</sup>

In the field of funding as a form of alleged diplomatic interference, the “classic” forms of justifications—the Court discussed self-defense and countermeasures<sup>107</sup>—have little practical relevance.<sup>108</sup> But the general existence of certain interests on the side of the sending State which ostensibly diverge from the right of the receiving State to be free from interference cannot easily be dismissed, and where the funding of insurgents is concerned, they may often take the shape of interests which themselves are recognized under international law—prominently, the interest of the international community to assist a people in the realization of self-determination.

In situations of that kind, however, the language of “justifications” is of little help to evaluate the meeting of the

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103. *Id.* ¶ 23.

104. *Id.* ¶ 241.

105. *See supra* text accompanying note 88.

106. *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 246-49.

107. *Id.* ¶¶ 247-48; *see also Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 26, arts. 21-22, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *Draft Articles on State Responsibility*].

108. There is, for instance, no reported case in which it was claimed that diplomatic funding had been adopted in response to an ongoing armed attack on the sending State (which are the situational parameters prescribed by the *Draft Articles on State Responsibility*, *supra* note 107, art. 21, in conjunction with the UN Charter, art. 51). Countermeasures have to comply with a whole range of conditions to be considered lawful. *See Draft Articles on State Responsibility*, *supra* note 107, arts. 49-53. In this field, too, there are no reported cases in which a sending State or its agents claimed that funding activities had been adopted in response to an internationally wrongful act by the receiving State. *See id.* art. 49(1).

norms. The concept of justifications applies to scenarios in which the existence of certain circumstances changes the assessment of conduct that would otherwise have been unlawful—a State which resorts to action covered by the relevant grounds is held not to have committed a wrongful act, due to the specificity of the situation.<sup>109</sup> Justifications thus presuppose atypical circumstances which lead to an exception from the ordinary applicability of the restrictive rule. The obligation incumbent on the State is not terminated; once the special circumstance ceases to exist, the obligation resumes.<sup>110</sup>

The meeting of interests that has been mentioned above requires a different assessment: it is a meeting of norms which both claim permanent existence and validity under international law. A diplomat who takes action, for instance, to aid a people's right to self-determination does not do so because of the existence of unusual circumstances which warrant exceptional assessment; but neither does a scenario of this kind mean that the interests of the receiving State (as in the case of justifications) have become inapplicable. The evaluation of such a meeting of norms may yet side with the receiving State.

These are features which arise in a great variety of instances of diplomatic funding, and they deserve consideration in their own right. The following section thus explores the interests which the sending State and its agents can invoke in defense of the conduct in question, and it investigates the legal bases for such claims. But an assessment on the lawfulness of diplomatic funding in these fields can only be reached once the legal relationship between the legitimate interests of sending and receiving State has been analyzed and once a mechanism has been employed which allows for a conclusive evaluation of the measure in question. These are points which will be discussed in Section IV.

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109. The most notable examples in that field are the “circumstances precluding wrongfulness” to which the *Draft Articles on State Responsibility* refer. See *Draft Articles on State Responsibility*, *supra* note 107, 71, ch. V cmt. ¶¶ 1-2.

110. *Id.* ¶¶ 2-3.

## III. LEGAL GROUNDS FOR DIPLOMATIC FUNDING

When *Plan of Attack*—Bob Woodward’s book on the background of the 2003 war in Iraq—was published, its revelations on certain Saudi activities in the run-up to the 2004 U.S. presidential election caused consternation. Woodward reported that, according to the Saudi Ambassador, Prince Bandar, “the Saudis [had] hoped to fine-tune oil prices to prime the economy for 2004. What was key, Bandar knew, were the economic conditions before a presidential election, not at the moment of the election.”<sup>111</sup>

That conduct of this kind would trigger criticism cannot be surprising. Jamie Rubin, spokesman for the State Department under President Clinton, was clear in his condemnation and declared that the attempt by the Saudi side “to pick America’s president [was] an interference of the highest order.”<sup>112</sup>

Bandar’s reported conduct differs from cases of straightforward funding of political parties: there was no allegation that money or other material means had been given to the Republican party or its candidate by the Ambassador. However, if the parameters identified in the context of corruption of officials are applied here, the alleged behavior bears all the hallmarks of the provision of an advantage to a faction which was the sending State’s party of choice in the forthcoming elections. At the same time, the question may be asked whether an attempt to steer the politics of the receiving State into a direction which is advantageous to the sending State is not one of the most basic tasks of the diplomatic office.

This is far from being a merely political consideration. The protection of interests of the sending State has, for a long time, been accepted as one of the principal aspects of diplomatic work.<sup>113</sup> Today, the VCDR contains, in Article 3, a list of five functions of which this particular task forms part. It is an open-ended list, but the enumerated functions—the tasks of

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111. BOB WOODWARD, *PLAN OF ATTACK* 324 (2004).

112. *The News on CNBC* (NBC News television broadcast Apr. 19, 2004).

113. On the long-standing recognition of the relevant diplomatic functions, see EILEEN DENZA, *DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 28 (4th ed. 2016).

representation, the protection of interests, negotiating with the host government, the observation of conditions and developments in the receiving State, and the promotion of friendly relations—can certainly claim to enjoy a large degree of acceptance within the international community.

In Bandar's case, the protective task (enshrined in Article 3(1)(b) of the VCDR) certainly gives room for an interpretation that would allow this rule to be a basis for the provision or the promising of advantages to a party whose direction is seen as beneficial to the sending State.<sup>114</sup> Diplomatic agents engaging in acts of this kind can therefore invoke a ground for their conduct which is recognized under international law. The lawfulness of the relevant action, as will be seen, turns in particular on the question of the extent to which a sending State and its agents go to achieve outcomes conducive to its purposes.<sup>115</sup>

Similar considerations apply where the promotion of friendly relations (Article 3(1)(e) of the VCDR) is concerned. It is a function which almost unavoidably involves a diplomatic agent in contact with individual factions in the receiving State,<sup>116</sup> but the maintenance of such contacts can easily lead to the provision of material means. The provision of food and drink at diplomatic events does, after all, fall within this wide category, and it is clear

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114. It is true that the wording which the function received makes reference to the "limits permitted by international law," within which the task has to be carried out. But this phrase does not constitute a significant addition to the norm. As Do Nascimento e Silva points out, it is an insertion *ex abundante cautela*: the same limitation applies to the performance of other provisions of the VCDR as well. GERALDO EULÁLIO DO NASCIMENTO E SILVA, *DIPLOMACY IN INTERNATIONAL LAW* 63 (1972). What the limits of international law are, is a matter of decision by members of the international community who are called upon to settle, through their own practice, the law on questions on which the Convention is silent. *See VCDR, supra* note 16, pmb. ¶ 5. In that regard, however, neither a reflection of the interests of the sending State nor those of the receiving State is enough, as both may well find support within the international community. What is required for a legal evaluation of the relevant conduct is the application of a mechanism which allows the character of both sets of interests to survive. *See infra* Section IV.

