



## Diplomatic Asylum in International Law: A Comprehensive Study of the Threshold of Diplomatic Asylum Between States

Laura Kurniadi Hasan<sup>1</sup> Livia Aurelia Naftalie<sup>2</sup> Ariawan Gunadi<sup>3</sup>

Faculty of Law, Universitas Tarumanagara, Indonesia<sup>1,2,3</sup>

Email:

### Abstract

Diplomatic asylum represents a contentious area of international law, lying at the intersection of state sovereignty, territorial jurisdiction, and the humanitarian imperative to protect individuals facing persecution. This study explores the legal threshold for granting diplomatic asylum, focusing on the interplay between the rights of the host state and the obligations of the asylum-granting state. While the Vienna Convention on Diplomatic Relations (1961) establishes the inviolability of diplomatic premises, it provides no explicit provisions for asylum, resulting in a fragmented and inconsistent framework. The requirement for host state consent is analyzed as a critical factor in balancing sovereignty with humanitarian concerns, often leading to diplomatic tensions and breaches of international law. Moreover, the absence of enforcement mechanisms exacerbates the challenges in resolving asylum-related disputes. Through a detailed legal analysis, this study argues for the necessity of a multilateral treaty under the auspices of the United Nations to harmonize practices and establish clear norms governing diplomatic asylum. It also emphasizes the potential of regional cooperation in reducing conflicts and setting precedents for broader international frameworks. By addressing these gaps, this article aims to contribute to the development of a coherent legal regime that reconciles the competing interests of state sovereignty and individual protection.

**Keywords:** Diplomatic Asylum, International Law, State Sovereignty, Humanitarian Protection, Host State Consent, Territorial Jurisdiction, Vienna Convention On Diplomatic Relations, Caracas Convention, International Consensus, Legal Framework



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### INTRODUCTION

Diplomatic Asylum under International Law has a lot of contradictory nature, as Diplomatic Asylum is not widely recognized as a practice worldwide. The ratification of the Caracas Convention is also very limited and is only ratified by Latin American states, other regions and countries may not recognize it. This research aims to analyze the roles of Diplomatic Asylum under aspects of International Law. This analysis is conducted by examining legal theories, cases, international commentaries, and expert doctrines related to cases of the granting of Asylum. The results of this research are expected to contribute to the development of understanding regarding the legal and the threshold of Diplomatic Asylum between states. Caracas Convention, also known as the Convention of Asylum, holds significant power to determine whether a state is able to provide Asylum to offenders. By examining precedent cases in Indonesia and other countries, the regular elements that are used for those proceedings can be adopted by countries who have not ratified the Caracas Convention, creating a safety net for political parties, or people from abroad, who can face dangers unknowingly, *Force Majeure* and conditions of a country can change within a speed of light, therefore, Indonesia and countries who have not ratified the convention would still have the need to protect foreign political parties. The results of this research are anticipated to contribute to the International perspectives on Diplomatic Asylum, understanding the legal basis, and examining countries' points of view regarding the use of Diplomatic Asylum for political offenders. Additionally, this research is also expected to provide better information for developing effective strategies in

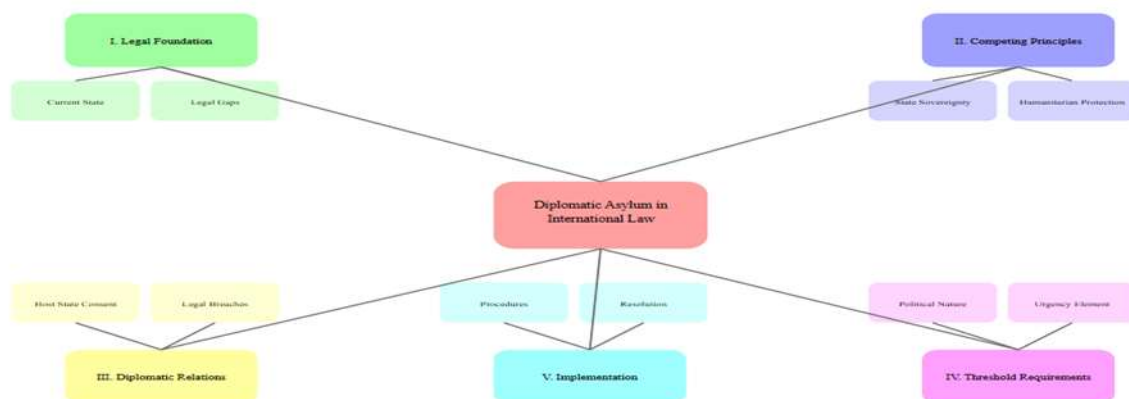
preventing and prosecuting asylum cases, thus enabling society to be better protected from the serious threat of criminal misuse of asylum.