115. *See infra* text accompanying notes 172-83.

116. "Friendly relations," as envisaged in the Vienna Convention, are not limited to the government of the receiving State, *see* GERHARD VON GLAHN, *LAW AMONG NATIONS* 518 (1992), and there is evidence that sending States are keen to base contact with the opposition on this particular task. *See, e.g.,* Ko Shu-ling, *Paraguay Reaffirms Relations with Taiwan*, *TAIPEI TIMES* (Aug. 20, 2002), <http://www.taipetimes.com/News/taiwan/archives/2002/08/20/0000164880> [<http://perma.cc/AZY5-AJ5A>].

that that is a practice which is widely adopted. Entertainment allowances are allocated to diplomatic missions for the very purpose of facilitating the maintenance of friendly relations, and their significance is not lost on sending States and their agents.<sup>117</sup> What is more: Article 3(1)(e) may positively require the provision of material means. If it is the custom in a receiving State—as in the example to which Sen refers—to give flowers or small presents on certain holidays, ignoring such traditions could defeat the very objective of the diplomatic task.

In other situations, again, the function of observation (Article 3(1)(d) of the VCDR) opens the door to the provision of material means—including means which will not necessarily cause much criticism in the receiving State. For one, the entertaining of guests, which will regularly involve the provision of sustenance, may also have the purpose of ascertaining their opinions on political developments in the receiving State, and this is often understood as a regular part of diplomatic work. But the task of observation can also extend to the purchase of information which, if the subject of the material is not classified in nature, may give the receiving State little reason for concern. Clark, for instance, refers to the case of a Japanese embassy which paid a journalist \$2,500 per year for a weekly report on the political scene.<sup>118</sup> It cannot be expected that conduct of this kind would encounter criticism in the majority of receiving States.

But diplomatic funding, even if performed in the pursuit of legitimate functions, will not always be perceived in a positive light. There is a difference between a diplomat who treats party members to tea or dinner and his colleague who funds a party website.<sup>119</sup> There is also a difference between paying a journalist

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117. See Barder's view that "entertaining and being entertained" are "essential elements in the vital task of establishing a personal relationship with the movers and shakers, the decision makers and influence wielders" in the receiving State. BRIAN BARDER, *WHAT DIPLOMATS DO* 147 (2014) (Adam's words). For an insightful elaboration on the way the British Foreign and Commonwealth Office dealt with entertainment allowances, see *id.* at 141-52.

118. ERIC CLARK, *DIPLOMAT: THE WORLD OF INTERNATIONAL DIPLOMACY* 73 (1974).

119. See the 2001 case of Michael Kozak, the U.S. Ambassador to Belarus. Ian Traynor, *Belarussian Foils Dictator-Buster . . . for Now*, *GUARDIAN* (Sept. 13, 2001, 10:24 PM), <https://www.theguardian.com/world/2001/sep/14/iantraynor> [http://perma.cc/959A-E2X9].

for a political analysis and paying an official of the intelligence service of the receiving State for the provision of military secrets. These are questions which attach to the permitted extent of the diplomatic activity and may indeed have an impact on the legality of the relevant conduct—a point which will be discussed in the following section.<sup>120</sup> By themselves, however, they do not change the premise that funding activities can find their basis in the performance of diplomatic functions.

Yet it is worth mentioning that not all grounds for such conduct enjoy equal popularity among those who seek to defend diplomatic conduct in the face of allegations of interference. Reference to the protection of interests, in particular, is, in spite of its position in the VCDR, a double-edged sword: it is difficult for a sending State to claim that this task allows the funding of a political party while avoiding the stigma of selfishness and maintaining the pretense of neutrality.

A simple denial of the factual basis of the allegations is a more frequent feature in situations of this kind. When Sofinsky, for instance, the Soviet Ambassador to New Zealand, was expelled in 1980 amid accusations of giving money to a political party,<sup>121</sup> he referred to the charges as “lies” and “slander.”<sup>122</sup>

Prince Bandar’s explanation was somewhat more interesting. Bandar did not deny that it had been the Saudi intention to keep the oil price at a low level ahead of the election.<sup>123</sup> He also stated that he was always in favor of the re-election of an incumbent president.<sup>124</sup> But the Ambassador stressed that he had entertained good relations both with Democratic and Republican presidents<sup>125</sup> and vehemently denied that the intended adjustment of the oil price had been designed to facilitate the

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120. *See infra* text accompanying notes 172-83.

121. *See supra* text accompanying notes 10-11.

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

123. Dan Froomkin, *No Saudi Oil ‘Deal,’ Woodward Says*, WASH. POST (Apr. 20, 2004), <http://busharchive.froomkin.com/A26971-2004Apr20.html> [<http://perma.cc/D2GS-4M73>].

124. *Id.*; *Late Edition with Wolf Blitzer* (CNN television broadcast Apr. 25, 2004) (interview with Prince Bandar Bin Sultan).

125. *Late Edition with Wolf Blitzer*, *supra* note 124.

re-election of George W. Bush.<sup>126</sup> Saudi Arabia, according to Bandar, had “hoped” that oil prices would stay low “because that’s good for America’s economy, . . . good for our economy and the international economy.”<sup>127</sup>

These statements suggest a shift of the basis of the diplomatic activity—but one with potentially far-reaching consequences. If the adjustment of the oil price had been performed for the benefit of both States, the promotion of interests of the sending State would be displaced by the promotion of friendly relations—a task to which international law undoubtedly accords considerable weight.<sup>128</sup> It is a different question whether such a claim can be backed up by the circumstances of the case: the fact in particular that the adjustment had been promised in close temporal proximity to a presidential election casts doubt on its character as an impartial gesture.<sup>129</sup>

Diplomatic functions are not the only grounds under international law which can provide a basis for the rendering of financial assistance to recipients in the receiving State. The fact must be taken into account that the law of nations recognizes certain situations in which States are entitled to take an interest in developments within the receiving State, and that diplomats, as agents of their States, are able to benefit from these grounds. The most prominent scenario in this field arises when the receiving State owes particular obligations not only to its own nationals, but *erga omnes*—i.e., to “the international community as a whole.”<sup>130</sup>

With regard to the rights affected by *erga omnes* obligations, the ICJ emphasized that “all States can be held to have a legal

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126. *Id.*

127. Froomkin, *supra* note 123.

128. See UN Charter art. 1, ¶ 2; G.A. Res. 2625 (XXV), Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, pmb. ¶¶ 1, 5, princ. 6 ¶ 2 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

129. On that occasion, Rubin observed that Bush’s opponent Kerry had called for a change in the Saudi Arabian oil policy “at the last OPEC meeting”, but that the Saudi side had “refused to increase production to lower prices.” *The Big Show with John Gibson* (Fox News Network television broadcast Apr. 19, 2004) (interview with Jamie Rubin).

130. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5).

interest in their protection.”<sup>131</sup>

Reference to *erga omnes* norms is typically (though not exclusively) made when human rights are involved—particularly where they have been subjected to severe threat. Protection from slavery, racial discrimination,<sup>132</sup> the prohibition of torture,<sup>133</sup> and the outlawing of genocide<sup>134</sup> have all been accepted as norms carrying *erga omnes* character.

Where diplomatic funding is concerned, it is a different aspect which has gained particular relevance in this context: the concept of self-determination, which finds mention in the Charter of the United Nations<sup>135</sup> and whose character as a right has been affirmed by Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>136</sup> That self-determination carries *erga omnes* character was confirmed in

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131. *Id.*; Rep. of the Study Grp. of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 37, U.N. Doc. A/CN.4/L.702 (July 18, 2006) [hereinafter Study Group on Fragmentation]; Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUR. J. INT'L L. 125, 165 (2010); Otto Spijkers, *What's Running the World: Global Values, International Law, and the United Nations*, 4 INTERDISC. J. HUM. RTS. L. 67, 77, 88 (2009).

132. 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 I.C.J., 32 ¶ 34. On freedom from slavery, see ICCPR, *supra* note 78, art. 8(1); ACHR, *supra* note 78, art. 6(1); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 4(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. On freedom from racial discrimination, see Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Apr. 11, 2000, E.T.S No. 177; ACHR, *supra* note 78, arts. 1(1), 24.

133. See *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, ¶ 151 (Int'l Crim Trib. for the Former Yugoslavia Dec. 10, 1998) (discussing the *erga omnes* character of the prohibition of torture). On freedom from torture as a human right, see ICCPR, *supra* note 78, art. 7; ACHR, *supra* note 78, art. 5(2); ECHR, *supra* note 132, art. 3.

134. *Barcelona Traction*, 1970 I.C.J. ¶ 34.

135. UN Charter art. 1, ¶ 2 (naming the purposes of the United Nations and referring to the objective of developing friendly relations among nations “based on respect for the principle of equal rights and self-determination of peoples”).

136. ICCPR, *supra* note 78, at art. 1(1) (“All peoples have the right of self-determination.”). The same wording can be found in International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

several decisions by the ICJ,<sup>137</sup> and that invites the possibility that diplomatic agents may rely on it as a basis for the provision of material means in the receiving State. In some situations, the General Assembly contributed to the interpretation of this rule: numerous General Assembly Resolutions call for the rendering of “moral and material assistance” by all States to peoples striving for self-determination<sup>138</sup> and for the provision of “all necessary measures” to facilitate its implementation.<sup>139</sup>

And in the case of apartheid, the Assembly spoke of the “duty of every State” to contribute to the implementation of the rule of self-determination<sup>140</sup> and appealed to all governments “to provide every assistance,” including direct assistance, “to the national movement of the oppressed people of South Africa in their legitimate struggle.”<sup>141</sup> It is a statement of some significance, given the fact that the African National Congress (ANC)—one of the leading forces in the struggle for self-determination in that country—was for a long time banned by the ruling government and depended during that period not only on moral, but also material assistance from the outside to continue its endeavors to achieve self-determination for the black majority.<sup>142</sup>

The particular significance of self-determination lies in the fact that its boundaries are drawn wide: ICCPR and ICESCR refer in this regard to a right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>143</sup> As such, the realization of self-determination presupposes the existence of other human

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

138. G.A. Res. 3328 (XXIX), ¶ 7 (Dec. 16, 1974); G.A. Res. 3163 (XXVIII), ¶ 7 (Dec. 14, 1973); G.A. Res. 3070 (XXVIII), ¶ 3 (Nov. 30, 1973); G.A. Res. 2649 (XXV), ¶ 2 (Nov. 30, 1970); G.A. Res. 2105 (XX), ¶ 10 (Dec. 20, 1965).

139. G.A. Res. 2160 (XXI), ¶ 2(b) (Nov. 30, 1966); *see also* G.A. Res. 31/33 (Nov. 30, 1976); G.A. Res. 2649 (XXV), *supra* note 138.

140. G.A. Res. 2787 (XXVI), ¶ 7 (Dec. 6, 1971).

141. G.A. Res. 2775 (XXVI) ¶ 6 (Nov. 29, 1971).

142. *See* Dingake, *supra* note 77. For the traditional, critical view on the provision of moral and financial means to a political party, see *Summary Records of the Ninth Session*, *supra* note 38, 149 ¶ 36 (Ago).

143. ICESCR, *supra* note 136, art. 1(1); ICCPR, *supra* note 78, art. 1(1).

rights,<sup>144</sup> including the “classical” political rights—chief among them, the right to vote and to stand in elections;<sup>145</sup> but presumably also freedom of assembly and association and freedom of expression.<sup>146</sup>

Diplomatic agents therefore who, for instance, facilitate the holding of free elections through the provision of financial aid, are able to invoke a ground for their actions which has a powerful basis in international law. But such action has to comply with the parameters of self-determination if a successful claim to this effect is to be advanced. There are two aspects in particular which are capable of imposing limitations on diplomatic conduct in this context.

For one, self-determination is a group right, and its beneficiaries are entities which fulfill the criteria of a “people.”<sup>147</sup> If diplomatic funding is therefore provided, self-determination cannot, in principle, serve as a legal foundation for that action because the rights of only a selected few individuals have come under threat. There are certain qualifications to that rule: it is not uncommon that the receiving State targets individuals precisely because of their relevance for 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 situations of this kind, diplomatic action, whose immediate benefits are felt by individuals, can still relate to the (threatened) breach of an *erga omnes* obligation.

Secondly, the existence of the right to self-determination does not make the right of the receiving State to its territorial integrity

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

145. ICCPR, *supra* note 78, art. 25; ACHR, *supra* note 78, art. 23; *cf.* ECHR Protocol 1, *supra* note 78, art. 3. For a critical view, see Daniel Thürer, *Self-Determination*, in 4 *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 23, at 364, 367.

146. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶ 55 (Oct. 16); *Socialist Party & Others v. Turkey*, 1998-III Eur. Ct. H.R. ¶ 45.

147. UN Charter art. 1, ¶ 2; ICCPR, *supra* note 78, art. 1(1); *Friendly Relations Declaration*, *supra* note 128, princ. 5. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 281, ¶¶ 123-25 (Can.) (providing a definition of “people”); ELIZABETH CHADWICK, *SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT* 4-5 (1996).

disappear. It too finds its basis in international law and is frequently affirmed by the same instruments which emphasize the principle of self-determination.<sup>148</sup> There is, in light of this, reason to follow the “remedial school” on self-determination, which draws a distinction between external and internal self-determination. External self-determination addresses the status of the State itself: it encompasses the declaration of independence for the territory in which the people live, its association with another State or its integration with such a State.<sup>149</sup> Internal self-determination, on the other hand, is realized within the boundaries of the State in question; it has been described as a people’s “pursuit of its political, economic, social and cultural development” in that State.<sup>150</sup> Outside the context of colonial or foreign oppression, peoples have to fulfill their right to self-determination primarily internally—a right to secession exists only if internal self-determination has been denied to them.<sup>151</sup> It is a consideration which gains particular relevance in instances in which diplomatic agents seek to finance a faction whose declared aim is the breaking away of a particular region from the receiving State and thus support potential acts against its territorial integrity.