### Research Questions

By looking at the background above, we conclude that there be some key points that needs to be addressed to understand Diplomatic Asylum within the scope of International Law:

1. How can we solve the void of legal basis for diplomatic asylum worldwide with the lack of legal consensus?
2. How does the requirement for host state consent in granting diplomatic asylum create diplomatic tensions and potential breaches of international law?
3. What is the threshold of "Urgency" and "Political in Nature" under Diplomatic Asylum?

### Conceptual Framework



This Research paper will examine Absence of universal treaties, Regional conventions (especially Latin American practice), Role of customary international law, Limited state practice and precedents, Jurisdictional uncertainties, Procedural requirements, Enforcement mechanisms, Dispute resolution processes, State Sovereignty, Territorial jurisdiction, Non-intervention principle, Control over internal affairs, Domestic law enforcement, Host State Consent, Diplomatic Tensions, Legal Breaches, Vienna Convention violations, Human rights violations, State responsibility, Threshold of Political Nature, and the Urgency Element.

### Research Objective

This research's objective is to analyze the legal gaps that are created because of the void of legal basis, and some other key points that are related to a state's sovereignty under Diplomatic Asylum.

### Research Methodology

This research mainly uses the Specific Methodology of Research that consists of the Doctrinal Legal Research method to complete the work, by studying the prime legal basis of international conventions, commentaries, precedent cases and comparing laws that are available, comparing legal analysis, as well as the content.



## Research Purposes

This research's objective is to analyze the legal gaps that are created because of the void of legal basis, and some other key points that are related to a state's sovereignty under Diplomatic Asylum.

## Research Benefits

This research offers two broad benefits: theoretical and practical, each providing distinct contributions to the academic field and practical implications for addressing the legal complexities surrounding diplomatic asylum:

### 1. Theoretical Benefits

- a. To provide an in-depth understanding of diplomatic asylum as a legal concept within the framework of international law, focusing on the absence of universal treaties and the role of regional conventions, especially in Latin America.
- b. To contribute insights into the interplay between state sovereignty, territorial jurisdiction, and the principles of non-intervention in the context of diplomatic asylum.

### 2. Practical Benefits

- a. The findings of this research can serve as a reference for readers to recognize the significance of addressing legal gaps and procedural ambiguities in diplomatic asylum cases.
- b. The research can identify challenges posed by the lack of legal consensus, jurisdictional uncertainties, and the requirement of host state consent, providing recommendations to improve regulations, reduce diplomatic tensions, and enhance compliance with international legal norms in future cases of diplomatic asylum.

## THEORETICAL FRAMEWORK

### Definitions and Scope of Diplomatic Asylum

#### International Definition of Diplomatic Asylum

Human rights law has been instrumental in developing modern frameworks regarding diplomatic asylum. While Antonio Cassese expresses reservations about its status within Customary International Law (hereinafter, "CIL"), and despite the fact that formal recognition came through the 1954 Caracas Convention on Diplomatic Asylum, diplomatic asylum is not a novel concept but rather an evolving principle that emerged from established diplomatic practices and treaty law. Approximately 20 states, primarily in Latin America, have committed to recognizing diplomatic asylum through their domestic legal frameworks after becoming parties to the Caracas Convention. According to Article 2 of the Caracas Convention on Diplomatic Asylum, diplomatic asylum constitutes protection granted in diplomatic missions, warships, military camps, or aircraft to persons being sought for political reasons or political offenses. This protection represents a humanitarian practice aimed at preserving human life in cases of persecution for political reasons.

## RESEARCH METHOD

### Type of Research

The primary aim of this study is to conduct a comparative approach by using normative research to examine and analyze how diplomatic asylum is defined, protected, and implemented within International Law and Indonesian Law. This research allows an in-depth comparison of both legal frameworks, aiming to identify the gaps in the Indonesian legal framework regarding diplomatic asylum and explore areas where alignment with International legal frameworks, particularly the Latin American regional system, may provide beneficial enhancement and improvement.



### **Type of Data**

This study will primarily use secondary data sources, where data is not obtained directly from the source, typically in the form of a document. In the context of legal research, documents obtained are referred to as legal materials, which can be categorized into three groups: primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are the fundamental source of law that holds authoritative power and are legally binding. This is crucial as it establishes the legal framework within which laws operate. Examples of primary legal materials being used in this study including The 1954 Caracas Convention on Diplomatic Asylum, The 1928 Havana Convention on Asylum, and Law No. 37 of 1999 on Foreign Relations (Indonesia).

### **Method Approach**

The comparative approach used in this study analyzes the legal framework on diplomatic asylum between International Law and Indonesian law. This approach will compare the concept and implementation of diplomatic asylum under Indonesian Law No. 37 of 1999 on Foreign Relations and international conventions, particularly the 1954 Caracas Convention on Diplomatic Asylum. After establishing the legal foundations, this study will examine how each system handles diplomatic asylum cases, followed by comparing how each legal framework addresses them, identifying the similarities and differences in their approaches to granting and managing diplomatic asylum. In addition to the comparative analysis, the study will include case analyses of significant diplomatic asylum incidents involving Indonesia, such as the East Timorese asylum seekers in the Australian Embassy in Jakarta in 2006. These cases will provide concrete examples of how the Indonesian legal framework has handled diplomatic asylum situations, highlighting practical challenges and outcomes. Furthermore, after comparing both legal frameworks, the study will identify the gaps and shortcomings within the Indonesian legal system, particularly in areas such as the recognition of diplomatic asylum, protection mechanisms for asylum seekers, coordination between diplomatic missions and host state authorities, implementation of safe passage guarantees, and procedural frameworks for asylum processing. This assessment will help identify areas where Indonesian law may diverge from international standards, offering insights into potential reforms that could strengthen Indonesia's legal approach to diplomatic asylum. Using this approach enables the identification of best practices and effective strategies from other jurisdictions, particularly Latin American countries with well-developed diplomatic asylum frameworks, which can guide potential reforms in Indonesia. Moreover, this comparative approach emphasizes both the similarities and differences in how various legal systems define and handle diplomatic asylum, which is crucial for assessing the effectiveness of Indonesia's legal framework against international standards. Additionally, given that diplomatic asylum involves complex intersections of state sovereignty, human rights, and diplomatic relations, a comparative analysis provides essential insights necessary for understanding how laws are applied and enforced in diverse settings. By uncovering gaps and weaknesses in the Indonesian legal framework through this comparative perspective, the approach lays the groundwork for proposing legal reforms that are informed by successful practices in international law while considering Indonesia's unique legal and political context.

## **RESEARCH RESULTS AND DISCUSSION**

### **How can we solve the void of legal basis for diplomatic asylum worldwide with the lack of legal consensus?**

The lack of a uniform legal framework governing diplomatic asylum poses significant challenges to its global application. Although diplomatic asylum has historical roots in



customary international law, its practice varies significantly among states, creating a fragmented legal landscape. For instance, the *Asylum Case* before the International Court of Justice (ICJ) highlighted the absence of a consistent legal obligation for states to grant diplomatic asylum under customary international law.<sup>1</sup> The Vienna Convention on Diplomatic Relations 1961 regulates the inviolability of diplomatic premises but does not explicitly address the granting of asylum within them.<sup>2</sup> Thus, states rely on bilateral or regional agreements, such as the Caracas Convention on Diplomatic Asylum 1954, which limits its applicability to specific jurisdictions.<sup>3</sup> A potential solution lies in fostering consensus through multilateral negotiations, leveraging existing regional frameworks as templates. For example, the Caracas Convention provides a detailed procedural guide for granting asylum, which could inform a global treaty.<sup>4</sup> Such an approach would harmonize disparate practices and enhance predictability. Efforts must also involve clarifying the relationship between diplomatic asylum and non-refoulement, a principle codified in Article 33 of the Refugee Convention 1951, ensuring that asylum does not undermine obligations under international refugee law. In the interim, states should focus on enhancing transparency and predictability in their asylum practices through domestic legal reforms. Establishing national legislation that aligns with international human rights obligations would serve as a stopgap measure. Moreover, states could adopt non-binding instruments, such as resolutions or declarations, to foster cooperation. The UN General Assembly, for instance, could adopt a resolution clarifying the scope and limitations of diplomatic asylum, similar to its approach to statelessness issues.<sup>5</sup> In conclusion, addressing the legal void surrounding diplomatic asylum requires both short-term and long-term strategies. These include adopting binding international instruments, enhancing domestic frameworks, and fostering normative development through soft law. By balancing state sovereignty with humanitarian considerations, the international community can create a robust and consistent legal regime for diplomatic asylum.