Even in situations in which a people seeks to realize self-determination internally, the existence of the relevant right does not, by itself, allow a finding that financial assistance by diplomatic agents is to be considered in compliance with international law. As in cases in which the fulfilment of diplomatic functions provides reasons for funding activities, the

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148. See Friendly Relations Declaration, *supra* note 128, pmbl.; UN Charter art. 2 (dealing with principles and stating in its fourth paragraph that members shall refrain from the threat or use of force *inter alia* “against the territorial integrity” of any State); G.A. Res. 1514 (XV), ¶ 6 (Dec. 14, 1960); see also Conference on Security and Co-operation in Europe Final Act art. IV, Aug. 1, 1975, 14 I.L.M. 1292, 1294.

149. On these options, see Western Sahara, 1975 I.C.J. ¶ 57; G.A. Res. 1541 (XV), princ. VI (Dec. 15, 1960).

150. Secession of Quebec, 2 S.C.R. ¶ 126.

151. *Id.* ¶ 138; see Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT’L & COMP. L. 547, 553 (2009); Robert D. Sloane, *The Politics of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century*, 30 FORDHAM INT’L L.J. 1288, 1306 (2007) (reviewing TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS (2006)).

identification of legitimate grounds for such conduct can only be one part of the assessment. Such grounds do not make the norms which support the receiving State disappear, nor do they change the fact that diplomatic funding can have serious and lasting consequences with regard to the internal order of that State. What is required, is the application of a mechanism that provides a solution to this meeting of divergent interests—a point which will be addressed in more detail in the following section.<sup>152</sup>

There are very few situations in which this level of the assessment will not be reached, and in which States are not able to rely on competing interests to withdraw the conduct of their agents from the scope of interference.

The funding of armed factions offers an illustration of the difficulty that arises in this regard. Reference has already been made to the fact that some scholars are categorical in their condemnation of such conduct and express the view that financial support to an armed opposition constitutes interference.<sup>153</sup>

But even in situations of this kind, the consideration of legal grounds on the side of the sending State is not without value and may lead to a different assessment of the underlying conduct. If financial support to the ANC in the age of apartheid had been used above as an example for diplomatic funding that can be based on the *erga omnes* interest of self-determination,<sup>154</sup> then the fact must be taken into account that the ANC too had a military wing<sup>155</sup> and engaged in acts against military installations and sabotage.<sup>156</sup>

It is likely that at least the intentional financing of *direct* armed action, organized by an opposition against the government, will in all receiving States be considered interference, and that the margin for arguing in favor of the existence of permissive norms in such situations will be very small. Such conduct does

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152. See *infra* Section IV.

153. See *supra* text accompanying note 98.

154. See *supra* text accompanying notes 140-42.

155. Roger Pfister, *Gateway to International Victory: The Diplomacy of the African National Congress in Africa, 1960-1994*, 41 J. MOD. AFR. STUD. 51, 54 (2003); Gay W. Seidman, *Blurred Lines: Nonviolence in South Africa*, 33 PS: POL. SCI. & POL. 161, 164 (2000).

156. Seidman, *supra* note 155, at 165.

not differ much from incitement to violence (a behavior which a majority of members of the international community have agreed to criminalize):<sup>157</sup> in both cases, the absence of significant intervening steps between action and effect and the very direct involvement of the diplomatic agent in the resulting harm militate in favor of an absolute prohibition.

A similar case can be made where the financing of terrorism is concerned: there too the overwhelming acceptance of a ban on the relevant conduct by the members of the international community allows for the conclusion that a ban on the relevant activity exists even under general international law,<sup>158</sup> and that there is not much room for the existence of permissive norms in this context. What is more, there are no reported instances in which sending States would have claimed that the funding of direct armed action or the funding of terrorism by their diplomats would in fact correspond to a legal right under international law.

Outside these areas, however, a legal assessment of diplomatic funding is not exhausted by a reference to the general rule against diplomatic interference or even an application of legitimate grounds on which the relevant conduct can be based. Instances of this kind are merely representative of a scenario which, due to the increasing fragmentation of international law,<sup>159</sup> is no longer a rarity: the existence of a situation in which two divergent norms have an impact on the same situation. Such situations call for the analysis of the relationship between the relevant norms and for the identification of parameters which allow an assessment of the underlying conduct. These are aspects which are explored in more detail in the following section.

#### IV. TOWARDS AN EVALUATION OF DIPLOMATIC FUNDING

When the ILC began its discussions on a draft code on

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157. See ICCPR, *supra* note 78, art. 20(2); ACHR, *supra* note 78, art. 13(5); International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), Dec. 21, 1965, 660 U.N.T.S. 195; *see also* S.C. Res. 1161, ¶ 5 (Apr. 9, 1998) (regarding the situation in Rwanda). There are no reported cases in which a State had tried to construct a basis for incitement to violence by diplomatic agents on grounds recognized under international law (as opposed to outright denial of the charges).

158. See *supra* text accompanying note 94.

159. On the whole problem, *see* Study Group on Fragmentation, *supra* note 131.

diplomatic law in 1957, the possibility of a meeting of norms of international law which ostensibly point in different directions, was already known. Some treaties had taken this possibility into account and had incorporated a mechanism which would resolve such a meeting. The most prominent example is, arguably, the Charter of the United Nations, whose Article 103, by stating that conflicts between obligations under the Charter and under other international agreements shall be resolved in favor of the former, establishes a hierarchy of norms to address the relevant situation.<sup>160</sup> There is no such rule in the VCDR which would allow an evaluation of the meeting of the ban on diplomatic interference with other norms of international law.

General international law offers two principal methods for the resolution of situations of this kind: confrontational options, which (as in the case of Article 103 of the UN Charter) lead to the complete subordination of one norm under the other; and conciliatory approaches, which seek to achieve a coexistence of the relevant rules.

It is questionable from the outset whether a confrontational solution can ever be appropriate to understand the meeting of restrictive and permissive norms where diplomatic interference is concerned. The hierarchy which an approach of this kind presupposes is difficult to establish: the meeting of the ban on interference with diplomatic functions or with rights arising from *erga omnes* obligations is hardly a situation in which a superior interest meets an inferior one. When the sovereign rights of the receiving State encounter, for instance, assistance towards a people's right to self-determination, there can be little doubt that the values involved on both sides occupy a high position in the eyes of the international community.<sup>161</sup>

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

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160. UN Charter art. 103.

161. In some cases, the relevant grounds for diplomatic action obtain further strength from provisions of the UN Charter: see, for the particular case of the promotion of friendly relations, UN Charter art. 1, ¶ 2.

the individual case, and by taking into account the impact which the diplomatic measure has in a specific situation.