### **How does the requirement for host state consent in granting diplomatic asylum create diplomatic tensions and potential breaches of international law?**

The requirement for host state consent in granting diplomatic asylum often creates diplomatic tensions because it pits the principle of state sovereignty against the humanitarian need to protect individuals from persecution.<sup>6</sup> This tension arises when an individual seeks refuge in a foreign embassy, which effectively places the embassy's protective function in conflict with the host state's legal jurisdiction over its territory.<sup>7</sup> Without the host state's consent, granting asylum may be seen as an infringement on its sovereign rights, leading to disputes between the states involved.<sup>8</sup> Such situations are particularly contentious in cases involving politically sensitive individuals, such as opposition leaders or whistleblowers. The host state may view the granting of asylum as interference in its internal affairs, potentially escalating the situation into a diplomatic standoff.<sup>9</sup> For example, the case of Julian Assange, who sought refuge in the Ecuadorian Embassy in London, illustrates how prolonged asylum without host state consent can strain bilateral relations and complicate international law enforcement.<sup>10</sup> From a legal perspective, the lack of universal norms governing diplomatic

<sup>1</sup> ICJ Reports 1950, p 266, para 10.

<sup>2</sup> Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, art. 22.[VCDR]

<sup>3</sup> Caracas Convention, Art 1.

<sup>4</sup> Caracas Convention, Art 7.

<sup>5</sup> UNGA Res 3274 (XXIX) (10 December 1974)).

<sup>6</sup> UN Charter, Art 2(1).

<sup>7</sup> VCDR, Art 22.

<sup>8</sup> *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 274.

<sup>9</sup> UN Charter, Art 2(7).

<sup>10</sup> Rafael Romo, 'Assange's Case: Diplomatic Stalemate or Sovereign Dispute 2019.





asylum exacerbates the issue.<sup>11</sup> While regional agreements, such as the Caracas Convention on Diplomatic Asylum, provide frameworks for granting asylum, they are not binding on non-signatory states, creating inconsistencies in practice. As a result, some host states argue that granting asylum without their consent violates customary international law principles, including territorial sovereignty and the inviolability of their legal systems.<sup>12</sup>

Furthermore, the Vienna Convention on Diplomatic Relations does not explicitly address diplomatic asylum, leaving its application ambiguous.<sup>13</sup> While the convention guarantees the inviolability of diplomatic premises, it also emphasizes the obligation of diplomats to respect the laws and regulations of the host state. This duality creates a legal gray area, where embassies may justify asylum as a humanitarian act, while host states perceive it as a breach of international law.<sup>14</sup> In practice, the requirement for host state consent is often politically charged, as it involves balancing legal principles with diplomatic considerations.<sup>15</sup> Host states may refuse consent to assert their sovereignty, while asylum-granting states may insist on their moral duty to protect individuals at risk.<sup>16</sup> Such impasses can lead to diplomatic retaliation, such as the downgrading of relations, expulsion of diplomats, or economic sanctions. These tensions are compounded by the lack of enforcement mechanisms in international law to resolve such disputes. While the International Court of Justice (ICJ) offers a forum for adjudicating state disputes, many states are reluctant to submit politically sensitive cases for adjudication. This leaves the resolution of asylum-related disputes largely dependent on bilateral negotiations, which can be protracted and inconclusive.<sup>17</sup>