These are features not of a hierarchical, but of a mediating approach. It is an option which has a better hope of commanding support among States and among international courts and institutions which largely prefer conciliatory methods to confrontational ones,<sup>162</sup> and it is also 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.”<sup>163</sup>

Dogmatically, harmonization is best considered a technique of interpretation which takes into account the contents of the rules that have an impact on a particular situation<sup>164</sup> and thus avoids the assumption of a normative conflict.<sup>165</sup> 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 is well established as one of the general principles to which Article 38(1)(c) of the ICJ

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

163. See Study Group on Fragmentation, *supra* note 131, at 25.

164. *Id.* ¶ 4; see Milanović, *supra* note 162, at 73.

165. See Milanović, *supra* note 162, at 98, on the presumption against norm conflict in international law. Harmonization derives its support from the practice of international courts, see, e.g., *Al-Adsani v. United Kingdom*, 2001-XI, Eur. Ct. H.R. 79, ¶ 55; *Loizidou v. Turkey*, App. No. 15318/89, 1996-VI Eur. Ct. H.R. ¶ 43 (1996), <http://hudoc.echr.coe.int/eng?i=001-58007> [<http://perma.cc/GE2P-E6HR>]; *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶ 41 (Nov. 6). But the principle is also supported in literature. See C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 1953 BRIT. Y.B. INT'L L. 401, 427-28. Sadat-Akhavi had suggested a similar non-confrontational method which he termed the “reconciliation of norms.” In his view, a differentiation between “interpretation” and “reconciliation” has to be made. SEYED-ALI SADAT-AKHAVI, *METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES* 25, 43 (2003). But the method of finding a way to reconcile apparently conflicting rules appears to be the adoption of an understanding which allows coexistence—this, however, is a task of interpretation. See Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; 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?*, 31 MICH. J. INT'L L. 621, 624, 631, 644 (2010) (for further references).

Statute makes reference<sup>166</sup>—it fills the gaps of the law<sup>167</sup> and provides a default position which applies unless States have specifically opted for a deviating regulation. Its presence has thus been recognized in fields as diverse as trade law and the use of force, human rights law, and the law of the sea, but also in those instances of diplomatic law where the rule of non-interference meets with norms which permit the diplomatic conduct in question.<sup>168</sup>

The identification of the particular elements which constitute the mechanism of proportionality is a more difficult task. Various tests have been suggested in the literature<sup>169</sup> and in the courts as aspects of the assessment which proportionality requires;<sup>170</sup> but on the basis of their common features, it is clear that proportionality has to involve at least the performance of a comparative analysis which extends to an examination of the impact of the (diplomatic) measure in question and the aim which it pursues.<sup>171</sup> There are two approaches to this examination which make frequent appearances in case law and literature: the test of the “least restrictive means” and that of “cost-benefit analysis.”

The test of the least restrictive means inquires whether, in a given situation, alternative measures had been available which would have achieved the same objective but imposed less of a burden on the affected interest.<sup>172</sup> Two measures, then, are being

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166. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 716 (2008); Riccardo P. Mazzeschi, *Enzo Cannizzaro. Il principio della proporzionalità nell'ordinamento internazionale*, 13 EUR. J. INT'L L. 1031, 1035 (2002) (book review).

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

168. For the general applicability of proportionality in these fields, see Paul Behrens, *Diplomatic Interference and Competing Interests in International Law*, 2012 BRIT. Y.B. INT'L L. 178, 226-27.

169. See Andenas & Zleptnig, *supra* note 167, at 382, 388; Han Xiuli, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 CHINESE J. INT'L L. 635, 636-37 (2007).

170. See *R (Q and Others) v. Secretary of State for the Home Department* [2003] EWCA (Civ) 364 [32], [2003] 3 WLR 365 (Eng.); *Matthews v. Ministry of Def.* [2002] EWHC (QB) 13 [35] (Eng.); *Bartik v. Russia*, 2006-XV Eur. Ct. H.R. ¶ 46.

171. For a more detailed analysis of the requirements of proportionality, see Behrens, *supra* note 168, at 228-30.

172. See *id.* at 231-32.

compared, but the affected interest continues to play a role in this examination, which presupposes an understanding of the impact which that interest experienced.

This aspect of proportionality can carry considerable significance for the legal assessment of diplomatic funding, but its performance also depends on the aim which such activities pursue. If, for instance, it had been suggested above that there is a difference between diplomats who treat party members to tea and those who fund a party website, the aim of the diplomatic conduct plays an important role: to diplomats who act to maintain friendly relations (Article 3(1)(e) of the VCDR), an invitation to tea certainly presents itself as a less intrusive alternative by comparison to direct involvement in the promotion of the relevant party.

If the aim, on the other hand, is assistance towards the realization of the right to (internal) self-determination of a people in the receiving State, a wider field of activities may open up for diplomatic agents seeking to adopt measures that are necessary for the achievement of that goal. But even there, the question of less intrusive means is unavoidable. Not every provision of material means is objectively needed to achieve the aim of self-determination, and funding of groups which pursue that objective is not always the least restrictive means to assist in the realization of that right.

A case involving Western diplomats in Malaysia in 1999 offers an illustration. In that year, Abdullah Ahmad Badawi, the Deputy Prime Minister of Malaysia, issued a warning to diplomats against interference with Malaysian politics, stating that such diplomats “would not be allowed to serve in the country.”<sup>173</sup> The sanction came after the youth wing of the ruling party in Malaysia had stated that diplomats from Australia, Britain, Canada, and the United States had offered money to opposition parties in the run up to elections in this country.<sup>174</sup>

Canada denied the charges, with Lloyd Axworthy, the Canadian Foreign Minister, asserting that there had been “no

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173. *Malaysia Tells West to Butt Out*, TORONTO STAR, Nov. 26, 1999 (paraphrasing by Toronto Star).

174. *Id.*; *Mahathir Blasts Opposition for Allegedly Seeking Foreign Aid in Election*, AGENCE FRANCE PRESSE, Nov. 26, 1999.

interference.”<sup>175</sup> But Axworthy referred to a form of funding which Canada had adopted, and which, it appears, constituted in his eyes an alternative that fell outside the remit of interference. “The only support we have been offering,” he said, “is to a couple of non-governmental organizations . . . to provide monitoring of the election itself.”<sup>176</sup>

Assistance given to a non-governmental organization (NGO) which works outside the partisan political context would thus appear as a viable, but less restrictive alternative to the funding of a party which stands in direct opposition to the ruling government. But even there, difficulties arise. There is, for instance, reason to believe that cases in which substantial financial support to NGOs results in a strong dependency on the State donor will raise concerns about the exercise of undue influence.

An incident which arose in Russia in 2006 exemplifies the problem. In January of that year, the FSB (the Russian Federal Security Service) stated that a group of British diplomats had provided funds to NGOs, including groups concerning themselves with human rights in the receiving State. The chief spokesman of the FSB claimed that the service had “obtained evidence” that the diplomats were “financing a number of nongovernmental organizations” and that the FSB was “investigating what the money was being spent on.”<sup>177</sup> Anthony Brenton, the British Ambassador to Russia, defended the funding of NGOs and reportedly stated that there was “nothing unlawful or in anyway improper about [it].”<sup>178</sup> The position taken by Russian President Vladimir Putin on the other hand, was more discerning: he noted that NGOs were “needed by society as controls over the activities of the state itself and its structures of authority,” but he objected to NGOs being “led by puppet masters from abroad” and found

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175. Martin Regg Cohn, *Dirty Tricks Accusations Fly as Malaysians Head to Polls*, *TORONTO STAR*, Nov. 27, 1999.

176. *Malaysia Tells West to Butt Out*, *supra* note 173.

177. Michael Mainville, *Between a Rock and a Spy Case*, *TORONTO STAR*, Jan. 24, 2006, at A19; Peter Finn, *Russia Says British Used Rock to Spy; Security Service Accuses Four Diplomats*, *WASH. POST* (Jan. 24, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/23/AR2006012300738.html> [<http://perma.cc/T65X-5ARU>].

178. Arkady Ostrovsky, *UK's Envoy Rejects Putin NGO Claim*, *FIN. TIMES*, Jan. 31, 2006, at 6.

that “states cannot use NGOs as an instrument of foreign policy on the territory of other states.”<sup>179</sup>

As the expression of a general concern, this statement should not be lightly dismissed. There may indeed be situations in which diplomatic funding of NGOs assumes such dimensions that the impartiality of the organization is imperiled. In scenarios of this kind, the provision of material means may have even more troublesome consequences than in situations in which a political party is the recipient of the funds. A partisan recipient does not aspire to standards of objectivity, but an NGO will often enjoy a continuing reputation as an impartial and objective observer.

Whether the “infiltration” of an NGO had indeed been at the root of the Russian reaction in 2006 is a question of factual rather than legal assessment. Certain aspects of the case cast doubt on such a reading: not least the fact that the “Moscow Helsinki Group” had been among the beneficiaries of the diplomatic conduct—an organization described as a “frequent critic of President Vladimir Putin.”<sup>180</sup>

Where legitimate concerns about a sending State’s influence on an NGO arise, it may be necessary to identify less restrictive alternatives to funding activities of this kind. The provision of material means to support local educational or informative initiatives or the rendering of assistance to development projects—which benefit all parties in the receiving State on an equal basis—can constitute alternative ways of assisting the population of that State in the realization of their rights. Miller refers to “little pockets of aid money” which may be available, and mentions by way of example, “women’s projects, village self-help, and similar projects”<sup>181</sup> which, depending on the relevant situation, may be viable means at the disposal of the diplomatic agent.

But the case of the British diplomats in Russia in 2006 also indicates a particular difficulty where the application of the least

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179. *Putin Says Spy Scandal Will Not Harm Relations with UK*, BBC MONITORING, Jan. 31, 2006; Press Conference, Pres. Vladimir Putin, Press Conference for the Russian and Foreign Media (Jan. 31, 2006), <http://en.kremlin.ru/events/president/transcripts/23412> [<http://perma.cc/5QAU-BZGP>].

180. See Mainville, *supra* note 177.

181. Robert Hopkins Miller, *Gathering Political Information*, in *INSIDE AN EMBASSY: THE POLITICAL ROLE OF DIPLOMATS ABROAD*, *supra* note 41, at 29.

restrictive means test is concerned. Less intrusive methods can often be found, and this may allow the host government to voice its objection even to diplomatic measures which, considered from an objective perspective, carry little intrusive potential to begin with.

There is, however, a corrective mechanism which imposes a cap on calls for less intrusive means, which finds wide support in international law,<sup>182</sup> and whose existence is in fact necessary if the test is not to be deprived of all significance for the principle of proportionality. According to this understanding, alternative measures must be at least of equal efficiency to achieve the objective which the adopted measure pursues.

This limitation carries particular significance in the field of self-determination. In this regard, much depends on the parameters of the relevant situation. In a receiving State in which the opposition can operate without hindrance and in which free and fair elections exist, the very need for diplomatic funding attracts doubt, and the question unavoidably arises whether the people in question cannot realize its right to self-determination through means which are already at its disposal. In a State in which the fairness of elections is in doubt, but in which the work of political parties is otherwise unimpeded, the funding of NGOs which monitor the elections may be indicated and necessary. In a State in which not even political factions representing the people can carry out their work without hindrance, there may be no viable way of rendering assistance to self-determination but through the provision of material means to the relevant political parties; and in extreme cases, this may even include factions operating outside domestic law.<sup>183</sup> The fact must be borne in mind that not all alternatives reach the same level of efficiency as the provision of material means; and in some instances, the adoption of less intrusive alternatives will put interests which enjoy

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182. See Behrens, *supra* note 168, at 235.

183. Reference may again be made to the situation of the African National Congress when apartheid was still in place. Few commentators today would claim that the transition in South Africa owed nothing to the influence of the ANC; yet it was a group which was for a long time banned by the ruling government and which, during that period, depended on material assistance from the outside to continue its struggle for self-determination for the black majority. Cf. Tony Leon, *Attitude for Gifts*, BUS. DAY (S. AFR.), Oct. 10, 2005; Dingake, *supra* note 77.

legitimate status under international law in considerable peril or bar their realization altogether.

In considerations of proportionality, the least restrictive means test is often joined by another examination—that of the “cost-benefit analysis”<sup>184</sup> (also called “proportionality *stricto sensu*” or “true proportionality”<sup>185</sup>). Cost-benefit analysis—a test which has been accepted in various branches of international law<sup>186</sup>—calls for a relationship of proportionality between the advantage gained (or expected to be gained) and the negative effects which the measure generates.

That is more than a mere comparison of the competing interests themselves:<sup>187</sup> it is an analysis which explores the way in which the diplomatic activity has shaped the relevant interests. That means, on the one hand, the identification of the negative impact of the measure on the affected interest and, on the other, the identification of the benefit which the decision is expected to carry.<sup>188</sup>

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

The question whether the performance of a return service had been expected by the offering or giving of material means—a question that carried such significance for the customary concept of “bribery” or “corruption”<sup>189</sup>—plays a certain role in this context as well. It will often be the case that in situations in which such an expectation is missing—if, for instance, diplomats purchase a

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184. Cf. Andenas & Zleptnig, *supra* note 167, at 388.

185. Han, *supra* note 169, at 637.

186. Behrens, *supra* note 168, at 237.

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

188. See Andenas & Zleptnig, *supra* note 167, at 390 (arguing that the “effects of a measure” must not be “disproportionate or excessive in relation to the interests affected”).