Additionally, the requirement for host state consent may discourage individuals from seeking diplomatic asylum altogether, fearing that their protection could be compromised by political bargaining.<sup>18</sup> This undermines the humanitarian purpose of asylum and exposes vulnerable individuals to the risk of persecution, imprisonment, or even death. The absence of a clear legal framework addressing these concerns further perpetuates uncertainty for both individuals and states. To address these challenges, there is a need for greater international consensus on the legal status of diplomatic asylum. This could involve drafting a multilateral treaty under the United Nations to clarify the obligations of states in granting and recognizing diplomatic asylum. Such a treaty should aim to balance the principles of sovereignty, territorial integrity, and the humanitarian imperative to protect individuals at risk.<sup>19</sup> Regional cooperation can also play a significant role in reducing tensions. By harmonizing practices within regions, states can establish precedents for resolving asylum-related disputes, which could inform the development of broader international norms. This approach would enhance legal predictability and reduce the risk of diplomatic conflicts stemming from asylum cases. In conclusion, the requirement for host state consent in granting diplomatic asylum creates significant legal and diplomatic challenges.<sup>20</sup> These challenges highlight the need for a coherent international framework that reconciles the principles of state sovereignty with the necessity of protecting individuals from persecution.<sup>21</sup> Only through dialogue, legal reform, and international cooperation can the tensions surrounding diplomatic asylum be effectively mitigated.

<sup>11</sup> Ian Brownlie, *Principles of Public International Law* (8th edn, OUP 2012) p. 275.

<sup>12</sup> VCDR, art 41; Asylum Case, n.3.

<sup>13</sup> VCDR, Art 22.

<sup>14</sup> See Michael Akehurst, 'The Law Governing Asylum in Embassies' (1977) 26 ICLQ 186.

<sup>15</sup> Erika de Wet, *The Role of Diplomatic Premises in International Law* p.148.

<sup>16</sup> Analysis of Sovereignty vs Asylum Conflicts' (2020) 19 Int Law Rev p, 67.

<sup>17</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994) p, 68.

<sup>18</sup> Amnesty International n, 15.

<sup>19</sup> Erika de Wet, n 13) p. 151.

<sup>20</sup> VCDR, Art 22; Asylum Case, n 3.

<sup>21</sup> UN Charter, Art 1(3).



## What is the threshold of "Urgency" and "Political in Nature" under Diplomatic Asylum?

### Threshold of urgency in diplomatic asylum

Article 5 of the Caracas Convention stipulates that diplomatic asylum shall only be granted in urgent cases or when it is necessary for the asylee to flee the country to safeguard their liberty.<sup>22</sup> The International Court of Justice (ICJ), in the *Asylum Case (Colombia/Peru, 1950)*, significantly shaped the interpretation of "urgent cases" within the context of diplomatic asylum. The ICJ determined that the threshold of urgency must be based on actual, imminent, and extraordinary danger to the safety or liberty of the person seeking asylum.<sup>23</sup> The concept of "urgent cases" cannot be invoked to shield individuals from lawful judicial proceedings or regular prosecutions under domestic law. Diplomatic asylum is not intended to serve as a means to evade justice unless the prosecution is arbitrary, politically motivated, or conducted without judicial guarantees such as a fair trial.<sup>24</sup> The ICJ held that political instability within a state, as seen in the *Asylum Case*, does not in itself constitute a situation of clear and immediate personal peril,<sup>25</sup> though this view was criticized as being too strict and narrow.<sup>26</sup> The assessment of urgency must be grounded in objective criteria, rather than relying on the subjective perceptions of the state granting asylum. Asylum should only be extended to political offenders who face a credible risk of arbitrary actions, such as extrajudicial killings or torture. It is not a mechanism for avoiding lawful proceedings but a safeguard against manifestly unjust or illegal actions by the territorial state.

### Threshold of for a crime to be political in nature in diplomatic asylum

Article 3 of the Caracas Convention specifies that individuals who have committed common offenses are not eligible for diplomatic asylum.<sup>27</sup> Common offenses are defined as crimes that are not political in nature and lack any connection to political beliefs, affiliations, or activities.<sup>28</sup> This distinction is critical in ensuring that diplomatic asylum is reserved for those facing persecution due to their political actions or beliefs rather than for individuals seeking to evade justice for ordinary crimes.<sup>29</sup> Political offenses typically involve actions such as dissent against a government, participation in protests, or other activities tied to exercising fundamental rights like freedom of expression.<sup>30</sup> In contrast, common offenses include universally recognized crimes like theft, fraud, or assault, which are unrelated to political motives. Article 3 and its application in the ICJ upholds the principle that asylum should protect individuals from politically motivated persecution, not serve as a shield against prosecution for criminal acts.<sup>31</sup> Determining whether an offense is political or common often requires a nuanced analysis of the motives behind the alleged acts, the context in which they occurred, and the potential consequences the individual faces if returned to their home country. In practice, this differentiation has been the subject of considerable debate and interpretation, as the line between political and common offenses is not always clear-cut. For instance, acts of violence, sabotage, or even murder may be deemed political in certain circumstances if carried out as part of a broader political struggle, while in other cases, they may be classified as

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<sup>22</sup> Caracas Convention, Art.5.

<sup>23</sup> *Asylum Case*, p.282.

<sup>24</sup> René Värk, "Diplomatic Asylum: Theory, Practice and the Case of Julian Assange," *Sisekaitseakadeemia Toimetised*, vol. 11 (2012), 245.

<sup>25</sup> *Asylum Case*, p.282.

<sup>26</sup> Dissenting Opinion by Judge, *Asylum Case*, p. 60; L. Valadares Fernandes Barbosa, "The Asylum Case: An Analysis of the International Court of Justice's Leading Judgment on Political Asylum and Regional Custom," *Revista Da Defensoria Pública Da União*, vol. 19, no. 19 (2023), 135.

<sup>27</sup> Caracas Convention, Art.3.

<sup>28</sup> Caracas Convention, Art.6.

<sup>29</sup> Harvard Research in International Law, 'Draft Convention on Extradition' [1935] 29 AJIL Supp 11.

<sup>30</sup> Attorney-General of the Government of Israel v Eichmann (1961) 36 ILR 5 (DC Jerusalem), p.8.

<sup>31</sup> The Asylum Case (Columbia v. Peru) (Judgment) [1950] ICJ Rep 266, p.1.



common offenses.<sup>32</sup> This ambiguity has led to challenges in the consistent application of Article 3, highlighting the importance of careful case-by-case assessment by the authorities involved.

## **CONCLUSION**

The legal framework for diplomatic asylum remains fragmented, with no universal consensus on its application, scope, or procedural requirements. While regional instruments like the Caracas Convention provide guidance, their jurisdiction is limited, and international law lacks binding provisions to govern this critical humanitarian practice globally. The tensions arising from host state consent and sovereignty further complicate the practical application of diplomatic asylum, leading to diplomatic disputes and uncertainty for asylum-seekers and states alike. These challenges underscore the urgent need for a unified legal framework to address the gaps in international law. The concepts of "urgency" and "political in nature" remain at the heart of diplomatic asylum but are subject to differing interpretations. Urgency requires an imminent and extraordinary threat to liberty or safety, while political offenses must reflect genuine political persecution rather than ordinary criminal behavior. However, these thresholds are inconsistently applied, leading to disputes about the legitimacy of asylum claims. This inconsistency weakens the humanitarian purpose of diplomatic asylum and risks undermining its credibility as a mechanism of protection. To address these challenges, the international community must balance the principles of sovereignty, territorial jurisdiction, and the humanitarian imperative to safeguard individuals at risk of persecution. By fostering international cooperation, clarity, and transparency, the practice of diplomatic asylum can be harmonized across jurisdictions. A consistent legal framework would protect vulnerable individuals while minimizing diplomatic tensions and ensuring adherence to international law.

## **Suggestion/Recommendation**

To address these challenges, the international community should prioritize the development of clear and universally accepted guidelines under the auspices of the United Nations or another international body. These guidelines should define objective thresholds for determining what constitutes a political offense, reducing the discretion granted to states in making such determinations. By providing a consistent and transparent framework, these guidelines would help standardize the practice of diplomatic asylum, minimize disputes, and ensure its humanitarian purpose is upheld without undermining international legal principles.

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<sup>32</sup> Judge Álvarez, Dissenting Opinion, *Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, pp. 297-298.





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