189. See *supra* text accompanying notes 61-63.

party newsletter or simply invite party members to an event at the embassy where hospitality is granted to them—the impact of the diplomatic activity on the interests of the receiving State has not reached a level of particular significance. The possibility of long-term consequences always exists: a party might, for example, use the proceeds of party publications for the next electoral campaign. But this effect will usually require intervening steps by the party organizers, and the involvement of considerations to which the provider of such funds will not be privy. What is more, the charging of a price of this kind applies regardless of the existence of diplomatic funding, and the fact that some of the recipients of party literature and other goods may have been diplomats, does therefore not generate a significant change to the preexisting situation.

Similar considerations will often apply where diplomats provide material assistance to NGOs, but without any indication of the specific goal for which the funds are to be employed. Much will, in this regard, depend on the objectivity of the relevant organization. Aid provided to an NGO which—as asserted in the above-mentioned case of 2006—occupies itself with the monitoring of elections,<sup>190</sup> may indeed exercise an impact in the receiving State if only to the degree that it draws public attention to the possibility that elections may not be carried out in compliance with standards of fairness.

At the same time, the core character of the sovereignty of the receiving State is not affected through the observation of elections by itself, and in instances which developed along the lines of the 2006 case, the argument can be advanced that activities of this kind serve to enhance a mechanism to which that State itself has agreed—i.e., the participation of its people in determining the political fate of the country.<sup>191</sup> If, at the same time, the potential fairness of elections has been called into question by independent observers on the matter, a risk to the right of the people of the receiving State to exercise its right to internal self-determination exists, and it is likely that in situations of that kind the costs of the diplomatic measure are outweighed by the benefits it carries.

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190. See *supra* text accompanying note 177.

191. On the right to vote and to stand in elections, see ICCPR, *supra* note 78, art. 25; ACHR, *supra* note 78, art. 23; cf. ECHR Protocol 1, *supra* note 78, art. 3.

But funding activities in that regard presuppose objectivity on the side of the NGO. The more an organization of that kind moves in the direction of a partisan political faction, the more difficult will it be to apply cost-benefit analysis in favor of diplomatic financing activities. In this regard, the usefulness of the lack of an expected return service as an indicator for lawful diplomatic conduct shows its limitations. If that were not the case, the funding of political parties would invariably have to be considered a lawful diplomatic action. A specific return service will in these situations often be absent—the belief that the supported faction will prove favorable to the policies of the sending State will often take the place of more specific expectations.<sup>192</sup> That may be enough to base the financing of parties, and even the funding of an entire electoral campaign, on Article 3(1)(b) of the VCDR. But it is clear that such conduct has grave consequences on the internal order of the receiving State: it would deprive both the right to self-determination of the people of the host country and the sovereign rights of that State of any meaningful content and would form a clear contradiction of the principle that the receiving State still retains jurisdiction over its territory and the persons inhabiting it.<sup>193</sup>

Neither the identification of legitimate interests on the side of the receiving State nor the establishment of such interests on the side of the sending State and its agents can therefore lead to a conclusive finding on the legality of diplomatic funding activities in the country in which they are posted. Frequently enough, both sides are able to invoke grounds which find support in international law, and it is only an analysis of the interrelationship of the competing norms that can lead to a legal assessment of the conduct in question.

That involves an examination of methods at the disposal of the diplomatic agent which would have formed a less intrusive alternative to the adopted measure, but would have promised equal efficiency for the realization of the relevant goal. But it also

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192. See *supra* text accompanying note 65.

193. See, in particular, the views expressed by the ICJ on the continued “territorial sovereignty” and “jurisdiction” of the receiving State even in situations concerning the premises of the diplomatic mission. *Asylum Case, (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, 274-75 (Nov. 20).*

involves a consideration of the individual interests in light of the risk to which they may have been exposed in a particular situation and in light of the benefits promised by the diplomatic measure.

The question whether, in the performance of this analysis, the benefits outweigh the negative impact cannot be approached through the application of a precise mathematical formula.<sup>194</sup> But there are parameters which assist in the performance of cost-benefit analysis in situations of this kind. Not all of these parameters depend on the actions and intent of the diplomatic agents—the particular complexity of the assessment of cost and benefit in the case of diplomatic funding derives from the fact that the situation involves three actors. On the side of the diplomatic funder, the expectation of a return service may provide an indication of the consequences which may arise to the internal order of the receiving State. On the side of the receiving State, the question whether the purpose of the funding—such as the performance of elections—had already been accepted by the hosts, has an impact on the assessment. On the side of the beneficiaries, the existence of objectivity or partisanship in the nature of their work serves to further determine the weight of the effect which diplomatic funding has on the internal order of that State.

The resulting situation often shows a complexity which the seemingly simple act of the provision of material to a recipient in the receiving State does, at first, not betray. Yet it is only a consideration of the various acts and motivations on the side of the funder, receiving State, and beneficiary and the analysis of their interrelationship which allows for a finding on the question whether diplomatic financing, in a given case, had been proportionate and, with that, for a conclusion on the lawfulness of the underlying conduct.

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194. See Draft Articles on State Responsibility, *supra* note 107, art. 51, comm. ¶ 5; Decision of the Arbitrator, United States – Tax Treatment for Foreign Sales Corporations, § 5.18, WTO Doc. WT/DS108/ARB (Aug. 30, 2002). But see also, concerning international humanitarian law, ICRC COMMENTARY, *supra* note 187, at 396 (expressing the view that the concept of military necessity “can never justify a degree of violence which exceeds the level which is *strictly necessary* to ensure the success of a particular operation in a particular case”) (emphasis added).

## V. CONCLUDING THOUGHTS

That the very concept of diplomatic funding activities in the receiving State meets with suspicion is not difficult to understand. At first sight, it may appear as the exercise of influence by an external party, which carries the potential of intruding upon the internal order of the hosts.

But diplomats spend money for a multiplicity of reasons. The purchase of a newspaper to gain information about the receiving State, may fall under this category, as may the providing of hospitality to guests, and even the making of small donations to theaters and museums. It can hardly be said that in all of these cases a disturbing effect on the order of the receiving State manifests itself.

For a legal assessment, this extensive range of activities causes difficulties. The leading treaties which address financing activities by foreign agents provide useful guidance for the identification of a concept of "corruption" or "bribery" which has found consensus within the international community. But their helpfulness is impaired by their limited scope. The fact in particular that they do not tend to cover financial assistance to political parties causes considerable hindrance for the legal evaluation in this field: in most cases arising in the last fifty years in which diplomatic funding has led to negative reactions, the recipients had been political parties or factions in the receiving State.

These shortcomings highlight the importance which the general prohibition on diplomatic interference, which is today enshrined in Article 41 of the VCDR, retains. Under a literal interpretation of the article, the concept of interference certainly can be considered to embrace funding activities of that kind, and it has thus been invoked by receiving States who felt that such conduct involves diplomats in matters which were outside the concerns of the sending State.

However, in most cases in which diplomatic funding activities have met with negative reactions, the rule against interference is not the only norm that has an impact on the underlying situation. The fact must be borne in mind that there are often legitimate interests on the side of the sending State which allow for the provision of material means.

There are, in fact, few instances in which the existence of permissive rules on the side of the sending State does not enter into the legal assessment of diplomatic conduct in the first place. The funding of terrorism and the funding of specific armed action have been outlined in this context above. These are activities in which not only overwhelming condemnation by the international community and the very proximity between diplomatic conduct and the use of force militate in favor of an absolute ban. The decisive point here is that there are no reported instances in which sending States themselves would have attempted to defend diplomatic funding activities in these contexts by referring to a right to offer support for these particular purposes.

But these are also areas in which cases of funding by diplomats assigned to permanent missions rarely arise. Outside this context, interests of the sending State retain their place in the evaluation of diplomatic funding. Their significance derives from the fact that they exist not only on a political plane: they regularly find their basis in norms of international law which call for conduct of this kind. Such rules include the functions of the diplomatic office which are today enshrined in Article 3 of the VCDR, but also involvement in the realization of obligations which the receiving State owes *erga omnes*—most prominently, the rule of self-determination. In some instances, refusal to provide material means can even have deleterious effects on the fulfillment of diplomatic tasks: diplomats who, for instance, receive a small present or hospitality from official side but refuse to reciprocate, are not likely to advance the maintenance of friendly relations which Article 3(1)(e) of the VCDR envisages.

Yet the existence of such permissive rules does not mean that the rights of the receiving State have lost all applicability. What it means is that a situation has come into existence in which the norms which either side can invoke to support its respective position, diverge. A resolution of such a meeting of norms can only be achieved through the application of a mechanism which allows for a conciliation of the relevant legitimate interests. The tests which result from a mechanism of this kind, and which have been outlined above, can be complex in nature: they may involve a careful balancing of the relevant interests in the shape which they have received through the parameters of the case—in light

of the threat that arises to the receiving State and the benefit for the sending State and the international community in general. But the interests which are involved in situations of this kind often carry significant value and merit a more discerning evaluation. When the right to self-determination faces the sovereignty of the host, it is not a satisfactory approach to completely dismiss one interest in favor of the other. What is required, is a more detailed analysis which takes the factual circumstances of the particular situation into account.

The performance of such an evaluation can be a daunting task—more so perhaps to diplomatic agents in the field than to foreign ministries which may have the advantage of a well-staffed legal department to achieve an analysis of that kind. There are, however, certain factors which carry particular significance whenever the acceptability of diplomatic conduct in this field is put in doubt. Considered together, they allow a clearer understanding of the intended funding activity to emerge, and give a measure of assistance to diplomatic agents who have to make a decision in this context.

It is suggested that the following four points have a bearing on these considerations:

First, the question arises whether there are any alternatives to the diplomatic measure which have a lesser impact on the internal order of the receiving State. That requires an understanding of the consequences which the measure is expected to carry, of the aim which the agent pursues through its adoption, and of the efficiency of the measure in relation to the aim. Alternatives to the diplomatic action have to carry at least equal efficiency to enter into the consideration—a point which can convey a certain advantage on diplomatic agents who resort to measures which can be expected to significantly benefit the protected interest.

Second, diplomats intending to resort to funding activities are advised to consider the expected outcome of such conduct. The expectation of a particular return service may signify that the diplomatic measure will come under closer scrutiny than the provision of means in situations in which no specific expectations are attached. By itself, this consideration is not conclusive: the choice of particular parties as recipients of funding might still fall

within the parameters of interference, even though a return service has not been specified. But it is certainly true (as the various treaties on bribery and corruption have demonstrated) that the provision of material means in expectation of a specific advantage not ordinarily granted under the law of the receiving State constitutes a sensitive area in the eyes of the international community.

Third, the very nature of the recipient of diplomatic funding merits observation. NGOs as beneficiaries of the diplomatic measure are more likely to withdraw the relevant conduct from the scope of interference than political parties, and even among NGOs, differentiations may be indicated according to the political independence and objectivity which they manifest in their daily work. Funding provided to more politicized organizations (and indeed, to political parties) is more likely to raise the risk that an excessive impact on the political affairs of the receiving State is generated—the financing of impartial bodies will, by comparison, often constitute a less intrusive alternative.

Fourth, the views of the receiving State itself on the purpose of diplomatic funding will regularly have to enter into consideration. The fact that the host may already have given its approval, in principle, to the general aim pursued by the diplomatic agent carries some significance: if the receiving State has, for instance, committed itself to the holding of free elections, and diplomatic funds are destined to protect that objective, the gap between the divergent interests narrows considerably. In situations of this kind, it may be difficult for the receiving State to claim that the interests it wishes to protect have come under threat, and the benefits which can be expected from the diplomatic measure may well outweigh concomitant costs that result from its adoption.

These are aspects of funding activities which regularly shape the legal assessment of diplomatic conduct in this field and which allow for the emergence of a clearer concept of the underlying behavior. At the same time, they involve diplomatic agents in the making of fine distinctions and in an analysis of factors which are not always within their own sphere of influence.

And yet, it is not uncommon that diplomatic agents, in the performance of their tasks, have to tread a fine line—the

argument can indeed be advanced that the ability to identify distinctions which others (including Foreign Ministers in the sending State) may have ignored, and to act accordingly forms the very essence of the diplomatic office.

Yet if such skills are regularly required where, for instance, the making of critical remarks is concerned,<sup>195</sup> there appears to be a much stronger case for their development in situations in which money or other material means pass hands.

This is conduct whose potential gravity in international relations can hardly be overestimated. It places a weapon in the hands of powerful States which rivals the might of battalions: one bank transfer to a well-chosen party can serve to change the political landscape in the receiving State beyond recognition and may well put the sending State in a position to determine the fate of the diplomatic hosts for an indefinite period of time.

At the same time, diplomatic funding can be a force which obtains results for objectives which are recognized under international law and which no other action could hope to achieve with equal efficiency. The funding of development projects—the building of a school or a hospital, the provision of access to clear water—can confer significant benefits on the receiving State and fulfill the diplomatic task of maintaining friendly relations in an unrivalled manner. Financial support to election monitors, and even to State institutions concerned with the holding of free elections, provides aid towards a people's right to self-determination, which well-intentioned statements and promises struggle to achieve.

To impose at the same time, the obligation on diplomatic agents to perform a precise analysis of their actions and their impact, of the nature of the recipient, and even of the position taken by the receiving State, does, in light of this, not constitute an undue burden. It is, in fact, a small price to pay, for it is

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195. See on this, the examples provided by Barder on the realization of fine distinctions in this field. Sending States intending to convey a grievance to the host without exacerbating the situation, might thus decide to do so not through the ambassador himself, but through a diplomat of lower rank; the language used in such a representation might be that of a "complaint" rather than a "protest," the representation might be made orally rather than through a *note verbale*, and so forth. See BARDER, *supra* note 117, at 51.

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imposed on agents who find themselves in possession of a formidable power—and who are shouldering a responsibility which knows no equal.